

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

**Kwik Stop,**

**Appellant,**

**v.**

**Case Number: C0201942**

**Retailer Operations Division,**

**Respondent.**

**FINAL AGENCY DECISION**

The U.S. Department of Agriculture, Food and Nutrition Service (FNS), finds that there is sufficient evidence to support the determination by the Retailer Operations Division to impose a permanent disqualification against the Kwik Stop (hereinafter Appellant) from participating as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP).

**ISSUE**

The issue accepted for review is whether the Retailer Operations Division 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 September 22, 2017.

**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 September 6, 2017, the Retailer Operations Division charged the Appellant with trafficking, as defined in Section 271.2 of the SNAP regulations, based on a series of irregular SNAP transaction patterns that occurred during the months of February 2017 through July 2017. The letter noted that the penalty for trafficking is permanent disqualification as provided by 7 CFR § 278.6(e)(1). The letter also noted that the Appellant could request a trafficking civil

money penalty (CMP) in lieu of a permanent disqualification within ten days of receipt under the conditions specified in 7 CFR § 278.6(i).

Appellant responded to the charges in a letter dated September 12, 2017, that requested a reduced CMP be imposed in lieu of a permanent disqualification and included documentation of SNAP training. The Retailer Operations Division notified Appellant in a letter dated September 22, 2017, that the firm 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. This determination letter also stated that Appellant's eligibility for a trafficking CMP according to the terms of Section 278.6(i) of the SNAP regulations was considered. However, the letter stated ". . . you are not eligible for the CMP because you failed to submit sufficient evidence to demonstrate that your firm had established and implemented an effective compliance policy and program to prevent violations of the Supplemental Nutrition Assistance Program."

By letter dated September 29, 2017, Appellant appealed the Retailer Operations Division's assessment and requested an administrative review of this action. The appeal was granted. No subsequent correspondence was received from Appellant.

### **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 Part 278.6(a) and Part 278.6(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 have engaged in trafficking of SNAP benefits.

7 U. S. Code § 2021(a)(2) states, "Regulations promulgated under this chapter shall provide criteria for the finding of a violation of, the suspension or disqualification of and the assessment of a civil penalty against a retail food store or wholesale food concern on the basis of evidence that may include facts established through on-site investigations, inconsistent redemption data, or evidence obtained through a transaction report under an electronic benefit transfer system."

In addition, 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(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 part, in 7 CFR § 271.2, as, “The buying, selling, stealing, or otherwise effecting an exchange of SNAP benefits . . . for cash or consideration other than eligible food, either directly, indirectly, in complicity or collusion with others, or acting alone . . . .” Trafficking is further defined, in 7 CFR § 271.2, to include “(5) Intentionally purchasing products originally purchased with SNAP benefits in exchange for cash or consideration other than eligible food.”

7 CFR §278.6(i) states, inter alia: “FNS may impose a civil money penalty in lieu of a permanent disqualification for trafficking . . . if the firm timely submits to FNS substantial evidence which demonstrates that the firm had established and implemented an effective compliance policy and program to prevent violations of the Program.”

7 CFR §278.6(b)(2)(ii) states, inter alia: “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).” Part 278.6(b)(2)(ii) further states that 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 Part 278.6(b)(1), the firm shall not be eligible for such a penalty.

### **SUMMARY OF THE CHARGES**

The issue in this review is whether, through a preponderance of evidence, it is more likely true than not true that the questionable transactions were the result of trafficking. The charges on review were based on an analysis of SNAP EBT transaction data during the six month period of February 2017 through July 2017. This involved two patterns of EBT transaction characteristics indicative of trafficking:

1. Multiple transactions were made from individual benefit accounts in unusually short time frames.
2. Excessively large purchase transactions were made from recipient accounts.

### **APPELLANT’S CONTENTIONS**

In the response to the letter of charges and in the request for administrative review, Appellant has stated as its position in the matter the following:

- The multiple transactions are because customers purchase low amounts to check their

EBT balance especially in the beginning of the month. Furthermore, different family members live in the same household and will use the same EBT card for their own purchases;

