

**U.S. Department of Agriculture
Food and Nutrition Service
Administrative Review Branch**

Katella Liquor Market,

Appellant,

v.

**Office of Retailer Operations and
Compliance,**

Respondent.

Case Number: C0212136

FINAL AGENCY DECISION

The U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS) finds that there is sufficient evidence to support the determination by the Office of Retailer Operations and Compliance (“ROC”) to impose a permanent disqualification from participating as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP) against Katella Liquor Market (“Appellant”).

ISSUE

The purpose of this review is to determine whether the ROC took appropriate action, consistent with Title 7 of the Code of Federal Regulations (CFR) § 278.6(a), (c) and (e)(1)(i), when it imposed a Permanent Disqualification against Appellant on March 10, 2021.

AUTHORITY

According to 7 U.S.C. § 2023 and its implementing regulations at 7 CFR § 279.1, “A food retailer or wholesale food concern aggrieved by administrative action under § 278.1, § 278.6 or § 278.7 . . . may . . . file a written request for review of the administrative action with FNS.”

CASE CHRONOLOGY

In a letter dated December 18, 2018, the ROC charged Appellant with trafficking, as defined in Section 271.2 of the SNAP regulations. This charge was based on a series of SNAP transaction patterns that “establish clear and repetitive patterns of unusual, irregular, and inexplicable activity for your type of firm.” This letter of charges states: “As provided by Section 278.6(e)(1) of the SNAP regulations, the sanction for trafficking is permanent disqualification.” The letter also states that “. . . under certain conditions, FNS may impose a civil money penalty (CMP) . . . in lieu of a permanent disqualification of a firm for trafficking.”

Appellant replied to the ROC's charges in writing. The record reflects that the ROC received and considered the information provided prior to making a determination. The ROC determined that Appellant's contentions did not outweigh the evidence that the store was trafficking. Based on the preponderance of evidence, the ROC concluded that trafficking is the most probable explanation for the questionable transactions listed in the charge letter attachments.

The ROC issued a determination letter dated March 10, 2021. This letter informed Appellant that it was permanently disqualified from participation as an authorized retailer in SNAP in accordance with Section 278.6 (c) and 278.6(e)(1) for trafficking violations. The letter also states the ROC considered Appellant's eligibility for a trafficking civil money penalty (CMP) according to the terms of Section 278.6(i) of the SNAP regulations. The ROC determined that Appellant was not eligible for the CMP because Appellant had not submitted sufficient evidence to demonstrate that it had established and implemented an effective compliance policy and program to prevent SNAP violations.

On March 18, 2021, Appellant appealed the ROC's determination and requested an administrative review of this action. The appeal was granted.

STANDARD OF REVIEW

In an appeal of an adverse action, Appellant bears the burden of proving by a preponderance of evidence that the administrative action should be reversed. That means Appellant has the burden of providing relevant evidence that a reasonable mind, considering the record as a whole, would accept as sufficient to support a conclusion that the argument asserted is more likely to be true than untrue.

CONTROLLING LAW

The controlling law in this matter is contained in the Food and Nutrition Act of 2008, as amended (7 U.S.C. § 2021), and implemented through regulation under Title 7 CFR Part 278. In particular, 7 CFR § 278.6(a) and (e)(1)(i) establish the authority upon which a permanent disqualification may be imposed against a retail food store or wholesale food concern in the event that personnel of the firm engaged in trafficking of SNAP benefits.

7 CFR § 278.6(a) states, in part:

FNS may disqualify any authorized retail food store . . . if the firm fails to comply with the Food and Nutrition Act of 2008, as amended, or this part. Such disqualification shall result from a finding of a violation on the basis of evidence that may include facts established through on-site investigations, inconsistent redemption data, evidence obtained through a transaction report under an **electronic benefit transfer system** (Emphasis added.)

7 CFR § 278.6(a) states, in part:

Any firm considered for disqualification ... under paragraph (a) of this section... shall have full opportunity to submit to FNS information, explanation, or evidence concerning any instances of noncompliance before FNS makes a final administrative determination. The FNS regional office shall send the firm a letter of charges before making such determination. The letter shall specify the violations or actions which FNS believes constitute a basis for disqualification The letter shall inform the firm that it may respond either orally or in writing to the charges contained in the letter within 10 days of receiving the letter . . .

7 CFR § 278.6(c) reads, in part:

The letter of charges, the response, and any other information available to FNS shall be reviewed and considered by the appropriate FNS regional office, which shall then issue the determination. In the case of a firm subject to permanent disqualification under paragraph (e)(1) of this section, the determination shall inform such a firm that action to permanently disqualify the firm shall be effective immediately upon the date of receipt of the notice of determination from FNS, regardless of whether a request for review is filed in accordance with part 279 of this chapter.

