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

Mandela Market,

Appellant,

v.

Office of Retailer Operations and Compliance,

Respondent.

Case Number: C0233155

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 to impose a permanent disqualification against Mandela Market (hereinafter Appellant) from participating as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP).

ISSUE

The issue accepted for review is whether the Office of Retailer Operations and Compliance took appropriate action, consistent with Title 7 of the Code of Federal Regulations (CFR) § 278.6(a), (c) and (e)(1)(i), in its administration of the SNAP when it imposed a permanent disqualification against Appellant.

AUTHORITY

According to 7 U.S.C. § 2023 and the 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

USDA conducted an investigation of the compliance of Appellant with federal SNAP law and regulations during the period September 26, 2020, through October 3, 2020. The investigation determined that personnel at the Appellant firm accepted items purchased with 5 U.S.C. § 552 (b)(6) & (b)(7)(C) SNAP benefits in exchange for 5 U.S.C. § 552 (b)(6) & (b)(7)(C) cash taken from the firm's cash register in Exhibit E and accepted items purchased with 5 U.S.C. § 552 (b)(6) & (b)(7)(C) SNAP benefits in exchange for 5 U.S.C. § 552 (b)(6) & (b)(7)(C) cash taken from the firm's cash register in Exhibit F as noted

in the letter of charges. Intentionally exchanging SNAP benefits for cash or purchasing products originally purchased with SNAP benefits in exchange for cash or consideration other than eligible food are defined as trafficking under 7 CFR § 271.2. These transactions were deemed clearly violative and warrant a permanent disqualification. Additionally, personnel at the Appellant firm also accepted SNAP benefits in exchange for ineligible merchandise on two occasions (Exhibits A and B). The ineligible items sold are best described in regulatory terms as common nonfood items. The investigative report shows that two clerks handled the transactions involving ineligible items while two different clerks were involved with the trafficking transactions in Exhibits E and F. It is also noted that on one occasion (Exhibit A), the clerk refused to allow the purchase of one ineligible item using SNAP, but did allow the purchase of a second ineligible item. In another occasion (Exhibit C), the clerk did refuse to allow the purchase of any ineligible items using SNAP and only ran the transaction for the eligible items. However, this same clerk had previously allowed the purchase of ineligible items using SNAP benefits in Exhibit B.

As a result of evidence compiled from this investigation, the Office of Retailer Operations and Compliance informed Appellant, in a letter dated December 16, 2020, that the firm and its ownership were charged with violating the terms and conditions of the SNAP regulations, 7 CFR § 278.6(e)(1). The letter of charges states, in relevant part, "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 permanent disqualification of a firm for trafficking."

Appellant, through counsel, requested an extension of time to respond to the charges by letter dated December 28, 2020, that was subsequently approved by FNS for an extension until January 27, 2021. Appellant's request acknowledged that it was aware that by requesting an extension it would be forfeiting its right to request a trafficking CMP.

Appellant responded to the charges in an email dated January 27, 2021, that did not request or provide any supporting documentation for a CMP. The Office of Retailer Operations and Compliance notified Appellant by letter dated February 17, 2021, that the firm was permanently disqualified from participation as a SNAP retailer in accordance with 7 CFR § 278.6(c) and 278.6(e)(1) for trafficking violations. This letter also stated that Appellant was not eligible for the CMP because insufficient evidence was submitted to demonstrate that it had established and implemented an effective compliance policy and program to prevent SNAP violations.

By letter dated February 19, 2021, Appellant, through counsel, appealed the Office of Retailer Operations and Compliance decision and requested an administrative review of this action. The appeal was granted. Subsequent correspondence dated March 19, 2021, was received which repeated the contentions previously submitted in Appellant's response to the charges

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 Section 278. In particular, Sections 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 CFR § 271.2 states that: 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 § 278.2(a) states that: Coupons [SNAP benefits] may be accepted by an authorized retail food store only from eligible households, and only in exchange for eligible food. Further, the citation specifies that coupons may not be accepted in exchange for cash, in payment of interest on loans, or for any other nonfood use.