- The large transactions are because many of the customers are large families who come in at different times of the day using the same EBT card to purchase groceries individually [sic];
- The employee responsible for these transactions was fired long before the owner received notice from USDA. He found out the employee was bipolar, irresponsible, stole money from the register, threatened customers, was a drug addict, and was completely out of control. The owner was out of the country when this was going on and the manager did not catch up on these doings by the employee as quickly as he would have if the owner were present;
- Losing EBT would have quite an impact on the community as over 90 percent are low income and rely on SNAP for food. The business carries many ethnic foods to cater to the ethnic community. It would cause hardship for many customers who are walking and have no means of transportation to access grocery stores. Removing SNAP would hurt both the neighborhood customer's convenience in shopping and the business. The owner would not jeopardize the business that is a main source of income. FNS has sent aides to the store before and found that it is compliant. The owner invests much time and money into the business. Unfortunately, there are times when the owner is away and employees may become negligent. The owner can provide receipts of customer purchases to show how important EBT is to the community and the consistency of purchases by locals;
- The owner was completely unaware of these occurrences and improper transactions. The employees responsible for this are negligent. The owner works very hard to be a respected and established businessman in the community and would not jeopardize everything worked for over the years to some ill-willed employees to ruin the business establishment and source of income. The owner has been a convenience store owner for over 10 years and has never come across situations like this. Employee trust is key in operating convenience stores. There is plenty of cash access in lotto, Western Union, and check cashing. It is becoming harder to employ honest trustworthy individuals and the owner has come to realize he must run background checks and have numerous references before hiring employees and be more hands-on with the business. Employees must earn their way of being responsible for the cash register and with customers. They must work months on stocking and floor duty before they are considered qualified or trustworthy enough to handle the cash register, customers, EBT cards, lotto, Western Union, cigarette sales, and alcohol sales;
- The owner has quarterly employee training and retraining sessions on SNAP card use and misuse. The owner will reevaluate his training methods and increase the training to monthly. The owner has enclosed the training logs and pamphlets used to train managers and employees. New employees are required to watch the online training video and are given pamphlets on their first day of employment on EBT use and misuse. The owner continues to reassess the importance of having all managers and employees understand and comply with SNAP program requirements. Obviously, the owner must and will reevaluate the training techniques and will improve and more frequently request staff meetings to address the misuse of EBT. Enclosed are Employee Guidelines and training checklist that the owner has implemented for new and existing employees on a monthly

basis; and,

- The owner requests consideration of a reduced CMP for the business as it is an initial violation and is a rude awakening for the owner. It seems like a hefty price to pay for employee negligence. The owner has checked his merchant statements that show the EBT volume is not high as it would have been if he were trafficking. The business is already struggling with EBT and it will be hard without it. The owner has never had problems with EBT before in his 15 years in the convenience store business and will make sure situations like this do not reoccur. The owner is in the process of replacing the manual registers with scanners that will make it easier to separate non-food items.

Appellant submitted a one-page form titled “SNAP/EBT DO NOT’S” that employees sign, a one-page “Employee Guide to SNAP/EBT/Food Stamps”, and a one page 2017 training log that has no entries in support of these contentions.

The preceding may represent a summary of Appellant’s contentions in this matter, however, in reaching a decision, full attention and consideration has been given to all contentions presented, including any not specifically recapitulated or specifically referenced herein.

## **ANALYSIS AND FINDINGS**

The Retailer Operations Division presented a case that Appellant trafficked SNAP benefits. Each Attachment furnished with the letter of charges represents the questionable and unusual patterns of SNAP transactions indicative of trafficking which were conducted at the Appellant business during the review period. As patterns of unusual transactions appear across multiple Attachments, the case of trafficking becomes more convincing.

### **Store Background and FNS Store Visit**

The FNS initially authorized the Appellant business on January 21, 2014, and the business is classified as a convenience store. The file indicates that in reaching a disqualification determination, the Retailer Operations Division considered information obtained during an August 4, 2017, store visit conducted by a FNS contractor to observe the nature and scope of the firm’s operation, stock, and facilities. This information was then used to ascertain if there were justifiable explanations for the EBT transactions at Appellant’s store that formed patterns indicative of trafficking. The store review summary documented the following store size, description, and characteristics:

- The business was a small store offering a marginal quantity and variety of staple foods and carrying no unique items or offering any distinctive services.
- The business stocked mostly typical mainstream American brand name products, but did have an extremely limited quantity and variety of Hispanic foods consisting of several canned foods such as Goya brand.
- There were no shopping carts or handheld baskets for customer use seen during the visit making it difficult for customers to carry large amounts of food to the checkout.