7 CFR § 278.6(e)(1)(i) reads, in part:

FNS shall [d]isqualify a firm permanently if . . . personnel of the firm have trafficked as defined in § 271.2.

Trafficking is defined in 7 CFR § 271.2, in part, as:

The buying, selling, stealing, or otherwise effecting an exchange of SNAP benefits issued and accessed via Electronic Benefit Transfer (EBT) cards, card numbers and personal identification numbers (PINs), or by manual voucher and signature, for cash or consideration other than eligible food, either directly, indirectly, in complicity or collusion with others, or acting alone”

Also at 7 CFR § 271.2, eligible food is defined as:

Any food or food product intended for human consumption except alcoholic beverages, tobacco and hot food and hot food products prepared for immediate consumption . . .

7 CFR § 278.6(b)(2)(ii) states, in part:

Firms that request consideration of a civil money penalty in lieu of a permanent disqualification for trafficking shall have the opportunity to submit to FNS information and evidence ... that establishes the firm’s eligibility for a civil money penalty in lieu of a permanent disqualification in accordance with the criteria included in § 278.6(i). This information and evidence shall be submitted within 10 days, as specified in § 278.6(b)(1).

7 CFR § 278.6(b)(2)(iii) states:

If a firm fails to request consideration for a civil money penalty in lieu of a permanent disqualification for trafficking and submit documentation and evidence of its eligibility within the 10 days specified in § 278.6(b)(1), the firm shall not be eligible for such a penalty.

SUMMARY OF CHARGES

The charges under review were based on an analysis of SNAP Electronic Benefit Transfer (EBT) transaction data during the period from May 2018 through September 2018. This analysis identified the following patterns of SNAP transaction activity that indicate trafficking:

- Multiple transactions made from the same accounts in unusually short time frames;
- Transactions that depleted the majority or all of a recipient's monthly SNAP benefits made in unusually short timeframes; and,
- Unusually large transactions.

The attachments enclosed with the charge letter specify the questionable and unusual SNAP transactions indicative of trafficking which were conducted at Appellant during the review period.

APPELLANT'S CONTENTIONS

Appellant's responses regarding this matter are essentially as follows:

- The store is approximately 3,200 square feet with 1,000 square feet of storage.
- Appellant sells drinks in bulk.
- Appellant is located in an area with many SNAP participants.
- Most households redeem nearly all their benefits within the first two weeks of the month.
- SNAP participants are more likely to shop at convenience stores and small grocery stores, and customers of these stores are among the most loyal customers.
- Convenience stores and similar stores had a 3% increase in customers over 2015.
- Appellant offers credit accounts.
- Appellant stocks more expensive items than were noted on the store visit report.
- Appellant was sufficiently stocked.
- The ALERT system has not been independently proven accurate in finding fraud. Data analysis is prone to error without accurate context. The analyst overly relied on the results of the ALERT system when issuing a charge of trafficking because of confirmation bias. The analyst made incorrect assumptions about customer shopping patterns and circumstances and failed to take into account local differences.
- Recent administrative review cases discuss the precedent that should be considered in this case.
- Multiple transactions **5 U.S.C. § 552 (b)(7)(E)** are not inherently suspicious according to *Onukwugha v. U.S.*

- Recent administrative review cases discuss the precedent that should be considered in this case.
- Past Administrative Review Branch decisions have identified a number of certain explanations which adequately explain the presence of Scan B2 and Scan F transactions.
- If allegations were raised in cases that were reversed, Appellant can conclude those were the reasons accepted by FNS for the reversal, even though FNS did not cite those reasons for the reversal.
- Back-to-back transactions are because households participate in co-shopping where different household members split benefits evenly or proportionately and separately shop at Appellant during a short period of time.
- SNAP participants shop at Appellant multiple times a day because it is more convenient and smaller than a supermarket or superstore.
- There are no logistic barriers to the transactions included in the charge letter.
- Appellant takes telephone orders and offers delivery. These transactions are sometimes broken into separate orders.
- Customers will often share their benefits with others.
- Back-to-back transactions were due to homeless people.
- There are 14 stores located within a mile of Appellant. Some of those stores are located close together, increasing competition.
- SNAP customers shop at Appellant because they lack consistent transportation.
- The store stocks the majority of a SNAP household's preferred needs, so it is reasonable to expect SNAP customers to spend the majority of their benefits at Appellant.
- Multiple purchases by SNAP participants are due to them forgetting an item or returning to the store to make a second purchase.
- A store that maintains credit accounts for SNAP benefits is not required to maintain records of the credit according to *Redmond vs. U.S.* Appellant also cited *183 Bronx Deli Grocery Corp. v. United States* and *Lugo v. United States* as examples of cases where little or no credit ledger pages were submitted in support of a contention of credit accounts.
- Appellant requests a one year disqualification based on the use of credit accounts.
- Appellant's transactions are consistent with that of similar stores in the county.
- Appellant denies the allegations.
- Appellant requests a CMP.
- Large transactions are because SNAP participants are buying sweetened beverages, salty snacks, meat, and other items sold by Appellant.

