

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

Marathon,

Appellant,

v.

Case Number: C0199982

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 there is sufficient evidence to support a finding that a Permanent Disqualification from participation as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP) was properly imposed against Marathon by the Retailer Operations Division of FNS.

ISSUE

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with 7 CFR § 278.6(e)(1)(i) in its administration of the SNAP, when it imposed a Permanent Disqualification against Marathon on August 28, 2017.

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.

CASE CHRONOLOGY

In a letter dated June 26, 2017, the Retailer Operations Division informed the Appellant that Marathon was in violation of the terms and conditions of the SNAP regulations, 7 CFR § 270 – 282, based on EBT SNAP benefit transactions that "establish clear and repetitive patterns of unusual, irregular, and inexplicable SNAP activity for your type of firm."

In a letter received by the Retailer Operations Division on July 6, 2017, the Appellant, through counsel, denied the trafficking allegations and provided various explanations for the questionable SNAP transactions that were outlined in the June 26, 2017 Charge Letter.

After considering the Appellant's reply and the evidence in the case, the Retailer Operations Division issued a Determination Letter dated August 28, 2017, informing the Appellant that Marathon was being permanently disqualified from participation in the SNAP in accordance with 7 CFR § 278.6(e)(1) for trafficking violations.

In a letter postmarked September 6, 2017, the Appellant, through counsel, requested an administrative review of the Retailer Operations Division's decision to permanently disqualify the firm from participation in the SNAP. FNS granted the Appellant's request for administrative review by letter dated September 12, 2017.

STANDARD OF REVIEW

In appeals of adverse actions, the Appellant bears the burden of proving by a preponderance of the evidence, that the administrative actions should be reversed. That means the 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

The controlling statute in this matter is contained in the Food and Nutrition Act of 2008, amended, 7 U.S.C. § 2021 and 278 of Title 7 of the Code of Federal Regulations (CFR). 7 U.S.C. § 2021, Part 278.6(a) and Part 278.6(e)(1)(i) of the Regulations establish the authority upon which a permanent disqualification may be imposed upon a retail food store or wholesale food concern. There also exist FNS policy memoranda and clarification letters which further explain the conditions necessary in order to permanently disqualify retail stores.

7 U.S.C. § 2021(b)(3)(B) states, inter alia:

... 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, inter alia:

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) states:

Disqualify a firm permanently if: Personnel of the firm have trafficked as defined in § 271.2.

7 CFR § 271.2 states, inter alia:

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 § 278.6(f)(1) states, inter alia:

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 as defined in § 271.2 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 ...

7 CFR § 278.6(b)(2) states, inter alia:

(ii) 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 as specified in § 278.6(i), 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). [Emphasis added].

(iii) 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 penalty. [Emphasis added].

SUMMARY OF CHARGES

The Appellant was charged and determined to be trafficking based on an analysis of EBT transaction data from October 2016 through March 2017. This involved the following SNAP transactions patterns which are indicative of trafficking:

- There were an unusual number of transactions ending in a same cents value;
- There were multiple purchase transactions made from individual benefit accounts in unusually short timeframes; and
- There were excessively large purchase transactions made from recipient accounts.

APPELLANT'S CONTENTIONS

The following represents a brief summary of the Appellant's contentions in this matter. Please be assured, however, that in reaching a decision, full attention and consideration was given to all contentions presented, including any not specifically recapitulated or specifically referenced herein.

In the Appellant's reply to the Charge Letter and in the review request postmarked September 6, 2017 and in a subsequent correspondence postmarked October 5, 2017, the Appellant stated the following summarized contentions, in relevant part:

- The unusual number of transactions that ended in a same cents value are the result of some of the food items that are stocked and purchased at Marathon being priced at \$x.00 (i.e., even-dollar amounts).
- The multiple transactions made from individual benefit accounts in unusually short timeframes and the excessively large purchase transactions are the result of: (1) Marathon being redeveloped in 2016 resulting in the store going from 400 square feet in size to 2,500 square feet in size which, in turn, allows more grocery products to be stocked at the store; and (2) During the last quarter of 2016, the only other SNAP authorized store in the area lost its SNAP privileges resulting in a dramatic increase in business at Marathon.
- A permanent disqualification from the SNAP is unreasonable and severe as the allegations of trafficking are based solely upon a computer generated analysis and not any allegations of prohibited SNAP activity at Marathon.
- The Appellant requests that FNS reconsider its decision to permanently disqualify Marathon from participation in the SNAP and reinstate its SNAP privileges.