7 CFR § 278.6(a) states 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.

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(f)(1) states in relevant part, "FNS may impose a civil money penalty as a sanction in lieu of disqualification when the firm is selling a substantial variety of staple food items, and the firm's disqualification would cause hardship to SNAP households. A civil money penalty for hardship to SNAP households may not be imposed in lieu of a permanent disqualification."

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.

In addition, 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 this 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 . . ."

APPELLANT'S CONTENTIONS

The following 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:

- This case was issued subsequent to the USDA's new rules regarding FOIA. Specifically, the Appellant was not permitted FOIA requests and the abatement of this matter therewith. This is a violation of the regulations. 7 CFR § 278.6(b)(1) states in clear terms, "Any firm considered for disqualification… shall have full opportunity to submit to FNS information, explanation or evidence concerning any instances of non-compliance before FNS makes a final administrative determination." Appellant cited a Final Agency Decision from 2016 as evidence that the Appellant was not afforded the opportunity to submit a response to the charges. Appellant further states that it appears to be FNS's position that it can now make decision prior to the retailer receiving a FOIA response – thereby depriving the retailer of a full opportunity to respond;
- The Department sent a charge letter dated December 16, 2020, to store ownership alleging a misuse of SNAP benefits and set forth two allegations of trafficking. The Appellant timely responded to the charges, but a permanent disqualification was issued on February 17, 2021, in which it determined that the violations had occurred and that the store did not qualify for a hardship CMP;
- The store is located in Buffalo, New York and has been open since 2007 operating as a small grocery of approximately 5,800 SF serving a variety of foodstuffs, nearly all of which are SNAP eligible. The store is located in an economically depressed area surrounded by poverty and many low income families. Appellant cited demographic data for area residents including statistics on households with children or older members as well as the median income of SNAP households;

- This case is an attempt to exploit 7 CFR § 271.2's definition of trafficking, which includes under subsection 5, an extension of the definition to include, "Intentionally purchasing products originally purchased with SNAP benefits in exchange for cash or consideration other than eligible food." The language plainly imputes intent into an element of the violation. Furthermore, it's logical that the "intent" component relates to "the purchase of products originally purchased with SNAP benefits." In order for the Department to prevail on a Red Bull case like this, there are three elements that have to be settled by a preponderance of the evidence in favor of the presence of a violation: 1. Did the retailer's personnel purchase the Red Bull from the investigator? 2. Was the retailer's personnel aware of what payment method the Red Bull was purchased with? 3. Did the retailer intend to purchase items that were bought using EBT? If store personnel were unaware that the items were purchased using EBT, then whether or not the transaction was completed is moot. Disqualification is entirely dependent upon knowledge on the part of the retailer's personnel. Anything less than that is simply inadequate;
- Despite no change in the language or definition from Congress, the Department wished to try to capture additional facially valid transactions within the definition of trafficking under the belief that the intent was to defraud the program. A reading of the stated language clearly indicates that the intent is to capture transactions which are intended for store use, and not to capture transactions for personal use. However, this infringes upon personal property ownership laws within the state. The purchase of items, such as Red Bull, from a retailer are governed by the Uniform Commercial Code – in this case by the State of Connecticut's Section 42a-2-401 [sic]. This law, entitled *Passing of Title; Reservation for Security; Limited Application of this Section*, notes under subsection (2) that title of goods (personal property) passes to the buyer at the time and place at which the seller physically delivers the goods, after which the Buyer retains power to transfer the personal property under Sec 42a-2-403, *Power to Transfer; Good Faith Purchase of Goods; "Entrusting.*" Sec 42a-2-403(1) states specifically that "a purchaser of goods acquires all title which his transferor had or had power to transfer." That means that the buyer of personal property, such as Red Bull, has the same authority to transfer title of the goods to a third party that the seller from whom they purchased the goods. So, if the SNAP participant purchases Red Bull from BJ's (for example), by state law they take all rights to the property that BJ's had to it prior to the purchase. Such rights include the ability to re-sell the items if they so choose. The fact that the item was purchased with EBT benefits does not change the state laws that control right and entitlement to property, nor do federal regulations then supersede state law to place a limitation on personal property conveyance. Accordingly, for the USDA to limit a participant's rights to property post purchase, it would have to base such authority upon Congressional grant. However, the statute which governs participant's use of EBT benefits, 7 U.S.C. §2015(b), merely states that participants shall use the benefits to purchase food from retail food stores at prices prevailing in such stores. Jurisdiction over items purchased on EBT ends with the sale of the items to the participant by the retailer. If Congress had intended the Department to restrict transactions after the purchase of the eligible item by the participant, it would not have gone to such great lengths to avoid such language in the statute. In short, and though it's likely an issue that exceeds this office's authority or control, the regulation under which this case proceeds is in excess of FNS's authority;
- After reviewing the investigators' affidavits and descriptions of the transactions, the Appellant contests that the transactions occurred the way presented by RIB. The progression