In support of its contentions, Appellant provided the following documentation:

- Approximately 35 pages of bank statements;
- A report by Insight Policy Research entitled *Benefit Redemption Patterns in the Supplemental Nutrition Assistance Program in Fiscal Year 2017*;
- Ten pages of affidavits signed by store customers;
- A three-page document entitled Pearson Correlation Coefficient Calculator;
- Four pages of an April 2016 article in *Convenience Store News*;

- A February 2011 USDA report entitled *Benefit Redemption Patterns in the Supplemental Nutrition Assistance Program*;
- A 38-page FMI report entitled *U.S. Grocery Shopping Trends, 2016*;
- An 11-page article entitled *What does SNAP benefit usage tell us about food access in low-income neighborhoods*;
- Approximately 10 pages of store photos;
- A November 2016 USDA report entitled *Foods Typically Purchased by Supplemental Nutrition Assistance (SNAP) Households*; and,
- A six-page article entitled *Shopping pattern and food purchase differences among Supplemental Nutrition Assistance Program (SNAP) households and Non-supplemental Nutrition Assistance Program households in the United States*.

These explanations may represent only a brief summary of Appellant’s contentions. However, in reaching a decision, full consideration has been given to all contentions presented, including any others that have not been specifically listed here.

ANALYSIS AND FINDINGS

Regarding Appellant’s denial of violations, this review examines the relevant information regarding the determination. Once the ROC establishes trafficking occurred, Appellant bears the burden of providing relevant evidence to support a conclusion, considering the record as a whole, that that it did not engage in trafficking. If this is not demonstrated, the case will be sustained. Without supporting evidence and rationale, assertions that the firm has not violated program rules do not constitute valid grounds for overturning the determination.

Administrative Reviews not Precedent Setting

Appellant contends that the determinations should be reversed based on Final Agency Decisions in other cases. Appellant asserts that if allegations were raised in cases that were reversed, Appellant can conclude those allegations were the reasons accepted by FNS for the reversal, even though FNS did not cite those reasons for the reversal.

Prior administrative review decisions are not precedent setting as they are based on the specific circumstances of each case as documented by materials provided by the Appellant and the Office of Retailer Operations and Compliance. Administrative review decisions do not establish policy or supersede federal law, regulations or policy guidance. The determination in this case conforms to SNAP regulations and is consistent with sanctions imposed upon other retailers that have committed similar violations. Appellant undermines its credibility in the present case by its apparent willingness to manufacture precedents from previous administrative review decisions.

Store Characteristics

In reaching a disqualification determination, the ROC considered information obtained during an August 31, 2018 store visit conducted by a USDA contractor to observe Appellant’s operation, stock, and facilities. This store visit information was used to ascertain if there were justifiable

explanations for the firm's irregular SNAP transaction patterns. The store visit report documented the following store size, description, and characteristics:

- Store size is approximately 2,400 square feet with 200 square feet of food storage outside of public view¹;
- Available inventory of SNAP-eligible food items showed stock composed predominantly of inexpensive items, which is typical of a convenience store;
- Only one cash register and one electronic SNAP terminal device;
- No shopping carts or hand baskets;
- A scanner and no conveyor belts;
- No evidence of a wholesale business such as posted prices or separate entrances for wholesale customers; and,
- No meat or seafood specials or bundles.

In addition, the store's checkout counter space area was cluttered, small and surrounded by plastic barriers allowing very little surface area to place large purchases and making it impractical to process more than one customer at a time.

Appellant argues it was sufficiently stocked. Appellant's offerings are consistent with that of a poorly stocked typical convenience store. Appellant's pictures show much more stock than was present at the time of the store visit. At that time, Appellant's stock would not have met the minimum stocking requirements for SNAP authorization. There was no indication that SNAP households were inclined to visit the store regularly to purchase large quantities of grocery items. The available food was primarily of a low-dollar value and there was no hint that the firm sold items in bulk. Given the available inventory, there was no sign that Appellant would be likely to have SNAP redemption patterns that differed significantly from those of similarly-sized competitors.

Repeat Transactions by the Same Household

Attachment 1 to the charge letter documents the same household conducting back-to-back transactions in unusually short time frames. Violating stores may conduct multiple transactions from the same household account **5 U.S.C. § 552 (b)(7)(E)** to avoid the detection of single, high-dollar trafficking transactions. There are 224 repeat transactions **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**.