In support of the Appellant's contentions, the following documents were submitted to FNS:

- Approximately 417 cash register and EBT receipts that were dated during the six month review;
- Photos of some of the food products stocked at Marathon;
- Highlighted bank statements for each month of the six month review period; and
- Vendor invoices/receipts for food products purchased for Marathon during the review period.

ANALYSIS AND FINDINGS

Store Characteristics

FNS authorized Marathon as a convenience store on July 29, 2014. The case file indicates that in reaching a disqualification determination, the Retailer Operations Division considered information obtained during a May 1, 2017 store visit conducted by a FNS contractor to observe the nature and scope of the firm's operation, stock, and facilities. This information obtained from the store visit was also used to ascertain if there were justifiable explanations for the firm's irregular SNAP transactions. The store visit report and photographs documented the following store size, description, and characteristics:

- Approximately 1,250 square feet in size (per confirmation by store employee) and it has a storage area outside of public view that is approximately 1,250 square feet in size;
- No shopping carts or hand-held baskets available for customer use;
- Two cash registers and two EBT point-of-sale (POS) devices for use in ringing-up SNAP transactions;
- No optical scanners;
- Typical convenience store layout and inventory with predominantly snack foods, cakes/pastries, candy, and beverages;
- No meat/seafood specials or bundles that might sell for high prices;
- Not a WIC Program vendor; however, the store does sell some infant formula;
- The most expensive staple foods in stock are Enfamil® infant formula at \$27.99 per 22.2 oz. can, Enfamil® infant formula at \$21.99 per 21.1 oz. can, Folgers® coffee at \$14.99 per 30 oz. container, and Home Run Inn® frozen pizza at \$8.99 per 27 oz. box;
- It does not appear from the store visit observations that the store extends credit to customers;
- No signs posted or flyers available advertising the availability of bulk foods offered at a discounted rate to include grocery package deals;
- Very limited checkout counter areas that operate through a turn-style. As such, the checkout counters do not provide adequate space for the large amounts of individual food items necessary to make up many of the large transactions cited in the Charge Letter Attachments;
- Frozen food items include boxed breaded chicken, fish sticks, ice cream, pizza, single-serving size cheeseburgers, and individual meals;
- No fresh or frozen unprocessed meats, poultry, or seafood;
- No deli case/section in which deli meats and cheeses are sold by the pound;
- Meat items include packaged lunch meat, canned/potted meat, canned fish, hot dogs, sausage, and eggs;
- No kitchen in which hot and cold prepared, ready-to-eat foods that are intended for immediate consumption and require no additional preparation are prepared and sold;
- Only one variety of canned fruits in minimal quantities;
- A minimal variety and amount of canned vegetables;

- No fresh produce;
- Other staple foods available for purchase include such items as 100% juice, milk, cheese, pasta, rice, cereal, flour, corn meal, cakes/pastries, snack foods, etc.;
- Much of the remaining food stock consists of accessory foods such as candy and gum, carbonated and non-carbonated drinks, spices, coffee, and vegetable oil; and
- A large supply of ineligible nonfood items such as health and beauty items, hats, paper products, household items, household cleaning supplies, tobacco, over-the-counter medications, lottery tickets, laundry detergent, gasoline, lighter fluid, cell phone accessories, jewelry, etc.

This documentation reflects that the firm was a typically stocked convenience store in all relevant respects. It is worth noting that the average SNAP purchase in a convenience store in Cook County, Illinois during the analysis period was \$6.45, reflecting that large purchases are not routinely made in such stores.

On review, the investigative materials provided by the Retailer Operations Division, including computer printouts of transaction data available from Federal records, store visit observations, information regarding area competitor firms, and household shopping patterns, were analyzed.

