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

Liquor Run,

Appellant,

v.

Case Number: C0220009

Retailer Operations Division,

Respondent.

FINAL AGENCY DECISION

It is the decision of the U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS) that a permanent disqualification of Liquor Run (hereinafter "Appellant") from participation as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP) was properly imposed by FNS's Retailer Operations Division.

ISSUE

The issue accepted for review is whether or not the Retailer Operations Division, in its administration of SNAP, took appropriate action, consistent with Title 7 Code of Federal Regulations (CFR) Part 278, when it imposed a permanent disqualification against Liquor Run.

AUTHORITY

7 U.S.C. § 2023 and its implementing regulations at 7 CFR § 279.1 provide that "[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."

SUMMARY OF CHARGES

The Appellant was charged with trafficking and subsequently permanently disqualified from SNAP based on an analysis of EBT transaction data from March 2019 through May 2019. This involved the following transaction patterns which are common trafficking indicators:

- There were multiple transactions made from the accounts of individual SNAP households within a set time period.
- The firm conducted EBT transactions that were large based on observed store characteristics and recorded food stock.

CASE CHRONOLOGY

The agency's record shows that FNS initially authorized Liquor Run for SNAP participation as a small grocery store on October 25, 2018. In a letter dated October 17, 2019, 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 between the months of March 2019 and May 2019. The letter noted that the penalty for trafficking is permanent disqualification as provided by 7 CFR § 278.6(e)(1). The letter also stated that the Appellant could request a civil money penalty (CMP) in lieu of permanent disqualification for trafficking, but noted that such a request must be made and supporting documentation submitted within 10 days of receipt of the charge letter under the conditions specified in 7 CFR § 278.6(i).

In a series of verbal and written correspondence between October 22, 2019 and June 23, 2020, the Appellant, primarily through counsel, disputed the allegations of trafficking and provided a large amount of documentation to support its contentions. It is noted that on November 14, 2019, Appellant's counsel submitted a request for case file information in a request made under the Freedom of Information Act. FNS provided its response to this request on December 17, 2019.

The bulk of the Appellant's written arguments were presented in a separate letter also dated November 14, 2019. In this letter the Appellant denied the allegations of misconduct. For instance, the Appellant argued that all of the transactions listed in Attachment 1 of the charge letter were alleged to have occurred during hours when the business was closed and unoccupied by any customer or employee. To support this assertion, the Appellant provided a copy of its operating hours and evidence from Sentinel Security Systems which showed that the alarm system for Liquor Run was deactivated when the store was opened for the day and then reactivated once the business was closed. The Appellant further argued that the firm used multiple EBT point-of-sale (POS) machines during the three-month review period because the machines were malfunctioning. According to the Appellant, it replaced its original POS in March 2019, and then replaced the replacement device in June 2019. The Appellant claimed that almost immediately after giving up possession of its original POS device in March, the unusual transactions began. Then, after acquiring the newest POS device in June, the unusual transactions ceased. From this, the Appellant concluded: "Obviously, some nefarious individuals somehow gained access [to the returned] EBT machine or machines and misused them."

As for large transactions, the Appellant argued that the transactions are neither large nor extraordinary in any way, as the average sales price for the transactions in Attachment 2 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Further, taking into consideration that the firm sells specialized meat products tailored to the Hispanic population and other products for large families, the average transaction size is hardly significant. For example, the Appellant stated that a pig's head sells for approximately $300.00, and five pounds of a Ranchera cut of meat sells for around $40.00.

The Appellant argued that it has, at all times, been committed to ensuring that the firm is operated in a matter consistent with applicable SNAP regulations and policies. Specifically, the firm has had in place a program of verbal training and repeated advisories to constantly remind employees

of the legal requirements of EBT, including a prohibition against trafficking and other abuses of the program. The owners also routinely make unannounced visits to supervise the business and ensure its proper operation.