Appellant contends that back-to-back purchases are because SNAP customers lack access to transportation, and that SNAP participants shop at Appellant because it is more convenient and smaller. The record reflects that customers conducting rapid, repetitive, and large transactions at Appellant frequently spent SNAP benefits at better-stocked and more competitively-priced grocery stores, sometimes on or about the same day they shopped at Appellant.

Appellant contends multiple transactions occurring **5 U.S.C. § 552 (b)(7)(E)** are not inherently suspicious according to *Onukwugha v. U.S.* This case, which supported that the pattern of back-

¹ Appellant asserts the store is approximately 3,200 square feet with 1,000 square feet of storage.

to-back transactions identified by FNS were indicative of trafficking, also stated that transactions “occurring in relatively quick succession” are “extremely suspicious.” It notes that this is especially the case when transactions are large and for identical amounts, but also cites as suspicious a variety of examples of back-to-back transactions – similar to those included in the charge letter in this case - that when considered together establish a pattern of trafficking.

Appellant contends that it is located in an area with many SNAP participants. While this may be true, the Case Analysis Document identifies much larger stores with more reasonable prices located within one mile of Appellant. There is no basis for unusually high customer attraction to Appellant, there being no great price advantage, profusion of ethnic goods, or special or custom services rendered. Oddly, some SNAP households spent considerably less at the larger stores than at Appellant.

Appellant stated there are 14 stores located within a mile of Appellant. Some of those stores are located close together, increasing competition. There are 18 stores located within a mile of Appellant, including one located .09 miles away. Appellant provides no evidence in support of its assertion that its location provides a competitive advantage.

Appellant argues households participate in co-shopping where different household members split benefits evenly or proportionately and separately shop at Appellant during a short period of time. That members of a household share the chore of grocery shopping (“co-shopping”) means that household members take turns doing the shopping, not that both shoppers shop on or about the same day. This would defeat the purpose of why households typically share the chore of grocery shopping. A household is one that purchases and prepares meals together, so there would be no need to split benefits. Households that purchase and prepare meals separately are considered separate households.

The following examples from the ROC’s Case Analysis Document show households shopped at better stocked firms on or about the same day as conducting large transactions at Appellant:

5 U.S.C. § 552 (b)(7)(E).

5 U.S.C. § 552 (b)(7)(E).

5 U.S.C. § 552 (b)(7)(E)

Appellant contends the back-to-back transactions are due to customers sharing benefits with others. Appellant has offered no evidence whatsoever that SNAP households share their cards with other household members, relatives, or friends. Appellant has also not provided any explanation for why, if such behavior was occurring, these purchases would occur at Appellant rather than at nearby, larger stores. It is unlikely that a family relying on SNAP to supplement their nutritional needs would share these benefits with another family that purchases and prepares meals separately. An unsubstantiated argument such as this does not provide a valid basis for dismissing the charges or for mitigating the penalty imposed.

Appellant insists multiple purchases by SNAP participants are due to them forgetting an item or returning to the store to make a second purchase. Customers sometimes forget an item or see something at the checkout and decide to purchase it after already having completed a transaction. In such instances, it is reasonable to expect the subsequent purchase would be for a nominal amount. This is because it is quite rare to find very expensive items positioned at the checkout area, especially in smaller stores. Also, forgotten goods purchased immediately after a prior transaction typically consist of only one or two items. However, the subsequent transactions exceeded any minor amount. In some cases, the amounts of subsequent transactions equaled or exceeded the preceding transaction total.

Appellant contends back-to-back transactions were due to homeless people. While homeless people may have made multiple purchases over a two day period, as they do not have access to cooking apparatus or refrigeration, they would not be expected to make large purchases at any one time.

While there are legitimate reasons why a SNAP recipient might return to a convenience store in a short period of time, the examples in Attachment 1 indicate a series of purchases that total to large amounts. SNAP benefits are intended to supplement the food budget for households whose net income is near or below the Federal Poverty Level. It is difficult to believe customers who must rely on SNAP benefits to make ends meet prefer to pay higher prices and spend considerable amounts of their benefits at a convenience store. Spending sizable portions of one's SNAP benefit allotment in a convenience store - when there are larger stores at which one also shops that carry more variety of foods at a lower cost - is unreasonable customer behavior. Moreover, households listed in this attachment conducted this strange shopping pattern of making substantial purchases at Appellant multiple times during the review period. Given the common practice of violating retailers breaking up large, suspicious transactions into multiple, smaller transactions to avoid detection, a firm's explanation and evidence for why these transactions are occurring **5 U.S.C. § 552 (b)(7)(E)** in a convenience store should be both rational and compelling. Appellant's explanation is neither.

SNAP Benefit Depletions

Attachment 2 to the charge letter documents the same household exhausting all or nearly all its benefits in rapid order. There are 108 transactions **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**.