Government analyses of stores caught in trafficking violations during on-site investigations have found that transactions involving trafficking consistently display particular characteristics or patterns. These patterns include, in part, those cited in the letter of charges. Based on this empirical data, and in the absence of any reasonable explanations for such transaction patterns, a conclusion can be drawn through a preponderance of evidence that the most likely explanation for “unusual, irregular, and inexplicable” transactions and patterns cited in the letter of charges is trafficking. Transactions having such characteristics sometimes do have valid explanations that support that they were the result of legitimate purchases of eligible food items. This is why opportunities are afforded to charged retailers to explain the questionable transactions cited. In this case, the Retailer Operations Division determined that the Appellant’s contentions did not outweigh the evidence. The issue in this review is whether, through a preponderance of evidence, it is more likely true than not true that questionable transactions were the result of trafficking. As patterns of unusual transactions appear across multiple Attachments, the case of trafficking becomes more convincing.

Same Cents Transactions

Charge Letter Attachment 1 lists 521 transactions **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. Marathon is a convenience store with a limited staple food stock. Based on the store visit, Marathon’s inventory contains almost exclusively inexpensive, typical convenience type food items. As such, it is implausible that several of these relatively inexpensive items purchased together would routinely total to purchase amounts ending in \$x.00 cent values. Consequently, when there are a disproportional amount of transactions that end in a same cent value, it appears that these transaction amounts are contrived and therefore, in the absence of any compelling rationale to the contrary, are indicative of trafficking.

The Appellant contends that the unusual number of transactions that ended in a same cents value are the result of some of the food items that are stocked and purchased at Marathon being priced at \$x.00 (i.e., even-dollar amounts). The Appellant provided FNS with approximately 417 cash register and EBT receipts that were dated during the six month review period in support of this contention. However, the Appellant's unsubstantiated statement is not supported by available evidence. For example, there are inconsistencies between the transactions listed in the Charge Letter and some of the cash register and EBT receipts provided by the Appellant.

5 U.S.C. § 552 (b)(6) & (b)(7)(C).

5 U.S.C. § 552 (b)(7)(E)

Although the merchant copy and the customer copy of the EBT receipts display the same amount, date, time, and EBT card number, the merchant receipt copy displays a hand-written note that states "PAID FULL". The blatant differences in the cash register receipts as indicated above and the suspicious hand-written note displaying "PAID FULL" indicates that this is most likely not a legitimate SNAP transaction.

The Appellant contends that that the unusual number of transactions that ended in a same cents value are the result of some of the food items that are stocked and purchased at Marathon being priced at \$x.00 (i.e., even-dollar amounts). However, FNS' analysis of the cash register receipts provided by the Appellant indicate that the majority of the food items purchased from Marathon ended in \$x.x9 cent values which disproves the Appellant's explanation for the questionable SNAP transactions. In addition, when the store employee was asked during the May 1, 2017 store visit to identify the four most expensive food items in stock, the employee provided the Reviewer with the following information: Enfamil® infant formula at \$27.99 per 22.2 oz. can, Enfamil® infant formula at \$21.99 per 21.1 oz. can, Folgers® coffee at \$14.99 per 30 oz. container, and Home Run Inn® frozen pizza at \$8.99 per 27 oz. box. Each of these foods ends in a price variation of \$x.99.

Included below are photos taken of various food items stocked at Marathon during the FNS store visit that end in a price variation of \$x.x9 cents—not an even dollar amount. The store visit observations indicate that Marathon's food inventory consists of almost exclusively inexpensive, typical convenience store type foods. As such, it is implausible that several of these relatively inexpensive food items purchased together would routinely total to purchase amounts ending in \$x.00.

Store Visit Photos of Foods with Price Variations of \$x.x9:



5 U.S.C. § 552 (b)(6) & (b)(7)(C). Although some of the SNAP transactions made during the six month review period ended in \$x.00, there were numerous transactions that did not end in an even dollar amount. In addition, typical retail food stores operate on relatively low profit margins and it is unlikely that a store would be rounding down its prices. Likewise, it is unlikely that store clerks would have the authority to choose when to round down amounts or to charge based on the price labels. This method of pricing would be seemingly arbitrary to store customers and would likely lead to more conflicts within the store and not less. As such, it is clear that it is not Marathon's policy to round down purchases to an even dollar amount for most of its SNAP customers.