The Appellant argued that there is no evidence-based connection between the transactions listed in the charge letter attachments and misconduct on the part of the Appellant. The Appellant further stated that since it had done everything humanly possible to prevent the occurrence of SNAP misconduct, it cannot be said that it "knowingly permitted" violations. According to the Appellant, without knowledge of any misconduct, liability is conceptually and legally impossible. The Appellant argued that it is not liable unless there is clear and convincing proof that some act or omission by the firm proximately caused or contributed to the misconduct.

In support of its response, the Appellant submitted a number of documents, including a two-page declaration from store owner 5 U.S.C. § 552 (b)(6) & (b)(7)(C), which largely repeats the arguments presented by Appellant's counsel; four photographs of the outside of the store, including one depicting the firm's business hours; and a one-paragraph letter from 5 U.S.C. § 552 (b)(6) & (b)(7)(C), explaining that Liquor Run's alarm system was working properly during the period of time in question and that with one minor exception on May 9, 2019, there was no deactivation of the alarm system between the time the store closed each night and reopened the next morning. A six-page report showing a daily log of alarm system activity was included with 5 U.S.C. § 552 (b)(6) & (b)(7)(C) letter.

The Appellant also submitted bank statements from September 2018 through July 2019 to show that the firm changed its EBT equipment in approximately March 2019 and again in June 2019; and a listing of all transactions (all electronic payment types) between March 1, 2019 and June 1, 2019. In response to a request from the Retailer Operations Division, the Appellant also provided eight inventory invoices from Frank Quality Meat. The invoices are dated between January 8, 2019 and February 26, 2019. According to the Appellant, the invoices show largely pork and beef products based on customer demand. The products were stored in the freezer and resold through May 2019. The Appellant stated that business was slow during that time, so there was no need to reorder; in fact, business became so slow that Liquor Run closed down its entire meat department in May 2019. Finally, on June 23, 2020, the Appellant submitted to FNS a short letter explaining that its retail markup percentages for meat products was approximately 25 to 35 percent, depending on the product.

It should be noted that although the Appellant claimed to have a SNAP compliance policy and training program in place, it did not submit any evidence to support this claim.

After evaluating the Appellant's responses and further considering the evidence in the case, the Retailer Operations Division concluded that trafficking had occurred as charged and issued a determination letter dated July 2, 2020. This letter informed the Appellant that it would be permanently disqualified from SNAP upon receipt of the letter in accordance with 7 CFR § 278.6(c) and § 278.6(e)(1). The letter also stated that the Retailer Operations Division considered the Appellant's eligibility for a trafficking CMP according to the terms of Section 278.6(i) of the SNAP regulations, but that a CMP was not appropriate in this case because the

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.

In a letter postmarked July 10, 2020, the Appellant, through counsel, appealed the Retailer Operations Division's determination by requesting an administrative review. The request was granted.

STANDARD OF REVIEW

In an appeal of adverse action, such as disqualification from SNAP participation, an appellant bears the burden of proving by a preponderance of the evidence that the administrative action should be reversed. This means that an appellant has the burden of providing relevant evidence which a reasonable mind, considering the record as a whole, would accept as sufficient to support a conclusion that the matter asserted is more likely to be true than not true.

CONTROLLING LAW AND REGULATIONS

The controlling law in this matter is found in the Food and Nutrition Act of 2008, as amended (7 U.S.C. § 2021), and promulgated 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.

7 U.S.C. § 2021(b)(3)(B) states, in part:
...[A] disqualification under subsection (a) shall be...permanent upon...the first occasion or any subsequent occasion of a disqualification based on the purchase of coupons or trafficking in coupons or authorization cards by a retail food store or wholesale food concern or a finding of the unauthorized redemption, use, transfer, acquisition, alteration, or possession of EBT cards...

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, [or] evidence obtained through a transaction report under an electronic benefit transfer system.... [Emphasis added.]

7 CFR § 278.6(e)(1)(i) states:
FNS shall disqualify a firm permanently if personnel of the firm have trafficked as defined in § 271.2.

7 CFR § 271.2 states, in part:
Trafficking means: 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...

7 CFR § 271.2 states, in part:
Eligible foods means: 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)(1) 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) states, 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(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.