In some cases, SNAP customers depleted SNAP account balances to within pennies of a zero balance and/or depleted balances during the first week of the month. It is highly implausible that customers would desire, or be able, to regularly conduct large transactions that deplete balances to within pennies of a zero balance. The likelihood that these transactions were the result of the legitimate sale of only eligible foods only is extremely small.

Appellant is correct that a government report on SNAP shopping patterns² indicates that after the first day of benefit issuance, on average, 80 percent of a household's allotment remains unspent.

²U.S. Department of Agriculture, Food and Nutrition Service, Office of Research and Analysis, *Benefit Redemption Patterns in the Supplemental Nutrition Assistance Program*, by Laura Castner and Juliette Henke. Project officer: Anita Singh, Alexandria, VA: February 2011.

Even after seven days, 40 percent of benefits still remain unspent. It typically takes 14 days to deplete 80 percent of one's benefits, and 21 days to deplete 90 percent. This report also revealed that households most often redeemed their benefits at supermarkets and supercenters, with only four percent of all households never shopping in a supermarket.

Appellant contends that SNAP participants are more likely to shop at convenience stores and small grocery stores than non-SNAP participants, and customers of these stores are among the most loyal customers. The article Appellant provides in support of this statement ("Know your Core, Protect Your Core" from *Convenience Store News*) does say that that low income households are more likely to shop at convenience stores, but it does not specifically refer to SNAP households. The article states that the main reason (80.1%) these customers are likely to shop at the store is to buy gas. This not a SNAP-eligible purchase. Appellant also states that many of its customers do not own vehicles. While some of the less common reasons for making purchases at a convenience store include making inexpensive purchases (e.g., snacks, beverages, gum), others are for purchases that SNAP benefits cannot be used (e.g., lottery tickets, cigarettes). The information included in this article does not support Appellant's conclusion regarding SNAP participants' shopping patterns at convenience stores. Even if Appellant is correct, this article does not support that SNAP participants make large purchases at these smaller stores. If anything, it implies the opposite.

Appellant asserted convenience stores and similar stores had a 3% increase in customers over 2015 (from 5% to 8%). Appellant cited a 2016 U.S. Grocery Shopper Trends report which does not reflect the period covered by this investigation. This report also supports that customers are much more likely to shop at supermarkets and superstores.

It is extremely doubtful that a SNAP household making a legitimate purchase would choose to spend a large portion of its monthly allotment at a convenience store with likely higher prices and substantially less inventory than what would be found at a supermarket or superstore. Although many SNAP households do shop early in the month as opposed to later in the month, most households do not spend all or a majority of their monthly benefits in only a few transactions or a single day. Depleting a large portion of one's SNAP balance early in the benefit month, leaving little to purchase food for the remainder of the month, is inconsistent with the normal shopping behavior of SNAP households.

Large Transactions

Appellant insists the store stocks the majority of a SNAP household's preferred needs, so it is reasonable to expect SNAP customers to spend the majority of their benefits at Appellant. Appellant also argues that large transactions are because SNAP participants are buying sweetened beverages, salty snacks, and other items sold by Appellant. The food stock and facilities of Appellant as reported in the store visit documentation do not appear sufficient to provide for all of one's food needs. People generally do not spend large sums at such stores. They usually stop at convenience stores to pick up a few staple food items, such as bread, milk, or a can or two of food that they may consider are not worth a trip to the supermarket to purchase. It is rare for a convenience store such as Appellant's to have purchases like those included in Attachment 3 to the charge letter. This attachment cites 409 EBT transactions during

the five-month period of investigation 5 U.S.C. § 552 (b)(6) & (b)(7)(C).
5 U.S.C. § 552 (b)(6) & (b)(7)(C).

Additionally, many of the charge letter transactions arrive at, or cluster around, certain dollar amounts in \$5 increments (5 U.S.C. § 552 (b)(6) & (b)(7)(C)). Households typically shop to obtain a certain mix of food items, irrespective of the total cost (other than to remain within allotment balances), and do not strive to achieve a particular total. The purchase amount of eligible food items typically approximates a random total. In contrast, firms facilitating trafficking tend to concentrate transactions at particular dollar amounts. In the absence of any compelling rationale to the contrary, the pattern of clustering transactions around certain dollar levels is implausible and indicative of transaction structuring and SNAP-benefit trafficking.

Appellant maintains its transactions are consistent with that of similar stores in the county. Actually, these transactions significantly exceed the county's average SNAP transaction, which was \$7.08 for this type of store during the five months of the review period. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Appellant's average transaction is significantly higher than the county's average transaction. As previously stated, Appellant has a limited food stock typical of a convenience store and does not have any features that would induce people to spend substantially more than the typical convenience store purchase amount.