Due to Marathon's mostly low cost foods, the larger dollar transactions cited in the Charge Letter would normally consist of multiple food products being purchased in one transaction. It is implausible that several of these relatively inexpensive items purchased together would disproportionately result in a total purchase price ending in \$x.00 (0 cents).

5 U.S.C. § 552 (b)(6) & (b)(7)(C). Consequently, when there are a disproportional amount of transactions that end in a same cents value, it appears that these transaction amounts are contrived and therefore, in the absence of any compelling rationale to the contrary, are a strong indicator that the firm is trafficking in SNAP benefits. A preponderance of the evidence indicates that the irregular transaction purchases ending in \$x.00 (0 cents) cited in Charge Letter Attachment 1 are more likely than not a result of the store trafficking in SNAP benefits.

Repeat Transactions by the Same Household

Charge Letter Attachment 2 lists 17 transaction sets (41 total transactions)

5 U.S.C. § 552 (b)(6) & (b)(7)(C). It is not credible that the subject store would have so many suspicious SNAP transactions greatly exceeding the average SNAP transaction for convenience stores in Cook County during the review period. Violating stores often conduct multiple transactions from the same household account to avoid detection of single high dollar transactions that cannot be supported by the firm's food inventory and infrastructure.

The Appellant contends that the multiple transactions made from individual benefit accounts in unusually short timeframes are the result of: (1) Marathon being redeveloped in 2016 resulting in the store going from 400 square feet in size to 2,500 square feet in size which, in turn, allows more grocery products to be stocked at the store; and (2) During the last quarter of 2016, the only other SNAP authorized store in the area lost its SNAP privileges resulting in a dramatic increase in business at Marathon. However, the Appellant's contentions are not supported by available evidence.

Regarding the Appellant's contention that Marathon was redeveloped in 2016 resulting in the store going from 400 square feet in size to 2,500 square feet in size which, in turn, allows more grocery products to be stocked at the store, while there are no limits on the number of times EBT cards may be used or the amount of eligible foods that may be purchased, the SNAP transactions noted in this Charge Letter Attachment are questionable because they display characteristics of use inconsistent with the nature and extent of the store's stock and facilities and are indicative of trafficking. Although it is not uncommon for customers to conduct more than one transaction

per day, it is not common that such multiple transactions are for large dollar amounts. Marathon is not set up to provide for all of one's food needs with no fresh or frozen unprocessed meats, poultry, or seafood, no frozen fruits or vegetables, no fresh produce, a minimal variety and amount of canned fruits and canned vegetables, and lacks an abundant depth and breadth of staple foods. Also, the store visit observations indicate that there is no evidence of a price advantage or custom or special services rendered at the subject store that are not offered at other authorized SNAP stores in the area. It is irregular for convenience stores to have purchases such as those cited, especially when Marathon stocks only a few high priced food items so the majority of food items stocked at the store are low priced items.

The Appellant provided FNS with several photos of some of the food products stocked at Marathon in an effort to support his contention that the store stocks a full line of grocery products. However, the May 1, 2017 store visit observations indicate that Marathon does not carry a full line of groceries with no fresh or frozen unprocessed meats, poultry, or seafood, no fresh produce, no frozen fruits or vegetables, and a minimal variety and amount of canned fruits and canned vegetables. The Appellant's photos indicate that fresh bologna, fresh salami, boiled ham, and turkey ham is sold by the pound at Marathon. However, there was no evidence of any meats being sold by the pound during the store visit conducted by FNS. The only deli meats in stock were packaged and priced at \$0.99 cents each. As such, the photos provided by the Appellant do not substantiate his claim that Marathon stocks a full line of grocery products.

A review of client shopping data for the review period shows that clients shopping at Marathon are also shopping at other area grocery stores, as well as full-line supermarkets and super stores that most likely offer customers a much larger quantity and variety of eligible food items for better prices. Based on these shopping patterns, transportation to other stores is not an issue for these SNAP customers. Yet, these customers continue to shop and spend suspicious high dollar amounts in short timeframes at Marathon, where the eligible food stock is limited, **5 U.S.C. § 552 (b)(7)(E)** of their purchases at better stocked stores. This is a strong indicator of trafficking.