7 CFR § 278.6(i) states, in part:
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...

APPELLANT'S CONTENTIONS

The Appellant, through counsel, made the following summarized contentions in its request for administrative review, in relevant part:

- As the Appellant has previously stated, the decision to permanently disqualify Liquor Run from SNAP is not based on substantial evidence to support the allegations of misconduct.
- The decision is not premised upon legally cognizable findings of fact nor upon legally cognizable conclusions of law.
- All of the Appellant's evidence, which is essentially uncontradicted, refutes the allegations of misconduct.

In support of its contentions, the Appellant resubmitted the same written arguments that were provided to the Retailer Operations Division along with most of the same evidence.

The preceding may represent only a brief summary of the Appellant's contentions presented in this matter. However, in reaching a decision, full attention was given to all evidence and contentions presented, including any not specifically summarized or explicitly referenced herein.

ANALYSIS AND FINDINGS

A key issue for consideration in a case based on suspicious SNAP redemption data is whether or not the Retailer Operations Division adequately established that the Appellant firm engaged in the violation of trafficking. In other words, did the Retailer Operations Division, through a preponderance of the evidence, establish that it is more likely true than not true that the irregular and unusual transactions cited in the charge letter were the result of trafficking?

Contractor Store Visit

The case file indicates that in reaching a disqualification determination, the Retailer Operations Division considered not only the Appellant firm's EBT transactions, but also information obtained from a May 24, 2019, store visit which was conducted by an FNS contractor to observe the nature and scope of the firm'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 and photographs documented the following store size, description, and characteristics:

- Liquor Run is a small grocery store, roughly 3,200 square feet in size, operating in the city of Hemet, Riverside County, California.
- At the time of the contractor's visit, the firm had a small number of handheld shopping baskets and two shopping carts. However, the shopping carts were located in a back storage area and it appeared that rather than for customer use, they were likely used by the store for inventory stocking.
- The store visit photographs show one cash register and agency records reflect the use of one EBT point-of-sale terminal for SNAP purchases.
- The store's staple food stock is sufficient for program eligibility in each of the four staple food categories and is typical of a small grocery store or convenience store.
- The report indicates that the store sells a large number of SNAP-eligible, non-staple accessory food items, such as carbonated and uncarbonated drinks, snacks, candy, and condiments. The store also sells ineligible nonfood items, including alcoholic beverages,

tobacco products, lottery tickets, health and beauty items, cleaning supplies, and other miscellaneous household merchandise. As noted earlier, agency records classify Liquor Run as a small grocery store. However, based on the information obtained by the contractor and considering the large amount of accessory foods and nonfoods in relation to staple foods, this review finds that this store should more appropriately be considered a convenience store.

- The store contains a large meat and deli display unit as well as meat cutting equipment. However, the store did not contain any fresh meat, either in this cooling unit or in storage, and none of the meat preparation equipment was in use. According to the contractor, the owner indicated that all of this equipment was being sold.
- The checkout area includes a small counter space surrounded by large amounts of snack foods and miniature bottles of alcoholic beverages. The countertop area is not conducive to conducting large or rapid transactions as there is little space to place more than a few items at a time.
- There is no indication from the store visit report that the firm has a special pricing structure. Most prices appear to end in 9, such as .99, which is typical of retail stores.
- There is no indication from the report that the firm has special food packages for sale or that items are sold in bulk or by the case.
- The most expensive eligible food items include a 12.5-ounce can of Enfamil infant formula for $17.99; a 12.5-pound bag of dry black beans for $12.50 (just two units available); a case of Springfield bottled water for $7.99 (one unit available); and a one-pound block of cheese for $5.99. Based on the contractor's report, it appeared that most items in the store sold for $5.00 or less. It should be noted that SNAP households containing infants are almost always eligible for simultaneous participation in the Special Supplemental Nutrition Program for Women, Infants, and Children (WIC). Infant formula is part of the WIC food package, so it is likely that households with infants would purchase expensive formula with WIC benefits rather than SNAP benefits.