Its large transactions during the review period were also much more frequent than those of similar stores in the county. 5 U.S.C. § 552 (b)(7)(E).

Additionally, the Case Analysis Document contains a comparison of Appellant's redemption activity during the analysis period to three SNAP-authorized convenience stores located nearby. Appellant's SNAP redemptions during the analysis period ranged from over 1.4 to over 7 times that of the nearby comparable firms.

Based on the store layout, infrastructure, and available inventory, it is not credible that the Appellant would so frequently conduct large transactions closely resembling those typically found at a supermarket or superstore. It is not plausible that the firm's customers would regularly carry very large amounts of merchandise around the store without the benefit of shopping carts or shopping baskets, especially since larger, better-stocked stores are readily available and in the vicinity of the Appellant firm. Appellant is not set up to process high-dollar transactions, as indicated by its lack of equipment to facilitate large transactions and limited counter space. There are no legitimate bases for SNAP customers' unusual attraction to the firm such as a superior selection of staple foods, price advantages, package specials, bulk or promotional items, an extensive variety of otherwise unavailable ethnic food items, or special services rendered. Appellant failed to provide convincing evidence to establish the legitimacy of these excessively large transactions, such as itemized cash register receipts. Based on all of these factors discussed in this section, the large volume of transactions for high-dollar amounts is unlikely to indicate a pattern of legitimate food purchases.

Credit Accounts

Appellant maintains that one of the reasons for the large transactions is that credit is extended to loyal customers, and their tabs are paid in full when they receive their SNAP benefits. Appellant requests a one year disqualification based on the use of credit accounts.

Appellant did not provide credit ledger pages to support the use of credit accounts at Appellant. Instead, Appellant maintains a store who offers credit accounts for SNAP benefits is not required to maintain records of the credit according to *Redmond vs. U.S.* Appellant stated in *183 Bronx Deli Grocery Corp. v. United States*, 10 ledger pages and four affidavits were sufficient to demonstrate the suspicious patterns were due to the maintenance of credit accounts. In *Lugo v. United States*, Appellant stated 17 affidavits were sufficient.

In the three cases cited by Appellant, FNS issued one year disqualifications based on the use of credit accounts. The decisions in these three cases upheld these sanctions. None of these court decisions state the evidence cited above would have been sufficient to require a firm's permanent disqualification be set aside in favor of the lesser penalty of credit accounts.

In its February 22, 2021 letter, the ROC requested additional information from Appellant to support the contention that credit was extended to customers, but no additional evidence was provided.

When a retailer attempts to refute charges of trafficking by claiming it maintains credit accounts, the retailer must provide adequate proof that credit accounts existed at the time the suspicious transactions occurred so that the ROC can compare such proof with transactions outlined in the letter of charges. This is because it is not uncommon for retailers to make false admissions of credit in an attempt to obtain a lesser penalty after committing the more egregious violation of trafficking. Without substantial documentation that credit was extended to SNAP customers, it is impossible to compare against any specific transactions outlined in the letter of charges dated December 18, 2018, or substantiate that such transactions were indeed the result of credit account repayments.

Logistical Barriers

Appellant argues there are no logistic barriers to the transactions included in the charge letter. Some transactions were conducted with implausible speed. Frequent and large transactions conducted quickly to purchase eligible foods at Appellant are highly unlikely given Appellant's low-dollar inventory and limited counter space. The firm does not maintain the logistical wherewithal required to rapidly process these transactions. The steps required to process a legitimate SNAP purchase include the following:

- 1) Waiting for the customer to load the items onto the counter space near the cash register. (Due to the large dollar amounts of the transactions and considering how many low-priced items it would take to reach the amounts listed in this attachment, it is unclear how customers, without the use of shopping carts or baskets, were able transport their items to the register and then out the door to waiting transportation);

- 2) Separating eligible items from ineligible items;
- 3) Entering the cost of each item;
- 4) If applicable, weighing any individual items sold by weight, such as fresh meat or fruits and vegetables;
- 5) Inputting manufacturers cents-off coupons, if applicable;
- 6) Bagging the items for carry out;
- 7) Handing the customer bagged items to make room for more food items on the counter;
- 8) Informing the customer of the totals (one for eligible foods and one for non-eligible items, if applicable);
- 9) Pressing the “SNAP transaction key” on the point-of-sale device;
- 10) Swiping the card;
- 11) Entering of the required PIN by the customer;
- 12) Entering the purchase amount by the cashier;
- 13) Confirming that the customer has a sufficient benefit balance;
- 14) Processing and approval of the transaction by the system;
- 15) Printing out cash register and EBT receipts;
- 16) Accepting an alternate form of payment for nonfood items and possibly handling cash and change; and,
- 17) Removing products from the checkout area so the next customer in line can begin another transaction.