- The checkout area consisted of a plastic security barrier with two pass through trays. There was a shelf in front of the checkout area that was approximately one foot deep containing displays and two PIN pads. The narrow width of the checkout counter shelf would make it problematic to process large orders.
- The checkout area had two cash registers, two POS terminals, and no scanners as evidenced by the store visit report and photographs.
- No food packages, bundles, case sales, bulk products, or other sales were evident that would explain the unusual transactions and no SNAP eligible cased items were available for sale.
- The store had a marginal stock of staple foods that consisted of many single serving and pre-packaged items with the majority of inventory in accessory foods (primarily soda, candy, and other drinks), snacks, and ineligible items.
- The store had no fresh unprocessed meats or seafood, no frozen unprocessed meats or seafood, a very limited quantity and variety of processed meats and seafood (canned meat/fish/poultry), no packaged lunch meats, no bacon, no hot dogs, no deli meats, no deli cheeses, no frozen entrees, no frozen dinners, no fresh or frozen fruits or vegetables, single serving nuts, minimal quantities and varieties of soups, a very limited quantity and variety of canned and packaged staple food items, no flour, no rice, no bread/rolls/tortillas, no dry pasta/noodles, no eggs, no fresh milk (quarts or larger), minimal quantities of butter/margarine, minimal quantities of yogurt/sour cream, only one box of tea, and no expensive eligible food items.
- Ineligible items included: tobacco, alcohol, lottery, hot food, household products, paper products, pet products, automotive products, health and beauty items, ATM, diapers, electronics accessories, Western Union, money orders, check cashing, hats, and gloves while accessory foods included: candy, spices, condiments, coffee, tea (one box), single servings of cocoa, and carbonated/ uncarbonated drinks.
- Signage in the store was in English and there were no SNAP posters (anti-fraud, eligible items, reporting trafficking, etc.) visible in the store.
- Most food items were priced with all visible staple food prices ending in .x9 cents except for a very limited number of items such as snacks and beverages priced at two for \$3.00 and two for \$1.00. A price ending in .x9 cents is the most common pricing structure for stores of this type.
- The FNS store visit report listed the four most expensive items **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** for sale in the store as being a 12.4 ounce container of Enfamil infant formula priced at \$13.89, a five pound container of grits priced at \$6.99, a 12 ounce can of corn beef priced at \$5.99, and an 11.3 ounce container of coffee priced at \$5.99. This listing of the most expensive items was provided by a store employee during the store visit.
- The store was not a WIC vendor. While the business did stock baby foods and infant formula, most SNAP households with infants or small children are WIC participants and therefore would be purchasing these products using WIC vouchers at WIC vendors, not SNAP EBT.
- The business's hours of operation were 7:00 AM-12:00 AM Monday-Friday and 7:00 AM-10:00 PM Saturday-Sunday as confirmed during the store visit by a store employee.

- The FNS store visit report and photographs showed many empty or marginally stocked shelves, racks, and coolers as well as dusty food items all indicative of a slow turnover of stock. The report also noted poor lighting.
- The quantity and variety of the store's staple food inventory was significantly less than that seen during the previous FNS store visit on January 11, 2014.

### **Multiple transactions in unusually short time frames**

This Attachment documents 56 individual transactions in 27 sets of two or more transactions conducted by 23 different households in a short period of time.

5 U.S.C. § 552 (b)(6) & (b)(7)(C). The dollar amounts of the subsequent transactions in each set are all substantial and they nearly equal or exceed the dollar amount of the initial transaction in 17 of the 27 sets. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). One transaction set is comprised of four individual transactions while the remaining 26 sets are comprised of two individual transactions. It is not a usual shopping pattern to see so many purchases, in a short period of time, by the same recipients as documented in this Attachment. Multiple transactions conducted by the same household account within a short period of time is a method which violating stores use to avoid single high dollar transactions that cannot be supported by a retailer's inventory and structure. These sets of transactions appear to be in amounts which are indicative of trafficking.

Appellant contends the multiple transactions are because customers purchase low amounts to check their EBT balance especially in the beginning of the month. Furthermore, different family members live in the same household and will use the same EBT card for their own purchases.