of the story told by the Investigator is illogical, redundant and clearly the result of a confused investigation. The investigator's contentions are that (1) the investigator suggested buying items for the store with his food stamps to sell to the store; which (2) the clerk agreed with; (3) the investigator told the clerk he could get Red Bull and the clerk gave him specifics, and (4) the clerk set the price of $1.00 per can. The investigator claims that the clerk came up with the idea of buying Red Bull. That's what the plain language of the affidavit says. So magically this clerk, along with the hundreds of other Red Bull cases RIB has been pushing through for the last two years, just comes up with the idea to buy Red Bull (not Enfamil or other high dollar items) all on his own – just like every other clerk across the country involved in these investigations? That's incredibly unlikely. It is more likely that the investigator suggested the purchase of Red Bull cases to the clerk – a difference which is not as slight as it might appear as it attributes intent to the clerk which was not actually there: the identification of a product he would like to purchase;

- The Appellants flat [sic] deny the allegation of trafficking. Attached is an affidavit by the clerk that is more detailed than his original statement submitted with the response to the charge letter. He paints a very different – and frankly more logical and credible – picture. The clerk's affidavit confirms that an investigator came to the store, and that he did not request that the investigator purchase anything. The investigator did not approach the owner or speak to him, and instead spent time talking with the clerk. The Investigator never mentioned to the clerk anything about the items being bought on EBT and he had no idea that the items were bought on EBT until after the charge letter was received by the store. Given the other investigations conducted by these investigators, the clerk's statements line up with the experience of other clerks at other stores. The investigators inappropriately used sex-appeal to lure in a particular clerk, and then conducted transactions with them that were not disclosed to the clerk to involve EBT. This "got-ya" approach to investigations does not adequately convey that the clerk had knowledge of the origin of the Red Bull, or the involvement of EBT in the transaction whatsoever;
- These statements are "hearsay" by definition (an out of court statement made by a declarant offered to prove the truth of the matter asserted). Hearsay may only be relied upon in administrative matters where the proponent (in this case, the Investigator or the Department) has to show that (1) the Investigator was not biased and had no interest in the result of the case; (2) that the owner, Mr. Saleh, could have obtained the information contained in the statement before the hearing and subpoenaed the investigator; (3) the information is not inconsistent on its face; and (4) the information has been recognized by the courts has inherently reliable. Appellant referenced two court case pertaining to hearsay;
- Furthermore, the investigative records completely lack any evidence of trafficking. There are no pictures of eligible food items, no notes about the disposition of items, and no photos of the alleged cash that was received is completely absent from the records altogether. As such, there's an inadequate amount of evidence in the record to justify a permanent disqualification. The RIB investigator also has no corroborating evidence. There are no recordings of the transactions – either visually or auditorily – and the delay between the transactions and the charge letter was five months - more than adequate to allow the owner's store surveillance to expire and prevent her from being able to produce video to support their contention. Instead, we have a he-said, she-said situation where the Investigator's story defies logic, is factually inaccurate, and intentionally misleading. Why would a store clerk traffick in SNAP when they refused repeatedly to do so in the same visit? If this was all the

clerk's idea, why would he reject the transactions to [sic] readily, stating that he had no intention of violating the program rules and initially refuse the Red Bull – all just to cave and purchase it later? He wouldn't. It's not logical or credible;