The Appellant contends that during the last quarter of 2016, the only other SNAP authorized store in the area lost its SNAP privileges resulting in a dramatic increase in business at Marathon. In response to the Appellant's contention, FNS has included (below) a SNAP Redemption Summary report for Marathon which displays the store's redemption history from August 2016 through March 2017.

5 U.S.C. § 552 (b)(7)(E)

5 U.S.C. § 552 (b)(6) & (b)(7)(C). While Marathon may have seen a slight increase in customers and SNAP redemptions as the result of the area competitor going out of business, this does not explain the suspicious transaction patterns and amounts cited in the Charge Letter.

Sometimes a firm may have unusual transaction patterns due to a recipient's lack of access to other SNAP authorized stores. However, there are a total of 46 SNAP authorized retailers located within a 1.0 mile radius of Marathon that can meet the nutritional needs of SNAP customers. These authorized SNAP stores include 27 convenience stores, 11 small grocery

stores, 3 medium grocery stores, 2 large grocery stores, 2 supermarkets, and 1 super store. Most of these SNAP stores are of a comparable size or larger than Marathon and offer a comparable or greater quantity and variety of food products at comparable or better prices as compared to the subject store. As mentioned above, SNAP customers that shopped at Marathon during the six month review period also shopped at other area grocery stores and, therefore, transportation to other stores is not an issue for these customers. Therefore, lack of access to other authorized stores does not appear to be an explanation for Marathon's abnormally high SNAP transaction amounts conducted within a short timeframe of each other.

The Appellant did not provide any compelling justification as to why SNAP households are conducting multiple transactions at Marathon or evidence that all of the irregular transactions cited in the Charge Letter were for eligible food items only. Based on the analysis above and in the absence of any other reasonable explanation, the irregular transaction patterns are more likely than not to be a result of trafficking in SNAP benefits.

Excessively Large Purchase Transactions

Charge Letter Attachment 3 lists 335 SNAP transactions **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. As noted previously, there is no indication from the store visit report that Marathon would be likely to have SNAP redemption patterns significantly different from similar-sized competitors offering similar food items.

The Appellant contends that the excessively large purchase transactions are the result of: (1) Marathon being redeveloped in 2016 resulting in the store going from 400 square feet in size to 2,500 square feet in size which, in turn, allows more grocery products to be stocked at the store; and (2) During the last quarter of 2016, the only other SNAP authorized store in the area lost its SNAP privileges resulting in a dramatic increase in business at Marathon. However, as was indicated previously, the Appellant's contentions are not substantiated by available evidence.

In support of his contention, the Appellant provided FNS with monthly bank statements for October 2016 through March 2017. The bank statements show several electronic payments to Frito Lay, AZ Metro, 7 UP Company, The American Bottle Company, and Home Juice. The Appellant submitted these bank statements to FNS in lieu of invoices as evidence of Marathon's purchases of food stock. However, the bank statements do not provide an itemized record of the specific food items purchased. As such, the bank statements do not validate that the excessively large purchase transactions conducted at Marathon during the review period were the result of purchases of eligible food items by SNAP recipients.

The store visit report and photos show that Marathon was stocked with a limited variety and amount of staple foods as it stocked no fresh or frozen unprocessed meats, poultry, or seafood, no fresh produce, no frozen fruits or vegetables, and only a minimal variety and amount of canned fruits and canned vegetables. The inventory report and photos also show only a few expensive eligible foods in stock that would account for these large amounts as well as showing the store has very limited checkout counter space, no optical scanner, and no shopping carts or hand-held baskets in which to transport the large number of items required to make up these

large transaction amounts. Without these, it is unlikely that such large dollar value transactions could be for actual food purchases and more likely they are trafficking.

The record shows that there are 46 SNAP authorized retailers located within a 1.0 mile radius of Marathon. Several of these authorized stores are larger than Marathon and offer a greater quantity and variety of food products at comparable or better prices as compared to the subject store. An analysis of the shopping patterns for all of the SNAP households listed in this Attachment shows that the majority of the households shopping at Marathon have access to transportation and that all are regularly shopping at a variety of larger stores, including super stores and/or supermarkets, located a few miles distance from the Appellant's location. While Marathon does offer some staple food items, SNAP recipients are already shopping at other larger SNAP retailers located within a few miles of the Appellant's business offering a greater quantity and variety of products, including fresh meats/seafood and produce, at lower prices. Therefore, the store has nothing to attract SNAP customers as there are no special or custom services offered.