SNAP households have no limit on the number of times they may use their benefits or the dollar value of eligible food they may purchase. The SNAP transactions listed in this Attachment are questionable not because they exceed any limits for use, but rather because they display characteristics of use inconsistent with the nature and extent of a convenience store's stock and facilities and are thus indicative of trafficking. These transaction sets do not contain the characteristics associated with a household purchasing a forgotten item right after checking-out or household members shopping together and making separate purchases as all but two of the 27 transaction sets occur over a period 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Additionally, none of these transactions are for low amounts indicative of SNAP households checking their balance as claimed by Appellant. It should be noted that as required by SNAP regulations at 274.12 (f), the EBT card holder must be able to check their account balance using the retailer's POS terminal without making any purchases or standing in a checkout line, and they can telephone a toll-free number for that information as well. Regulations also require that EBT card holders receive a POS terminal receipt showing the dollar amount of remaining benefits so, contrary to Appellant's contention, it would be unusual for many households to not know their SNAP balance. It is certainly not unusual for a small number of SNAP households to conduct multiple transactions in a short period of time. However, it is unusual that the subsequent transaction dollar amount is for a substantial amount in all of these transaction sets and that they nearly equal or exceed the dollar amount of the first transaction in 17 of the 27 sets. It is also unusual based on the available food stock that all of the transaction sets in this Attachment 5 U.S.C. § 552 (b)(6) & (b)(7)(C) when the comparable average convenience store SNAP

transaction amount in Orange County during the period under review was \$6.65. These multiple transactions indicate that the amounts were contrived by store employees trying to avoid suspiciously high transactions that would be indicative of trafficking by breaking them into multiple, smaller amounts.

An analysis of the shopping patterns for the 23 households listed in this Attachment shows that all of these households have ready access to transportation as evidenced by their shopping at a variety of other larger food stores located nearby and at a distance from Appellant's location with all 23 households shopping at a large number of super stores and supermarkets. This analysis further shows that 15 of the 23 households conducted 16 or fewer transactions at the Appellant business during the six month period under review with six households conducting six or fewer transactions indicating that more than 65 percent of the households in this Attachment are not regularly shopping at the Appellant business and would therefore not be likely to conduct multiple transactions totaling to large dollar amounts in short periods of time.

FNS records further show there are two super stores, three supermarkets, a medium grocery store, and two small grocery stores located within 1.97 miles of Appellant's location that would offer greater quantities and varieties of food items at lower prices than would be found at a marginally stocked convenience store. The Appellant business is located on North Lane and is steps from the intersection of North Pine Hills Road; both streets have fixed route bus service that would facilitate shopping at other stores. Given the proximity of these larger stores, there is no reason for the attraction to the Appellant business and the volume of violative transactions, especially the large dollar transactions. Appellant has failed to provide any viable explanations for the irregular shopping patterns exhibited by the households in this Attachment. Also, no explanation or rationale has been offered by Appellant as to why households that are regularly shopping at much larger stores offering a greater quantity and variety of SNAP eligible food stock at lower prices and who apparently have no transportation limitations would be conducting multiple, high dollar value transactions at a convenience store that offers a marginal selection of staple food items and has no shopping carts that would be needed for the large transactions in this Attachment. Common sense dictates that it is improbable that SNAP households, with limited cash resources, would choose to shop at the Appellant business when their SNAP eligible food needs could be met at any of the larger stores they are already regularly shopping at and therefore it is more likely than not that these households were trafficking SNAP benefits at the Appellant business.

There may be legitimate reasons why a SNAP recipient might return to a store during a short period of time, but the examples in this Attachment indicate a series of SNAP purchases that total to large dollar amounts. Multiple transactions over a short period of time, especially those of high dollar values, are indicative of attempts to obscure trafficking by dividing a large dollar value transaction into a series of smaller dollar value transactions and are a method which violating stores use to avoid high dollar transactions that cannot be supported.

### **High Dollar Value Transactions**



This Attachment lists 1,077 individual EBT transactions 5 U.S.C. § 552 (b)(6) & (b)(7)(C). The substantial number of high dollar transactions is atypical for a marginally stocked convenience store of this size and calls into question the legitimacy of these transactions. The SNAP transactions listed in this Attachment are all substantially higher than the average SNAP transaction amount of \$6.65 for this store type in Orange County. The 1,077 excessively large SNAP EBT transactions at Appellant's business for the review months 5 U.S.C. § 552 (b)(6) & (b)(7)(C) of all SNAP redemptions at Appellant's business during the period under review. This is unusual and indicative of trafficking.

The record shows that within a two mile radius of Appellant's store there are 44 SNAP authorized retailers including: two super stores, three supermarkets, one medium grocery store, two small grocery stores, one seafood specialty store, one bakery specialty store, 12 combination grocery stores, and 22 convenience stores. The evidence under review shows that SNAP households shopping at the Appellant business are also shopping at other nearby stores, as well as at many full-line supermarkets and super stores, located nearby as well as at a distance from Appellant's location that offer a greater quantity and variety of SNAP eligible foods items for better prices than customers can find at the Appellant business. The large dollar transactions remain questionable when considering the proximity of these other SNAP authorized stores that would be better shopping options for consumers. Based on these shopping patterns, transportation does not appear to be an issue for these households. Yet, these recipients continue to shop and spend suspicious high dollar amounts at the Appellant business, where the eligible food stock is limited, 5 U.S.C. § 552 (b)(6) & (b)(7)(C) of their purchases at larger food stores.