- The Department has failed to make any of those showings in general, but the fact is plain on the face of the documents presented by the Department as there is no reasonable opportunity for the Appellant to subpoena or otherwise depose the witness because the Department has redacted all of that information prior to sending the charge letter. Therefore, the document (and indeed all of the documents) cannot and should not be relied upon by this Department in determining whether or not trafficking has occurred. Given the mischaracterization, failure to document, inaccuracy, and persistence demonstrated by the investigator – even in his own descriptions of the transactions – it's just not credible that the investigator's version of events is accurate. It's more likely than not that the investigator failed to make the store owner or customer actually aware that the Red Bull was purchased using SNAP. It is the Department's burden of proof to demonstrate that it is more likely than not that a violation occurred. Yet, IAB and RIB lack audio recordings to prove that the store owner was actually notified of the nature of the purchase. Furthermore, shoving a receipt in front of a person– and not even bothering to point to the payment method – does not confer knowledge to that person that the items were bought on EBT. As such, the Department lacks admissible evidence to sustain allegations of trafficking;
- Appellant referenced Administrative Review Branch case, *Circle Seven Food & Grocery Market vs. Office of Retailer Operations and Compliance, Case No: C0223624*, it is the Department's burden to prove its case and issue a disqualification. Id at 3. In that case, the Department had little more than a he-said-she-said set of allegations wherein the investigator alleged that trafficking had occurred (an exchange of cash for Red Bull purchased on EBT). Id. The Retailer flatly denied the transactions, noting inconsistencies with the transaction descriptions. Id. Ultimately, Administrative Review Officer Proulx found that the record was inadequate for purposes of issuing permanent disqualifications: "A review of the Office of Retailer Operations and Compliance's case file indicated the determination cannot be supported based on the evidence." Id. A more recent case, *7-Eleven Inc. F 34537A vs. Retail Operations Division, Case No C0225055*, decided February 16, 2021, determined that where the RIB investigation made similar allegations to those which are present in that case, the evidence was insufficient to satisfy the Department's burden where the retailer stated that the store personnel were unaware the items were sold on EBT. In that matter, the investigator represented that he was in town for his mother's funeral, that he was a military veteran who had items to sell for cash, and where the investigator was unsuccessful in getting the retailer to traffick using cash-back or card purchasing efforts. This case mirrors *Circle Seven* and *7-Eleven* in that the documentation here is inadequate, and where RIB had the opportunity and authority to be more thorough in its documentation and recording of the transactions, the burden must continue to be borne by the Department. Inaccuracies, vagaries, and forgotten documentation should not be permitted in the way that this case has been. Accordingly, this matter should be dismissed: and,
- Alternatively, the Appellant contends that a CMP should have been issued in this case, as the firm complied with 7 CFR § 278.6.

Appellant submitted two statements from one of the store clerks and a typed statement from the owner in support of these contentions.

ANALYSIS AND FINDINGS

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 Office of Retailer Operations and Compliance and is limited to what circumstances were at the basis of the Office of Retailer Operations and Compliance action at the time such action was made. In an appeal of an adverse action, the Appellant bears the burden of proving by a preponderance of evidence that the administrative action should be reversed. That means the 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. Assertions that the firm has not violated program rules, by themselves and without supporting evidence and rationale, do not constitute valid grounds for dismissal of the current charges of violations or for mitigating their impact.