While such transactions may well be conducted in succession, performing these actions on large transactions cannot be done rapidly. The amount of time required is generally proportional to the dollar amount of the transaction; typically, the larger the dollar amount transacted the longer the time period between transactions. Limited counter space and a lack of shopping carts and baskets add additional time to transactions. Appellant processed large orders considerably faster than supermarkets typically process them, yet it has only one small checkout counter, no optical scanner, and none of the logistical tools (such as conveyor belts, rotating bagging platforms or order separators) routinely used in rapid throughput operations.

As described above, the rapid processing of large transactions of eligible food items at Appellant is improbable. Yet, the questionable transaction data cited in Attachment 1 reveals consecutive transactions involving large-dollar amounts **5 U.S.C. § 552 (b)(7)(E)**. It is highly unlikely that the rapid, multiple, large transactions described above involve solely the sale of eligible foods.

Expensive Offerings

Appellant asserts it sells drinks in bulk which explain the large purchases, and this was erroneously omitted from the store visit report. The evidence does not support this contention.

During the August 31, 2018 store visit, there were no cases of drinks on display as being available for bulk sale. In addition, there were no posted prices for these items. The store clerk identified the four most expensive items at Appellant, which were then recorded and photographed by the store reviewer. These ranged in price from \$5.49 to \$6.99. None of these items Appellant now alleges it sells were identified by the store clerk. Appellant did not provide any receipts or invoices in support of its contentions.

While there may have been occasions when Appellant sold expensive items, based on evidence from the store visit and lack of corroborating receipts or invoices, it is more likely true than not true that the sale of expensive items does not explain the large SNAP transactions that occurred at Appellant. Trafficking is a more likely explanation for the unusual and irregular pattern of high-dollar transactions.

Special Services

Appellant argues suspicious transactions are because customers make phone orders which are delivered to the customers' homes or picked up at the store. Appellant stated these transactions are sometimes broken into separate orders. Appellant did not provide evidence that it offers these services. There was no evidence that Appellant maintained a delivery truck or a separate cold storage area near the counter to store customer's telephone orders. In response to the store visit report, the clerk stated the store did not take telephone orders or offer delivery. There were no notices visible at the time of the store visit stating Appellant took phone orders or offered delivery. Even if Appellant provided such services, Appellant provided no explanation for why customers would split these transactions. An unsubstantiated argument such as this does not provide a valid basis for dismissing the charges or for mitigating the penalty imposed.

Customer Statements

With regard to customer statements provided by Appellant that purport to establish that questionable transactions were legitimate and no trafficking occurred, the truth of such statements cannot be verified. Customers engaging in trafficking transactions would be unlikely to admit to this behavior. On the contrary, customer statements would be expected to attest to the legitimacy of questionable transactions regardless of whether they were, in fact, legitimate.

However, the ROC did analyze the affidavits provided by Appellant. Of the ten customers who signed these documents, five were identified as SNAP participants. Of those, two had transactions which were included in the charge letter. Both of these individuals regularly shopped at a variety of stores during the review period, including supermarkets and superstores. The affidavits do not explain the suspicious transactions in the charge letter.

Evidence of Trafficking

Appellant argues the ALERT system has not been independently proven accurate in finding fraud, and the analyst overly relied on the results of the ALERT system when issuing a charge of trafficking because of confirmation bias. Appellant also contends that the analyst made incorrect assumptions about customer shopping patterns and circumstances and failed to take into account local differences. As previously stated, 7 CFR § 278.6(a) states, in part:

FNS may disqualify any authorized retail food store . . . if the firm fails to comply with the Food and Nutrition Act of 2008, as amended, or this part. Such disqualification shall result from a finding of a violation on the basis of evidence that may include facts established through on-site investigations, inconsistent redemption data, **evidence**

obtained through a transaction report under an electronic benefit transfer system . . .
. . (Emphasis added.)

FNS employs a computerized fraud detection tool to identify EBT transactions that form patterns having characteristics indicative of trafficking. Appellant stated that past reversals in administrative review prove that ALERT scans on their own are insufficient to support trafficking. This tool does not determine that trafficking has occurred. The ROC must still analyze the transaction patterns, along with other information such as store visit observations, customer shopping patterns, and comparative data from nearby stores. Only then does the ROC conclude whether questionable transactions were, more likely than not, the result of trafficking. Transactions with these patterns sometimes have valid explanations that support the idea they were the result of legitimate purchases of eligible food items, which is why opportunities are given to charged retailers to explain the questionable transactions cited. In this case, based on the suspicious patterns displayed and the other supporting evidence in the file - and in the absence of any reasonable explanations for such transaction patterns - the preponderance of the evidence supports that the “unusual, irregular, and inexplicable” transactions and patterns cited in the letter of charges are the result of trafficking.