Evidence shows that the difference in the average SNAP transaction dollar amount, the total SNAP transaction dollar volume, and the SNAP transaction count for Orange County convenience stores during the review months and at the Appellant business is significant. 5 U.S.C. § 552 (b)(7)(E). The unusually high number of SNAP transactions is an indication that the business may be dividing larger transactions into multiple smaller transactions in an effort to circumvent detection as previously discussed. A comparison of Appellant's SNAP redemptions to that of nearby convenience stores that had redemptions for the review period shows similar differences. Additionally, none of these nearby stores exhibit the same suspicious transaction patterns listed in the charge letter for the Appellant business even though all are located in proximity to Appellant's location and would therefore be expected to share the same SNAP customer base and shopping patterns. This is a further indication that the SNAP transactions in this Attachment and the others do not represent legitimate food purchases. The Retailer Operations Division considered all of these to be indicators of unusual and suspicious activity.

This store also had irregular SNAP transaction data as compared to like type convenience stores in Orange County. A comparison of Appellant's SNAP redemption data with that of Orange County convenience stores using ten dollar increments shows that Appellant's transaction count and dollar volume ranges are significantly higher than the average of like type stores 5 U.S.C. § 552 (b)(6) & (b)(7)(C) at which point redemptions stop while transactions at Orange County convenience stores drop below one transaction 5 U.S.C. § 552 (b)(6) & (b)(7)(C). 5 U.S.C. § 552 (b)(6) & (b)(7)(C). These unusual spikes in both transaction numbers and dollar volume do not appear in the transaction count and dollar volume averages for other Orange County convenience stores. These high dollar transactions are considered to be irregular and

suspicious based on the Appellant store's food inventory. The Retailer Operations Division determined there was no credible reason for the Appellant business to have transactions at those high dollar levels given the marginal stock of staple foods and the lack of any specialty, bulk, or ethnic foods that might sell for large dollar amounts and therefore also considered this to be a strong indication of trafficking. None of Appellant's contentions explain these unusual and suspicious differences.

Appellant contends the large transactions are because large transactions are because many of the customers are large families who come in at different times of the day using the same EBT card to purchase groceries individually [sic]. Also, the owner has checked his merchant statements that show the EBT volume is not high as it would have been if he were trafficking.

The SNAP transactions noted in this Attachment are not presumed to be trafficking because they exceed a set dollar amount; they are questionable because they are inconsistent for this type of store and the store's stock. An analysis of shopping patterns by the Retailer Operations Division shows that households in this Attachment are regularly shopping at much larger stores, and conducting transactions of large dollar amounts, yet are conducting comparable or higher dollar value transactions at the Appellant business. It would make no sense for a household that regularly shops at larger stores and apparently has no transportation limitations to spend large dollar amounts at the Appellant business since its cost of goods would be higher than that of larger stores such as supermarkets or super stores.

Information obtained during the FNS store visit on August 4, 2017, shows that the Appellant business offers a marginal quantity and variety of SNAP eligible staple food items, many accessory foods, and many ineligible items. Since the Appellant business no fresh unprocessed meats or seafood, no frozen unprocessed meats or seafood, a very limited quantity and variety of processed meats and seafood (canned meat/fish/poultry), no packaged lunch meats, no bacon, no hot dogs, no deli meats, no deli cheeses, no frozen entrees, no frozen dinners, no fresh or frozen fruits or vegetables, minimal quantities and varieties of single serving nuts, minimal quantities and varieties of soups, a very limited quantity and variety of canned and packaged staple food items, no flour, no rice, no bread/rolls/tortillas, no dry pasta/noodles, no eggs, no fresh milk (quarts or larger), minimal quantities of butter/margarine, minimal quantities of yogurt/sour cream, only one box of tea, and offers little or no expensive eligible food items, these patterns are deemed to be suspicious. The fact that: tobacco, alcohol, lottery, hot food, household products, paper products, pet products, automotive products, health and beauty items, ATM, diapers, electronics accessories, Western Union, money orders, check cashing, hats, and gloves are not eligible for purchase with SNAP benefits also provides no justification for the high transaction amounts. The business carries no special foods or offers any unique services that are not also available at other nearby grocery stores making it unlikely that SNAP recipients with available transportation would make this business their grocery store of choice.