SNAP regulations at 7 CFR § 271.2 define trafficking in part as, "The buying, selling, stealing, or otherwise effecting an exchange of SNAP benefits for cash or consideration other than eligible food". Trafficking also includes "(5) Intentionally purchasing products originally purchased with SNAP benefits in exchange for cash or consideration other than eligible food." Both the SNAP retailer application and retailer reauthorization application contain a certification page whereby applicants must confirm their understanding of and agreement with SNAP retailer requirements in order to complete the application and the reauthorization process. When store ownership originally signed the certification page of the SNAP retailer authorization application to become a SNAP retailer and again when it reapplied following its period of disqualification, it confirmed it understood and agreed to abide by program rules and regulatory provisions. It also agreed to accept responsibility on behalf of the firm for SNAP violations including those committed by any of the firm's employees, paid or unpaid, new, full-time or part-time regardless of the amount of time the owner(s) is present at the subject firm and that ownership is accountable for the proper training of staff and the monitoring and handling of all SNAP benefit transactions. The certification is clear that store ownership understood by signing the document that violations of program rules can result in administrative actions such as fines, sanctions, withdrawal, or disqualification from the SNAP. It is also noted that store ownership and the firm were disqualified from the SNAP for a period of six months in 2016 for allowing the sale of ineligible items on multiple occasions during a previous undercover investigation of the firm.

USDA investigators are thoroughly trained before entering any retail establishment and all protocols, including, but not limited to what can and cannot be said, are met and affirmed, under penalty of perjury after each store visit. The investigator's signature on the investigative report is redacted to protect the identity of the investigator. An unsubstantiated denial by store ownership is not sufficient evidence that any interactions or conversations did not occur. It is also highly questionable that the clerks responsible for the charge letter transactions, including the illicit trafficking transactions, were not at all suspicious when a total stranger, who was using SNAP for purchases at the Appellant firm, offered to purchase items for the store using SNAP benefits and would then agree to sell the items to the store at a greatly reduced price.

It is noted that Appellant's correspondence in this matter contains numerous errors raising the question of whether counsel for the Appellant was, in fact, referring to the Appellant firm or to a different case(s).

- The Appellant incorrectly references the State of Connecticut when discussing personal property ownership laws when the Appellant firm is, in fact, located in New York;
- The Appellant repeatedly refers to the store owner as "her" and to the investigators as "he" when the owner is a male and the two investigators were female;
- Appellant claims on page 13 of its March 19, 2021, brief that, "… the delay between the transactions and the Charge Letter was five months - more than adequate to allow my client's store surveillance to expire and prevent her [sic] from being able to produce video to support their contention". Appellant offered no evidence in support of this libelous statement. As previously stated, the owner in this case is a male, not a "her", and a period of approximately 10 weeks elapsed between the last investigative visit to the firm on October 3, 2020, and the charge letter issuance on December 16, 2020, not the five months claimed by the Appellant. One has to wonder if the Appellant was responding to a totally different case given these the frequency of these errors. A 10 week period does not appear to be unduly excessive considering that the evidence had to be thoroughly analyzed and confirmed before charges could be issued. It is also noted that there is no statute of limitations with regards to when a charge letter is issued. Therefore, Appellant's claim that the charge letter was intentionally delayed is baseless; and,
- Appellant also asks, "Why would a store clerk traffick in SNAP when they refused repeatedly to do so in the same visit? If this was all the Clerk's idea, why would he reject the transactions to [sic] readily, stating that he had no intention of violating the program rules and initially refuse the Red Bull – all just to cave and purchase it later?" The real answer is that neither the investigative report nor any other documentation supports that a store clerk repeatedly refused to traffic during any of the visits in this investigation. The investigative report makes no mention of a clerk rejecting a transaction, stating he had no intention of violating the program rules, and initially refusing the Red Bull. Again, Appellant is either creating facts not supported by any evidence or has again included contentions pertaining to a different case(s) in its March 19, 2021, brief.