The Appellant provided FNS with 10 vendor invoices/receipts (9 invoices were from Sam's Club and one invoice was from Dearborn) for foods purchased for Marathon during the six month review period in order to help substantiate that enough staple foods had been purchased to cover/explain the SNAP transactions that occurred at Marathon during the review period. FNS' analysis of these vendor invoices indicates that the majority of the purchases were for candy, beverages, water, some breakfast foods (such as Pop Tarts® and cereal), snack foods (such as cookies, pastries, and Luchables®), and a minimal amount of packaged and canned foods. The invoices indicate that no fresh meats, poultry, or seafood were purchased for the review period.

The below tables show Marathon's eligible food purchases for each review month compared to its monthly SNAP redemptions. Marathon's SNAP redemptions exceeded its available food stock during the review period. The invoices do not explain or substantiate the suspicious SNAP transactions that occurred at Marathon during the review period.

5 U.S.C. § 552 (b)(7)(E).

It is important to note that even if the Appellant's review period invoices had showed that sufficient food inventory had been purchased to account for the firm's SNAP redemption volume, sufficient inventory alone does not explain the suspicious patterns of SNAP transactions such as unusual numbers of transactions ending in a same cents value and rapid and consecutive transactions by individuals during the same store visit or in a single day. Even the large dollar transactions would remain questionable if there were sufficient food inventory to support such transactions when consideration is made of there being only a limited variety of stock in the store, no fresh unprocessed meats, poultry, or seafood, no frozen unprocessed meats, poultry, or seafood, no frozen fruits or vegetables, no fresh produce, a greater variety of foods at comparable or lower prices at other stores, no shopping carts or hand-held baskets available for customer use, and very little counter space to place food for purchase at the checkout counter. Even if there were sufficient food stock at Marathon to mathematically support high dollar transactions, there does not appear to be anything that would reasonably attract SNAP households to shop there, a

convenience store, in some cases traveling a few miles to do so, and spend substantial amounts of their SNAP benefits.

Lastly, the case record documents that the Retailer Operations Division conducted a detailed analysis of three SNAP households identified in the Charge Letter to analyze their shopping patterns at Marathon compared to their shopping patterns at other SNAP authorized stores. Each of these households had access to, and shopped at larger stores including super stores and/or supermarkets. It is obvious that these SNAP households had transportation available to them to reach these other authorized stores. However, despite this access to better stocked stores, these sampled households conducted excessively large transactions at Marathon often **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** of shopping at the larger stores where they conducted much smaller SNAP purchases. It is highly unlikely that a convenience store with minimal staple foods would have legitimate SNAP transactions greater than these larger and better stocked stores.

In summary, the store's layout, infrastructure, and food inventory do not support a high percentage of transactions markedly exceeding those of similar type stores. In addition to the statistical irregularity of such high dollar transactions, the limited availability of counter space for checking out and the lack of shopping carts and hand-held baskets support the Retailer Operations Division's determination. It is not plausible that the store's customers are carrying large amounts of food around the store without the benefit of shopping carts and hand-held baskets. Customers purchasing such large quantities of food items would have to hold them in their arms, or enlist the help of others while shopping. Based on the preponderance of the evidence, the irregular transaction patterns cited in Charge Letter Attachment 3 are more likely than not the result of trafficking in SNAP benefits.

No Allegations of Prohibited SNAP Activity

The Appellant contends that a permanent disqualification from the SNAP is unreasonable and severe as the allegations of trafficking are based solely upon a computer generated analysis and not any allegations of prohibited SNAP activity at Marathon. Firms are chosen for analytical investigation based upon numerous detailed and rigorous mathematical algorithms. This data presents the Retailer Operations Division with a statistically valid prima facie indication of highly unusual transaction activity; the activity therein identified is not marginally aberrant, but markedly so. Properly analyzed and interpreted, the Retailer Operations Division does not contend that EBT transactions are overtly suspicious when they occur on an occasional or intermittent basis, but when such transactions form repetitive patterns, on a comparative basis, over a period of time that ensures such activity is not simply intermittent, such activity is identified for further analysis.