**5 U.S.C. § 552 (b)(6) & (b)(7)(C).**

Increasing food prices make it even more unlikely that SNAP recipients, with limited food benefits, would want to spend a considerable part of their benefits in a convenience store that does not address all of their food shopping needs when they are already shopping at larger, fully-stocked stores that would offer a greater variety of foods at lower prices. Many of these stores

would also offer store brand products at lower prices, offer weekly specials, and have shopping carts and checkouts with scanners and conveyor belts to facilitate processing purchases quickly. The Appellant business has an extremely small checkout area, no shopping carts, and no handbaskets thereby making it difficult to facilitate the great quantities of eligible food items required to make up these large dollar transactions. Accordingly, it is improbable that the food items purchased in these high dollar amounts could be carried to the register without the use of many carts and thus more likely the amounts were contrived. Additionally, Appellant furnished no itemized cash register and EBT receipts for the period under review to document the legitimacy of these excessively large transactions and no evidence was provided of SNAP eligible store stock via receipts of products taken into inventory for the relevant review months. Accordingly, it is improbable that the food items purchased in these high dollar amounts could be carried to the register without the use of many carts and thus more likely the amounts were contrived.

It was further noted that SNAP redemptions at the Appellant business spiked dramatically following receipt of the charge letter on September 7, 2017. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). It appears as though Appellant, realizing the business might be losing its SNAP license, was attempting to maximize his profits. A pronounced increase in SNAP transactions immediately following receipt of the charge letter is a clear indication of trafficking since, if trafficking were not occurring, there would be no abnormal fluctuations in redemption amounts.

5 U.S.C. § 552 (b)(7)(E).

Based on this discussion, Appellant did not provide adequate evidence to support the legitimacy of the excessively large transactions in this Attachment.

### **Other Contentions**

Appellant contends that the employee responsible for these transactions was fired long before the owner received notice from USDA. The business is already struggling with EBT and it will be hard without it. The owner has never had problems with EBT before in his 15 years in the convenience store business and will make sure situations like this do not reoccur. The owner is in the process of replacing the manual registers with scanners that will make it easier to separate non-food items and will reevaluate his training methods and increase the training to monthly.

It is important to clarify for the record that the purpose of this review is to either validate or to invalidate the earlier decision of the Retailer Operations Division. This review is limited to what circumstances were at the basis of the Retailer Operations Division action at the time such action was made. It is not within the authority of this review to consider what subsequent remedial actions may have been taken or will be taken in the future so that a store may begin to comply with program requirements. There is no provision in the SNAP regulations for waiver or reduction of an administrative penalty assessment on the basis of corrective actions implemented subsequent to investigative findings of program violations. Therefore, while the owner is installing scanners and promises to increase employee training to monthly are both positive steps, they do not provide any valid basis for dismissing the charges, or for mitigating the penalty

imposed. While store ownership may or may not have personally conducted the violative transactions, SNAP rules and regulations state that regardless of whom the ownership of a store may utilize to handle store business or their degree of involvement in store operations, the ownership is accountable for the proper training of staff and the monitoring and handling of all SNAP benefit transactions. The ownership remains liable for all violative transactions handled by store personnel, whether paid or unpaid, new, full-time or part-time. Ownership is also responsible for all SNAP transactions at the firm regardless of the amount of time the owner is present at the subject firm. Additionally, a record of participation in SNAP with no previously documented instance of violations does not constitute valid grounds for dismissal of the current charges of violations or for mitigating the impact of those charges. Lastly, while Appellant claims that the employee responsible for these transactions was fired long before the owner received notice from USDA, an examination of SNAP transactions for the months of August and September 2017 at the Appellant business shows that the same questionable and unusual patterns of SNAP transactions indicative of trafficking were still evident calling into question the legitimacy of Appellant's allegations.