Summary

The ROC determined that Appellant likely trafficked in SNAP benefits. The charges of violations were based on the ROC’s assessment that substantial evidence exists that the questionable transactions occurring during the review period displayed patterns inconsistent with legitimate sales of eligible food to SNAP participants. The evidence the ROC considered in support of its determination included:

- The irregular SNAP transaction data of Appellant as compared to similar stores;
- Observations made during an store visit by a USDA contractor, including the inadequacy of the firm’s staple food stock to support such large transactions;
- The availability and characteristics of other SNAP-authorized stores located close to Appellant; and,
- Shopping behaviors of Appellant’s customers.

The transaction data and overall firm record demonstrate the patterns of unusual, irregular, and inexplicable SNAP activity for this firm is likely the result of trafficking.

Upon review, Appellant failed to prove by a preponderance of the evidence that the administrative action should be reversed. Appellant provided inadequate explanations for the suspicious transactions and insufficient evidence to legitimize its transaction data. It has not convincingly rebutted the ROC’s determination that Appellant most likely trafficked in SNAP benefits. The SNAP regulations are specific with regard to the action that must be taken if personnel of the firm have trafficked, which is that FNS must disqualify the firm permanently.

CIVIL MONEY PENALTY

Appellant requested a civil money penalty (CMP) contending that it had established and implemented an effective compliance policy and program to prevent SNAP violations. According to 7 CFR § 278.6(i) of the SNAP regulations, FNS may impose a CMP in lieu of permanent disqualification for trafficking.

For an Appellant's request for a CMP to be considered, the regulations at 7 CFR § 278.6(b)(2) require that Appellant submit supporting documentation within ten days of receipt of the charge letter. Appellant was advised of this provision in the charge letter of December 18, 2018. A review of the administrative record indicates Appellant did not submit documentation to support its eligibility for this alternative sanction by this deadline.

7 CFR § 278.6(i) sets forth the eligibility requirements for a CMP:

The firm shall, at a minimum, establish by substantial evidence its fulfillment of each of the following criteria:

Criterion 1: The firm shall have developed an effective compliance policy as specified in Section 278.6(i)(1); and,

Criterion 2: The firm shall establish that both its compliance policy and program were in operation at the location where the violation(s) occurred prior to the occurrence of violations cited in the charge letter sent to the firm; and,

Criterion 3: The firm had developed and instituted an effective personnel training program as specified in Section 278.6(i)(2); and,

Criterion 4: Firm ownership was not aware of, did not approve, did not benefit from, or was not in any way involved in the conduct or approval of trafficking violations; or it is the first occasion in which a member of firm management was aware of, approved, benefited from, or was involved in the conduct of any trafficking violations by the firm . .

..

In support of Appellant's contention that it is eligible for a CMP, it described its SNAP compliance policy and training program. In this regard, the various statements made by Appellant is not "substantial evidence" that fulfills each of the four criteria of 7 CFR § 278.6(i), demonstrating "that the firm had established and implemented an effective compliance policy and program to prevent violations."

The standards of eligibility for a trafficking CMP are high. They require substantial proof that a compliance policy and program was established and implemented prior to the occurrence of violations. These standards exist to thwart attempts to falsely present compliance policies and programs that were not actually implemented prior to violations. As Appellant did not provide the required supporting documentation, the ROC did not assess a CMP. According to the requirements stated in 7 CFR § 278.6(b)(1), § 278.6(b)(2)(ii and iii), and § 278.6(i), Appellant is not eligible for a CMP in lieu of a permanent disqualification from participation as an authorized retailer in SNAP. The determination by the Office of Retailer Operations and Compliance to deny Appellant a civil money penalty is sustained.

CONCLUSION

The record has yielded no indication of error in the finding by the Office of Retailer Operations and Compliance that Appellant trafficked in SNAP benefits. A review of the evidence supports that it is more likely true than not true that program violations occurred as charged. Based on the discussion above, the determination by the Office of Retailer Operations and Compliance to impose a permanent disqualification against Katella Liquor Market from participating as an authorized retailer in SNAP is sustained.

RIGHTS AND REMEDIES

Applicable rights to a judicial review of this decision are set forth in 7 U.S.C. § 2023 and 7 CFR § 279.7. If Appellant desires a judicial review, the complaint must be filed in the U.S. District Court for the district in which Appellant's owner resides, is engaged in business, or in any court of record of the State having competent jurisdiction. This complaint, naming the United States as the defendant, must be filed within thirty (30) days of receipt of this decision.

Under the Freedom of Information Act, we are releasing this information in a redacted format as appropriate. FNS will protect, to the extent provided by law, personal information that could constitute an unwarranted invasion of privacy.

RICH PROULX
ADMINISTRATIVE REVIEW OFFICER

May 10, 2021