The investigative report shows that the clerks in Exhibits A and B allowed the sale of ineligible, nonfood items using SNAP with little no questions or concerns. That these clerks readily permitted these violative SNAP transactions for a complete stranger is strong evidence that this was a normal business practice at the Appellant firm indicating an ongoing pattern of SNAP violations. It is therefore not surprising that other clerks at the firm would agree to buy items for cash that the investigator would purchase using SNAP benefits. In fact, the clerk in Exhibit D told the investigator to buy as many cases of Red Bull with food stamps as possible and he (the clerk) would pay the investigator $1.00 per can. Contrary to Appellant's claim, the record does not show that the clerk specified what size of Red Bull the investigator was to purchase. The investigator agreed to this proposal, travelled to another store where three cases of Red Bull were purchased, and returned to the Appellant firm later that same day. Upon entering the firm with the cases of Red Bull in Exhibit E, the investigator was met by the same clerk who took the cases of Red Bull and put them on the floor. The investigator then told the clerk that the Red Bull had

been purchased 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in food stamps and gave the receipt to the clerk who looked at it. This same clerk then took 5 U.S.C. § 552 (b)(6) & (b)(7)(C) cash from the register (5 U.S.C. § 552 (b)(6) & (b)(7)(C)) and gave them to the investigator and told the investigator to bring three more cases the next day. The next day, the investigator returned to the firm with two more cases of Red Bull that had been purchased with food stamps as documented in Exhibit F. The investigator told the clerk that the cases had been purchased using food stamps and showed the receipt to the clerk which confirmed that SNAP benefits (commonly referred to as food stamps) were used to purchase the Red Bull. The clerk took the receipt and paid the investigator 5 U.S.C. § 552 (b)(6) & (b)(7)(C) cash (5 U.S.C. § 552 (b)(6) & (b)(7)(C)) from the cash register in exchange for the Red Bull. The clerk told the investigator to talk to the clerk from Exhibits D and E about bringing more Red Bull.

In summary, the investigative report shows that two clerks accepted SNAP benefits for the purchase of ineligible items in Exhibits A and B and two different clerks accepted items purchased with SNAP benefits in exchange for cash in Exhibits E and F. It is clear that the investigator started the conversation in Exhibit D by asking the clerk if he wanted the investigator to purchase various items for the store with food stamps in exchange for cash. It should be noted that this is not illegal, does not constitute entrapment, and is therefore allowed since the investigator was merely giving the clerk an opportunity to continue violating the program. As to Appellant's question as to why other products, like Enfamil, were not picked, it would make sense that Enfamil, which is limited only to those customers with infants being bottle fed, would be much less in demand as compared to a product such as Red Bull. Additionally, not every store carries Enfamil so it is not unusual or suspect that the investigators would use a well-known and popular product such as Red Bull that has been successful in the past. That the two clerks were both agreeable to indirect trafficking is supported by the conversations documented in investigative report. Additionally, the narratives throughout the investigative report document that the clerks were undoubtedly aware that the energy drinks were to be purchased and had been purchased using SNAP benefits thus clearly showing that knowledge and therefore intent was present thus refuting Appellant's claim of the investigator not stating how the cases of energy drinks would be purchased.

Appellant's March 19, 2021, brief also incorrectly claims that, the investigative records completely lack any evidence of trafficking and, as such, there's an inadequate amount of evidence in the record to justify a permanent disqualification. Contrary to these claims, a review of the investigative report clearly shows the denominations for the cash paid by the two clerks to the investigator in both Exhibits E and F are listed in the investigative report and photos of the bills showing their serial numbers are also included in the investigative record along with photos of all items purchased at the Appellant firm, both eligible and ineligible, as well as photos of the cases of Red Bull and their receipts.