The available inventory of SNAP-eligible food at the time of the store visit showed stock that would be typical of a convenience store, where households normally purchase a limited number of items to supplement their overall dietary needs. There was no indication that SNAP households would be inclined to regularly visit Liquor Run to purchase large quantities of groceries, especially considering the constricted checkout area, the limited overall inventory, and the availability of much larger grocery stores in the area, including five supermarkets and five superstores located within a two mile radius. Given the available inventory and the store's characteristics, this review could find no reason why the Appellant firm's SNAP redemption patterns differed so significantly from those of its competitors.

Transaction Times

One of the key contentions made by the Appellant is an assertion that the transactions listed in the charge letter are spurious because virtually all of them occurred during hours when the business was closed and unoccupied by customers or employees. To support this claim, the Appellant provided a copy of its operating hours as well as evidence from its alarm system company which shows that the alarm for Liquor Run was deactivated when the store was opened each day and then reactivated once the business was closed at night. The Appellant further argues that the firm

used multiple EBT point-of-sale (POS) machines during the three-month review period because the machines were malfunctioning. According to the Appellant, it replaced its original POS device in March 2019, and then replaced that device in June 2019. The Appellant claims that almost immediately after giving up possession of its original POS device in March, the unusual transactions began. Then, after acquiring the newest POS device in June, the unusual transactions ceased. From this, the Appellant concludes: "Obviously, some nefarious individuals somehow gained access [to the returned] EBT machine or machines and misused them."

Based on a cursory review of the transaction dates and times listed in the charge letter attachments, it certainly appears that the transactions in question occurred outside of the firm's business hours. This preliminary evidence could lead one to believe that someone other than store employees had inappropriately gained access to the firm's SNAP authorization information or had improperly accessed the POS device – often in the middle of the night when the store was closed. A closer look at the data, however, strongly suggests that the transactions did, in fact, occur at Liquor Run and almost certainly occurred in the patterns described in the charge letter. This is because the POS device was very likely programmed to the wrong time zone. By all indications, the transaction times listed in the charge letter are not local times, but rather Greenwich Mean Time or Coordinated Universal Time (UTC). UTC is the international basis for all other time zones. It is likely that the firm's POS device either defaulted to UTC or was inadvertently reset to UTC upon placing the device into service in the store. Thus, when it was 4:30 a.m. UTC on March 2, 2019, it was 8:30 p.m. on March 1, 2019 in Hemet, California, in the Pacific Time Zone, which is within the store's operating hours.

This review examined several days' worth of SNAP transactions from the review period that were attributed to Liquor Run, including days which did not have any suspicious transactions and were not listed on the charge letter, and discovered that nearly all transactions at the store were timestamped on agency records between roughly 3:00 p.m. and 6:00 or 7:00 a.m. This leaves a large gap of eight or nine hours during the store's business hours in which no SNAP transactions occurred. This review finds it highly unlikely that Liquor Run failed to conduct any SNAP transactions between approximately 7:00 a.m. and 3:00 p.m. every day of the review period even though that is what the timestamp records suggest. What is far more likely is that the firm's POS device was programmed to the incorrect time zone and that the eight or nine hour daily absence of transactions described above was actually the period of time when the store was closed.

Further confirming this review's conclusion that the POS device was improperly programmed leading to incorrect timestamps, is a 248-page report provided by the Appellant owner in his original response to the charge letter. This document – a printout from Wells Fargo Bank – lists all transactions (including all electronic payment types) that took place at the store between March 1, 2019 and June 1, 2019. This report proves that every transaction listed in the charge letter was, in fact, credited to the Appellant's account through Wells Fargo Bank. The report does not list transaction times, but does list the date that a transaction occurred, the amount of the transaction, and the last four digits of the customer's EBT card. In every case, the transactions listed in the charge letter correspond to transactions listed on the Wells Fargo report.