The issue under review involves a charge of trafficking SNAP benefits based on EBT transaction data. EBT transaction data is covered in SNAP regulations at 7 CFR § 278.6(a) and is addressed below. Trafficking is always considered to be the most serious violation even if it is a first offense therefore a temporary suspension or lesser penalty would not be applicable. SNAP regulations at 278.6(e)(1) clearly state that, "FNS shall . . . [d]isqualify a firm permanently if . . . personnel of the firm have trafficked as defined in § 271.2." SNAP regulations at 7 CFR § 271.2, define trafficking as, "The buying, selling, stealing, or otherwise effecting an exchange of SNAP benefits . . . for cash or consideration other than eligible food, either directly, indirectly, in complicity or collusion with others, or acting alone . . ." SNAP regulations at 7 CFR § 278.6(a) clearly state, in part, that "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). In the present case, the data presented in the Attachments is solely based on the SNAP electronic benefit transfer transactions conducted at the Appellant business during the period under review. This firm was selected as a result of a series of complex algorithms that make numerous data comparisons with other like type firms during the period under review. All of the transactions were then reviewed and analyzed by the Retailer Operations Division staff before the decision was made to issue a charge letter. This investigative process included a detailed examination of information obtained from various sources, including, but not limited to the inventory report and photographs from the FNS store visit on August 4, 2017, a transaction comparison and analysis of like type and larger stores, and analysis of shopping patterns for recipient households conducting transactions at the Appellant business during the review period. This analysis also included a review of the business to ensure its store classification was correct and the data comparisons with like type firms valid. Additionally, there are nearby like type stores whose transaction data does not form these suspicious patterns and are therefore not at risk of disqualification for trafficking. There is also no regulatory requirement that trafficking disqualifications be based solely on on-site undercover operations.

Based on this empirical data, and in the absence of sufficient evidence for the legitimacy of such transaction patterns, a conclusion can be drawn, through a preponderance of evidence that the “unusual, irregular, and inexplicable” transactions and patterns cited in the letter of charges evidence trafficking as the most likely explanation for the questionable transactions listed in the charge letter Attachments. It is herein determined that Appellant has not provided a preponderance of evidence demonstrating that the transactions contained in the charge letter were more likely due to eligible food sales than not. Under review, the evidence more substantially supports a conclusion that the transaction activity in the charge letter Attachments was due primarily to trafficking in SNAP benefits.

The evidence under review shows SNAP activity indicative of trafficking. Neither the Food and Nutrition Act of 2008, as amended, nor the regulations issued pursuant thereto cite any minimum dollar amount of cash or SNAP benefits, or number of occurrences, for such exchanges to be defined as trafficking. Nor do they cite any degrees of seriousness pertaining to trafficking of SNAP benefits. Trafficking is always considered to be the most serious violation, even when the exchange of SNAP benefits for cash is dollar-for-dollar or is conducted by a non-managerial store clerk. This is reflected in the Food and Nutrition Act, which reads, in part, that disqualification “shall be permanent upon . . . the first occasion of a disqualification based on . . . trafficking . . . by a retail food store.” In keeping with this legislative mandate, Section 278.6(e)(1)(i) of the SNAP regulations states that FNS shall disqualify a firm permanently if personnel of the firm have trafficked. There is no agency discretion in the matter of what sanction is to be imposed when trafficking is involved.

### **CIVIL MONEY PENALTY**

Appellant contends the owner has quarterly employee training and retraining sessions on SNAP card use and misuse. The owner will reevaluate his training methods and increase the training to monthly. The owner has enclosed the training logs and pamphlets used to train managers and employees. New employees are required to watch the online training video and are given pamphlets on their first day of employment on EBT use and misuse. Additionally, losing EBT would have quite an impact on the community as over 90 percent are low income and rely on SNAP for food. The business carries many ethnic foods to cater to the ethnic community. It would cause hardship for many customers who are walking and have no means of transportation to access grocery stores. Removing SNAP would hurt both the neighborhood customer’s convenience in shopping and the business. The owner would not jeopardize the business that is a main source of income. FNS has sent aides to the store before and found that it is compliant. The owner invests much time and money into the business. Unfortunately, there are times when the owner is away and employees may become negligent. The owner was completely unaware of these occurrences and improper transactions. The owner also requests consideration of a reduced CMP for the business as it is an initial violation and is a rude awakening for the owner. It seems like a hefty price to pay for employee negligence. Appellant submitted three pages of documentation consisting of a one-page form titled “SNAP/EBT DO NOT’S” that employees sign, a one-page “Employee Guide to SNAP/EBT/Food Stamps”, and a one page 2017 training log that has no entries listed in support of these contentions.

A CMP for hardship to SNAP households may not be imposed in lieu of a permanent disqualification as specified in SNAP regulations at 7 CFR § 278.6(f). Trafficking is a permanent disqualification so Appellant is not eligible for a hardship CMP.

A review of the inventory report completed during the FNS store visit shows that although the Appellant business stocked mostly typical mainstream American brand name products, it did have an extremely limited quantity and variety of Hispanic foods consisting of several canned foods such as Goya brand. This refutes Appellant's contention that the business carries many ethnic foods to cater to the ethnic community.