Once such firms have been identified as potential compliance cases, from approximately 263,105 authorized firms nationwide, the Retailer Operations Division undertakes a detailed examination of the available transaction data and obtains further relevant information regarding the firm's business operations such as the level and condition of staple food stock maintained by the firm, the presence or absence of the firm's logistical retail wherewithal and numerous other factors

pertinent to the firm's ability to legitimately process the transaction activity for which the firm has been flagged. Agency policy and procedures direct that only after a careful, comprehensive and complete analysis, from which appropriate conclusions are logically derived, will the firm be issued a Charge Letter. The firm is then given the opportunity to reply to those charges and provide any information it deems appropriate in justifying as legitimate the transaction activity detailed in the Charge Letter. In the present case, these policies and procedures are shown by the record to have been duly performed in all relevant and pertinent detail. Moreover, 7 CFR § 278.6(a), noted above, established the authority upon which FNS may disqualify any authorized retail food store on the basis of evidence obtained through a transaction report under an electronic benefit transfer system. The Retailer Operations Division's use of transaction data and other reports, in addition to store visit observations and an analysis of household shopping behavior and other relevant data and information, in rendering a finding that trafficking is the most likely explanation of the transaction activity, is as valid a means of establishing evidence as that obtained through an on-site investigation and the eye witnessing of trafficking. Accordingly, the Appellant's contention that the charges are unreasonable and based solely upon a computer generated analysis is not compelling.

Reconsideration of Permanent Disqualification

The Appellant requests that FNS reconsider its decision to permanently disqualify Marathon from participation in the SNAP and reinstate its SNAP privileges. However, the Food and Nutrition Act of 2008, at § 2021, does not allow for discretion in determining sanctions for trafficking and is specific in its requirement that "... a disqualification . . . 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 ...". In keeping with this legislative mandate, 7 CFR § 278.6(e)(1)(i) of the SNAP regulations states that FNS shall disqualify a firm permanently if personnel of the firm have trafficked.

CIVIL MONEY PENALTY

As previously indicated, the August 28, 2017 Determination Letter advised the Appellant of the ineligibility for consideration for a trafficking civil money penalty (CMP) according to the terms of Section 278.6(i) of the SNAP regulations. The letter of charges dated June 26, 2017 advised the Appellant that documentation of eligibility for that alternative sanction was to be provided within 10 days. The regulations specify that such documentation must, in part, establish that there was an effective compliance policy and training program and that both were in effect and implemented prior to the occurrence of violations. The letter indicates that no information was provided by the Appellant for consideration; therefore, on review the Retailer Operations Division's determination that the Appellant firm is ineligible for the imposition of civil money penalties in lieu of disqualification is affirmed.

CONCLUSION

The Retailer Operations Division's analysis of the Appellant's EBT transaction record, upon which charges of violations are based, together with observations made during the store visit and an analysis of customer shopping behaviors, provide substantial evidence that questionable transactions during the focus period have characteristics and display patterns that are not consistent with legitimate sales of eligible food to SNAP benefit customers at a store of this type, size and makeup. Rather, the characteristics are indicative of illegal trafficking in program benefits. The Appellant's contentions do not outweigh this evidence.

The record has yielded no indication of error or discrepancy in the reported findings by the Retailer Operations Division that program benefits were accepted in exchange for cash or consideration other than eligible food. Therefore, based on a review of the evidence in this case, it is more likely true than not true that program violations did, in fact, occur as charged. Therefore, the decision to impose a permanent disqualification from participation in the SNAP against Marathon is sustained.

RIGHTS AND REMEDIES

Your attention is called to Section 14 of the Food and Nutrition Act of 2008 (7 U.S.C. 2023) and to Section 279.7 of the Regulations (7 CFR § 279.7) with respect to your right to a judicial review of this determination. Please note that 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 you reside or are engaged in business, or in any court of record of the State having competent jurisdiction. If any Complaint is filed, it must be filed within thirty (30) days of receipt of this Decision.

Under the Freedom of Information Act, FNS is 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.

LORIE L. CONNEEN
Administrative Review Officer

May 1, 2018