Accurate timestamping would have provided a clearer picture of the circumstances surrounding the transactions in this case. However, this review can find no evidence that the time discrepancy

was the fault of FNS. Instead, the manner in which the POS device reported the transactions to FNS is likely to blame.

Despite an apparent difference of eight hours for each transaction, there is strong evidence that the transactions did, in fact, occur, and the Appellant's explanations and evidence are insufficient to prove otherwise. This review can find no evidence whatsoever that the unusual patterns found in the charge letter were the result of "nefarious individuals" who had inappropriately gained access to the firm's POS equipment. Finally, the patterns found in Attachments 1 and 2 are indicative of trafficking. As such, this review finds that the unusual transaction times listed in the charge letter do not provide a valid basis to dismiss the trafficking charges.

SNAP Transaction Analysis

Charge Letter Attachment 1: Multiple transactions were made from the accounts of individual SNAP households within a set time period. This attachment lists 16 sets of transactions (42 transactions in all) 5 U.S.C. § 552 (b)(6) & (b)(7)(C). 5 U.S.C. § 552 (b)(7)(E).

For example, 5 U.S.C. § 552 (b)(6) & (b)(7)(C) – an extraordinary amount for what is essentially a convenience store with minimal overall staple food inventory. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Such transaction patterns at a store like Liquor Run are highly irregular and are often an indication of trafficking.

It is common for multiple members of the same household to use the EBT card at different times on the same day. It is also common for a customer to make a purchase and then a short time later realize that he or she forgot an item or two. Such incidents regularly play out at stores of all types across the country and are valid reasons for an occasional incident in which multiple transactions are close together. But the repetitive transactions in Attachment 1 are so frequent and so large at Liquor Run, especially in comparison to other stores of similar size, that there appears to be something beyond normal shopping occurring at the store. It is the finding of this review that trafficking was a likely cause of the transaction patterns listed in this attachment.

Charge Letter Attachment 2: The store conducted EBT transactions that were large based on observed store characteristics and recorded food stock. This attachment lists 47 SNAP transactions 5 U.S.C. § 552 (b)(6) & (b)(7)(C). These large transactions are not consistent with a small grocery store in the state of California. The Retailer Operations Division has determined that during the review period, the average SNAP transaction for a small grocery store in California was $15.10. In Riverside County, the average was a bit higher, at $17.48 per transaction, but the average transaction in Attachment 2 is more than three times larger than the average purchase amount for this store type.

Given that the Appellant firm has a modest inventory of staple foods as well as other SNAP-eligible items, including snacks and drinks, it is probable that there would be an occasional purchase where the transaction amount is high, 5 U.S.C. § 552 (b)(6) & (b)(7)(C). As such, it is possible that there are some legitimate SNAP transactions listed in Attachment 2. However, as noted earlier, there is little evidence that the firm would be likely to have SNAP redemption patterns that differ significantly from similar-sized competitors in the area. The substantial

number of high-dollar transactions in a three-month period calls into question the legitimacy of these transactions.

Attachment 2 lists 29 transactions 5 U.S.C. § 552 (b)(6) & (b)(7)(C) during the review period, including a high of 5 U.S.C. § 552 (b)(6) & (b)(7)(C) and two transactions for 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Another eight transactions were for 5 U.S.C. § 552 (b)(6) & (b)(7)(C) even though there is no evidence that the firm has a pricing structure that would lend itself to such even-dollar transactions. Considering how many food items it would typically take to add up 5 U.S.C. § 552 (b)(6) & (b)(7)(C), and considering the available inventory and other characteristics of the store, this review finds it difficult to believe that every large transaction in Attachment 2 was a legitimate purchase of eligible food.

The Appellant contends that the transactions in Attachment 2 are neither large nor extraordinary in any way. It argues that the firm sells expensive, specialized meat products tailored to the Hispanic population as well as other products for large families. For example, the Appellant stated that a pig's head sells for approximately $300.00, and five pounds of a Ranchera cut of meat sells for around $40.00. To support this contention, the Appellant submitted eight inventory invoices from Frank Quality Meat. These invoices are dated between January 8 and February 26, 2019.