The Retailer Operations Division determined that the Appellant was not eligible for a trafficking CMP in lieu of a disqualification under 7 CFR 278.6(i) because Appellant failed to submit sufficient evidence to demonstrate that the firm had established and implemented an effective compliance policy and program to prevent SNAP violations within the specified timeframe. As such, the Retailer Operations Division determined that Appellant was not eligible for a trafficking CMP in lieu of permanent disqualification.

To be considered eligible for a trafficking CMP a firm must 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).
- 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.
- Criterion 3: The firm had developed and instituted an effective personnel training program as specified in Section 278.6(i)(2).
- 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.

SNAP regulations are explicit in what constitutes substantial evidence. Specifically, 7 CFR § 278.6(i)(2) states in relevant part, "As specified in Criterion 3 above, in determining whether a firm has established an effective policy to prevent violations, FNS shall consider *written and dated statements of firm policy* which reflect a commitment to ensure that the firm is operated in a manner consistent with part 278 of current FNS regulations and current FSP policy on the proper acceptance and handling of food coupons." This section goes on to state, "As required by Criterion 2, such policy statements shall be considered only if documentation is supplied which establishes that the policy statements were provided to the violating employee(s) prior to the commission of the violation." This section further states, "A firm which seeks a civil money penalty in lieu of permanent disqualification *shall document* its training activity by submitting to FNS its *dated training curricula and records of dates training sessions were conducted...*" (Emphasis added).

The three pages of documentation submitted by Appellant do not constitute an effective

compliance policy as they lack substance and detail, nor do they show any indication that the store owner had a compliance program in effect to monitor store transactions for possible violations prior to the issuance of the charge letter. The addition of an employee signature block to the “Do Not’s” form and a blank training log also do not constitute acceptable evidence that an effective training program was in operation prior to the violations. Therefore, Appellant failed to meet the regulatory standard for a trafficking CMP as it did not provide substantial evidence that it met all four criteria required by 7 CFR §278.6(i). Based on the above, the Retailer Operations Division’s decision not to impose a CMP in lieu of disqualification is sustained as appropriate pursuant to 7 CFR §278.6(i).

It is recognized that some degree of economic hardship is a likely consequence whenever a store is disqualified from participation in SNAP. However, there is no provision in the SNAP regulations for waiver or reduction of an administrative penalty assessment on the basis of possible economic hardship to the firm or to ownership resulting from imposition of such penalty. To allow store ownership to be excused from an assessed administrative penalty based on purported economic hardship to the firm would render virtually meaningless the enforcement provisions of the Food and Nutrition Act of 2008, as amended, and the enforcement efforts of the USDA. Furthermore, giving special consideration to economic hardship to the firm would forsake fairness and equity, not only to competing stores and other participating retailers who are complying fully with program regulations, but also to those retailers who have been disqualified from the program in the past for similar violations. Therefore, Appellant’s contention that the firm may incur economic hardship based on the assessment of an administrative penalty does not provide any valid basis for dismissing the charges or for mitigating the penalty imposed.

## **CONCLUSION**

The Retailer Operations Division has presented a case that Appellant has likely trafficked in SNAP benefits. The Retailer Operations Division’s analysis of Appellant’s EBT transaction record was the primary basis for its determination to permanently disqualify Appellant. This data provided substantial evidence that the questionable transactions during the review period had characteristics that are consistent with trafficking violations in SNAP benefits. This is evidenced by: the suspicious patterns in two Attachments of EBT transaction data, the inadequacy of the store’s staple food stock as observed during the store visit to support large transactions in short time frames, the lack of adequate evidence for customer spending habits given that there are other SNAP authorized stores located within proximity to Appellant that likely offer a greater selection of eligible food items at competitive prices, and the irregular SNAP transaction data of Appellant as compared to other like type and larger stores in the county and state.

The retailer has not provided sufficient evidence to rebut the case that Appellant most likely trafficked in SNAP benefits. Therefore, based on a review of all of the evidence in this case, it is more likely true than not true that program violations did, in fact, occur as charged by the Retailer Operations Division. Based on the discussion above, the determination to impose a permanent disqualification against Appellant is sustained. Furthermore, Retailer Operations properly determined that Appellant was not eligible for a trafficking CMP according to the terms

of Section 278.6(i) of the SNAP regulations.

### **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 a judicial review is desired, 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.

ROBERT T. DEEGAN  
Administrative Review Officer

January 16, 2018