The investigative report shows that the nature and scope of the violations under review do violate SNAP regulations and a review of the report shows no errors or discrepancies. The transaction amounts cited in the report have been matched to SNAP transactions posted by the Appellant firm and by the firm selling the energy drinks on the dates in question with no disagreements and a comparison of the dates/times/amounts on the POS receipts given by the Appellant firm to the investigator correspond to the dates/times/amounts provided to FNS by the firm's EBT processor

when it submitted the transactions to FNS for reimbursement. FNS evidence consisting of photos of the eligible and ineligible items purchased, photos of the POS receipts with the firm's name, photos of the cases of Red Bull and their receipts, and detailed donation records signed by a local charitable organization provides conclusive evidence supporting the details provided in the investigative report. The exchange of cash for items purchased using SNAP benefits in Exhibits D and E constitutes trafficking as previously defined in SNAP regulations with the penalty being permanent disqualification. There is no regulatory threshold for the dollar value of the items purchased or for the amounts of cash paid for them. It is further noted that the cash register receipts provided by the Appellant firm had the store name and address of another store under the same ownership and were submitted under that store's FNS license. This is a violation of SNAP rules and regulations.

Although the Appellant freely claims that, "The investigators inappropriately used sex-appeal to lure in a particular clerk…", there is no evidence supporting this. The second investigator was only involved in the transaction for Exhibit C which occurred on September 30, 2020, while the clerk making the statements was only present during Exhibits D and E which occurred on October 3, 2020. This alone refutes Appellant's claim of inappropriate conduct since only one of the two investigators had any dealings with the clerk making the statements. In fact, the clerk's initial statement makes no mention that the "investigators inappropriately used sex-appeal", nor does the owner's statement. Even the clerk's lengthy March 17, 2021, statement makes no mention that the "investigators inappropriately used sex-appeal". The lengthy statement only includes a brief reference that he (the clerk) found an investigator to be attractive – hardly a solid foundation upon which to base claims of inappropriate conduct on the part of either investigator. This discussion clearly shows that the Appellant fabricated the claims of inappropriate conduct by both investigators which were not even supported by the Appellant's own "evidence".

Appellant also failed to submit any evidence supporting its claim that, "the investigator's story defies logic, is factually inaccurate, and intentionally misleading. A reading of the narratives in the investigative report for each of the exhibits finds nothing that defies logic, is inaccurate, or is intentionally misleading. However, the two statements purportedly made by the store clerk are not credible while the statement by the store owner simply says that he was not involved in the transactions and only wants his ability to accept EBT payments restored. If the Red Bull had been purchased for the clerk in Exhibits D and E's personal use, as claimed, then why did the clerk not meet the investigator offsite, especially as his statement alleges that they exchanged phone numbers? And more importantly, why would the clerks in both Exhibits E and F take the money from the store's cash register to pay for the cases of Red Bull? Appellant's explanation for the legitimacy of these trafficking transactions defy common sense and logic and are certainly are not convincing evidence.

Appellant offered no other evidence to validate any of its claims. Since Appellant's contentions are only assumptions, not facts, and no basis has been presented to substantiate them, they are found to be without merit.

In regard to case law cited by the Appellant, considerations of relevant legal precedent through case law, or the lack thereof in relation to the present case, are beyond the scope of this review. This review relies upon the statute and regulations governing the SNAP and evaluates whether

the decision to impose a disqualification upon the Appellant was in accordance with same and sustainable by a preponderance of the evidence. Appellant's case law references are acknowledged in this context only. This also applies to Appellant's claims involving the personal property ownership laws within the state of New York. The applicability of both the case law decisions and the personal property ownership laws to Appellant's case would be best decided during the judicial review process by a federal district court judge.

The Food and Nutrition Act of 2008, as amended, and the regulations issued pursuant thereto do not 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 and second chances are not an authorized option.

Based on the discussions above, there is not any valid basis for dismissing the charges or for mitigating the penalty imposed.

Other Contentions

Appellant's reference to the FNS Profile of SNAP Households and demographic data for area residents including statistics on households with children or older members as well as the median income of SNAP households is noted. SNAP recipients are by definition low income and most cities and towns have low income neighborhoods so it is not unusual for SNAP authorized retail stores to be located in low income areas with many SNAP recipients. While these characteristics are common to many SNAP retailers, neither they nor the demographic data offered by Appellant provide a justification or explanation for the charge letter transactions.