A review of these invoices show that the firm purchased chicken, beef, pork, and seafood products, but none of the invoices included a pig's head and all were dated before the review period began. It is possible that some of the meat inventory was frozen and sold later, but the Appellant has offered no evidence as to how frequently this occurred (the Appellant has acknowledged that business was slow during the review period) and no evidence to show how much of its meat was actually purchased by SNAP recipients. Compelling evidence might have included copies of itemized cash register receipts to clearly show what transpired between the customer and the cashier at the point of sale. It is notable that by the time the contractor conducted its store inspection on May 24, 2019, the firm's meat department was completely shut down and the owner was attempting to sell off all related equipment, including the display coolers and meat cutters. This suggests that expensive meat sales were not a significant portion of the firm's sales during the review period.

This review does not doubt that Liquor Run sells eligible food items and conducts legitimate SNAP business. There is no evidence that this has ever been questioned. But when unusually large transactions form patterns that are substantially different from comparable stores in the area, compelling evidence from the Appellant is warranted to verify that there is not something more, such as trafficking or other program violations, taking place. In this case, this review finds that the Appellant's explanations and evidence are insufficient to demonstrate that what took place between the customers and cashiers at the point of sale was legitimate. Accordingly, it is the finding of this review that trafficking was a likely cause of the unusual transaction patterns found in Attachment 2.

The transactions identified in the charge letter are highly irregular and substantially different from comparable stores in the area. In an appeal of adverse action, the onus is on the Appellant to prove, by a preponderance of the evidence, that the administrative action should be reversed. This means submitting sufficient and compelling evidence that would lead a reviewer to conclude that

trafficking likely did not occur. Unfortunately the Appellant's evidence does not meet this standard.

Trafficking Case based on EBT Data / Knowledge of Misconduct

The Appellant contends that there is no evidence-based connection between the transactions listed in the charge letter and misconduct on the part of the Appellant. The Appellant further states that since it has done everything humanly possible to prevent the occurrence of SNAP misconduct, it cannot be said that it "knowingly permitted" violations. The Appellant claims that without knowledge of any misconduct, liability is conceptually and legally impossible. The Appellant argues that it is not liable unless there is clear and convincing proof that some act or omission by the firm proximately caused or contributed to the misconduct.

With regard to the Appellant's claims regarding knowledge of misconduct, it must first be stated that "clear and convincing proof" is not the standard of evidence in this case; rather a case must be proven by a preponderance of the evidence. This review finds that the Retailer Operations Division met this standard of proof when it made its determination that the Appellant was likely engaged in trafficking. Conversely, the Appellant has not met this standard in its effort to have the disqualification dismissed or reversed.

Further, the record shows that on October 4, 2018, the Appellant owner signed an application to participate as a retailer in SNAP. By signing this application, the owner agreed to accept responsibility on behalf of the firm for compliance with all statutory and regulatory requirements associated with participation in SNAP. The record clearly establishes that the Appellant owner agreed to abide by program rules, including taking responsibility for violations committed by any of the firm's employees, whether paid or unpaid, new, full-time or part-time. It is likely that a store owner is not present at all times, so it is probable that an owner is not entirely aware of what its employees are doing in the store at all hours of the day. However, an owner or manager is not free of responsibility simply because he or she was not in the vicinity at the time the violations occurred or because he or she was uninvolved in or unaware of the violations. Regardless of which clerks are operating the cash register at a given time and regardless of whom firm ownership authorizes to handle store business, the ownership of the firm is ultimately responsible for the proper training of staff and the monitoring and handling of SNAP benefit transactions. As such, the owner's implied lack of knowledge in this matter is not a valid reason to dismiss the charges or modify the penalty in any way.

Finally, with regard to the Appellant's contention that that there is no evidence-based connection between the transactions listed in the charge letter and misconduct on the part of the Appellant, this review acknowledges that a conclusion of trafficking cannot be drawn from EBT data alone, nor would it be possible to do so in a case based primarily on inconsistent redemption data. It is noted that FNS uses a fraud detection system to identify EBT transactions that form patterns having characteristics indicative of trafficking. However, this tool does not, by itself, determine or conclude that trafficking has occurred. FNS's Retailer Operations Division must still analyze the transaction data and patterns with other factors, such as observations from a store visit, an analysis of customer shopping behavior, and a comparison with similar stores in the area, and

then render a determination as to whether or not the questionable transactions were, more likely than not, the result of trafficking.

The legality of this method is identified in 7 CFR § 278.6(a) which 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, [or] evidence obtained through a transaction report under an electronic benefit transfer system** …." [Emphasis added.]

Prior to a disqualification determination, the accused firm is given ample opportunity to reply to the charges and provide any information it deems appropriate in justifying as legitimate the transaction activity detailed in the charge letter.

This review has thoroughly examined the documentation and information provided by the Retailer Operations Division and has found no evidence to suggest that the agency simply manufactured numerical data and declared it to be trafficking. From all indications, the Retailer Operations Division obtained the EBT data, found it to be suspicious in comparison to other area stores of similar size and characteristics, and then completed a thorough analysis before concluding that trafficking was likely occurring.

Civil Money Penalty

The Appellant contends that it has, at all times, operated the store in a matter consistent with applicable SNAP regulations and policies and claims that the firm has had in place a program of verbal training and repeated advisories to constantly remind employees of the legal requirements of EBT, including a prohibition against trafficking and other abuses of the program. The owners also routinely make unannounced visits to the store to ensure its proper operation.

Anecdotal claims of program compliance and employee training do not provide a valid basis for a reversal of the agency's disqualification determination. However, evidence of a compliance and training program is important when determining whether or not a store is eligible for a civil money penalty in lieu of disqualification. In this case, the Retailer Operations Division determined that the Appellant firm was not eligible for a CMP in lieu of permanent disqualification because it did not submit sufficient evidence to demonstrate that it had established and implemented an effective compliance policy and program to prevent SNAP violations.

In accordance with regulations at 7 CFR § 278.6(b)(2), in order for a CMP to be considered, a firm must not only notify FNS that it desires the agency to consider a trafficking CMP in lieu of permanent disqualification, but it must also submit appropriate supporting documentation within 10 days of receipt of the charge letter. The case record shows that the Appellant did not request a trafficking CMP within 10 days of receipt of the charge letter and there is no evidence that the Appellant submitted any documentation that would indicate that the firm had a compliance policy or program of any kind.

Therefore, in accordance with 7 CFR § 278.6(b)(2)(iii) and § 278.6(i), a civil money penalty in lieu of permanent disqualification for trafficking is not an option in this case.

CONCLUSION

An analysis of the Appellant's EBT transaction record was the primary basis for the decision by the Retailer Operations Division to permanently disqualify Liquor Run from SNAP participation. This data provided sufficient evidence for this review to conclude that the questionable transactions and patterns listed in the charge letter were more likely than not the result of trafficking violations committed by the Appellant. Likewise, the Appellant has not proven, by a preponderance of the evidence, that the administrative action should be reversed.

Based on a review of all available information in this case, the decision to impose a permanent disqualification against the Appellant, Liquor Run, under the ownership 5 U.S.C. § 552 (b)(6) & (b)(7)(C), is sustained.

RIGHTS AND REMEDIES

Applicable rights to a judicial review of this decision are set forth in Section 14 of the Food and Nutrition Act of 2008 (7 U.S.C. § 2023) and in Section 279.7 of the SNAP regulations. If a judicial review is desired, the complaint, naming the United States as the defendant, must be filed in the U.S. District Court for the district in which the Appellant owner resides or is engaged in business, or in any court of record of the State having competent jurisdiction. If a complaint is filed, it must be filed within 30 days of receipt of this decision. The judicial filing timeframe is mandated by the Act, and this office cannot grant an extension.

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.

JON YORGASON
Administrative Review Officer

August 19, 2020