Regarding Appellant's contentions relating to the FOIA process, the FOIA is governed by current FOIA rules and regulations which fall outside of the purview of this administrative review and so are not addressed further.

Administrative review decisions are not precedent setting as the decision is based on the specific circumstances of this case as documented by materials provided by both the Appellant and the Office of Retailer Operations and Compliance. In addition, administrative review decisions do not establish policy or supersede Federal law, regulations, or policy guidance.

Appellant contends that the investigative report is hearsay, and that according to *U.S. Pipe & Foundry Co. v. Webb* and *J.A.M. Builders, Inc. v. Herman*, hearsay is only admissible in this case if it meets four criteria: "(1) the Investigator was not biased and had no interest in the result of the case; (2) that the Appellants could have obtained the information contained in the

statement before the hearing and subpoenaed the investigator; (3) the information is not inconsistent on its face; and (4) the information has been recognized by the courts has inherently reliable." These cases also state hearsay must be reliable and credible. However, the cases cited by Appellant refer to the criteria for documents submitted into evidence in lieu of witness testimony in administrative hearings. Revisions to parts 278 and 279 of the Supplemental Nutrition Assistance Program regulations eliminated administrative hearings effective September 8, 2003. Accordingly, these case citations are not relevant to this administrative review.

Appellant further contends that the Department's current interpretation of trafficking exceeds its authority in this case as it would also apply to a host of acceptable actions that would be considered trafficking violations, such as customers who buy popcorn using SNAP benefits then selling it at a sporting event as a fund raiser. It is noted that the SNAP regulatory definition of trafficking at 7 CFR Section 271.2 does not differentiate between retailer or recipient trafficking while the Food Stamp Act of 1964, the Act, divides responsibilities between states (certification and issuance) and the Federal Government (funding of benefits and authorization of retailers and wholesalers). Appellant's examples all focus on SNAP recipients selling items purchased using SNAP benefits to other individuals which, based on the Act, has no bearing on the matter under review which involves SNAP retail store, not recipient, trafficking.

CIVIL MONEY PENALTY

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.

The Office of Retailer Operations and Compliance 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 request or to submit sufficient evidence within the specified timeframe to demonstrate that the firm had established and implemented an effective compliance policy and program to prevent SNAP violations. As such, the Office of Retailer Operations and Compliance determined that Appellant was not eligible for a trafficking CMP in lieu of permanent disqualification.

It is noted for the record that Appellant, through counsel, requested and received an extension of time to respond to the charges. In its December 28, 2020, extension request, counsel explicitly stated in writing that in requesting an extension of time to respond, it was aware it was forfeiting its right to request the issuance of a CMP in lieu of other sanctions.

Based on the above discussion and the evidence under review, Appellant failed to meet the regulatory standard for a trafficking CMP as it did not request or provide substantial evidence that it met all four criteria required by 7 CFR §278.6(i). Based on the above, the Office of Retailer Operations and Compliance's decision not to impose a CMP in lieu of disqualification is sustained as appropriate pursuant to 7 CFR §278.6(i).

CONCLUSION

A review of the evidence in this case supports that the program violations at issue did occur as charged. As noted previously, the charges of violations are based on the findings of a formal USDA investigation. All transactions cited in the letter of charges were conducted by a USDA investigator, signed under penalty of perjury, and all are thoroughly documented. A review of this documentation has yielded no indication of error or discrepancy in any of the reported findings. Rather, the investigative record is specific and accurate with regard to the dates of the violations, the specific exchange of items purchased with SNAP benefits for cash, and in all other critically pertinent detail. Additionally, the decision by the Office of Retailer Operations and Compliance that Appellant was not eligible for a trafficking CMP is also found to be correct.

Based on the discussion above, the determination by the Office of Retailer Operations and Compliance to impose a permanent disqualification against the Appellant business 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 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

May 14, 2021