

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

National Petroleum-mh,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0205373

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 the permanent disqualification of National Petroleum-mh (National Petroleum or Appellant) from participation as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP), as initially imposed by the Retailer Operations Division, was appropriate.

ISSUE

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with 7 CFR § 278.6(a), (c) and (e)(1) in its administration of the SNAP, when it assessed a permanent disqualification against Appellant.

AUTHORITY

7 USC § 2021 and the 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 February 22, 2018, the Retailer Operations Division charged Appellant with trafficking, as defined in Section 271.2 of the SNAP regulations, based on a series of irregular SNAP transaction patterns that occurred during the months of July 2017 through December 2017. The letter noted that the penalty for trafficking is permanent disqualification as provided by 7 CFR § 278.6(e)(1). The letter also noted that Appellant could request a trafficking civil

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

Appellant replied to the charges on February 26, 2018. Appellant denied trafficking and explained that the transactions were normal based on the unique circumstances of the store.

After considering the evidence and the retailer's reply, the Retailer Operations Division issued a determination letter dated March 15, 2018. The determination letter informed Appellant that it was permanently disqualified from the SNAP in accordance with 7 CFR § 278.6(c) and § 278.6(e)(1). The determination letter also stated that Appellant was not eligible for a trafficking CMP because Appellant failed to submit sufficient evidence to demonstrate that the firm had established and implemented an effective compliance policy and program to prevent violations of the SNAP.

In a letter dated March 23, 2018, Appellant, through counsel, appealed the Retailer Operations Division's determination and requested an administrative review. The appeal was granted. On April 20, 2018, counsel requested documents under the Freedom of Information Act (FOIA). FNS responded to the FOIA on May 23, 2018. On June 20, 2018, counsel provided information in support of its administrative review request.

STANDARD OF REVIEW

In appeals of adverse actions, the Appellant bears the burden of proving by a clear 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, as amended, 7 USC § 2021 and § 278 of Title 7 of the Code of Federal Regulations (CFR). Part 278.6(a), (c) and (e)(1) 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 SNAP benefits.

7 USC § 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 § 271.2 states that the definition of "coupon" includes:

... an electronic benefit transfer card or personal identification number issued pursuant to the provisions of the Food and Nutrition Act of 2008, as amended, for the purchase of eligible food.

7 CFR § 271.2 states, in part, 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 § 271.2 defines trafficking, in part, as:

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

7 CFR § 278.6(a) states:

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(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).

7 CFR § 278.6(e)(1) reads, in part:

FNS shall disqualify a firm permanently if personnel of the firm have trafficked as defined in § 271.2.

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) states, in part:

- (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 a penalty. [Emphasis added.]

SUMMARY OF THE CHARGES

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

- There were multiple transactions made from individual benefit accounts in unusually short time frames.
- There were excessively large purchase transactions made from recipient accounts.

The issue in this review is whether, through a preponderance of evidence, it is more likely true than not true that the questionable transactions were the result of trafficking.

APPELLANT'S CONTENTIONS

In its March 23, 2018, administrative review request, and subsequent correspondence submitted on June 20, 2018, Appellant, through counsel, provided the following summarized contentions, in relevant part:

- It is not uncommon for the store's SNAP customers to make multiple purchases in a short period of time after the customer receives his or her benefits.
- Participants realize after they leave that they have forgotten a grocery item or have decided that they wanted to purchase items they saw but originally opted not to purchase.
- Multiple members of the same household will shop together and then make their purchases separately, using the same account and card, in quick succession.
- Households will go on a spending spree wherein they make purchase after purchase without leaving or by returning after a brief absence, thereby reducing their benefits in short order.
- The store visit report noted the presence of some of the more expensive food items but failed to cite them on the list of the most expensive items in the store's inventory.

- Photographs of the items can be seen in the on-site inspection, including cases of monster (pictured with a blue handcart), cases of soda stacked in the storage coolers, and more cases of soda/drinks on the floor by the storage cooler.
- A specific list of the items missed by the inspector include:
 - • Red Bull cases (\$99.99);
 - • Beef Jerky (\$7.49);
 - • Bacon (\$5.50);
 - • Coffee (\$6.99);
 - • Olive Oil (\$9.99); and
 - Soda cases (\$17.99);
 - Milk (\$5.99 per gallon);
 - Lunch Meats (\$4.49 - \$4.99);
 - Oatmeal (\$5.49);
 - Monster Energy Cases (\$89.99).
- The on-site inspection found that the Appellant was sufficiently provisioned to satisfy the purchase amounts listed in the Charge Letter.
- The copy of the Case Analysis Document does not indicate that a terminal check was completed and therefore there are transactions contained within the Charge Letter that are not appropriately assigned to this store.
- It is important to consider the limitations of the ALERT System, as its over-utilization has created an internal belief that the system is infallibly accurate and that the ALERT System has been proven to be accurate in finding fraud.
- The system is not always accurate, as the numbers fail to account for special business practices, differences in demographics and foodstuffs, and geographic areas.
- The analyst does not understand the system’s capabilities and leans too heavily upon the ALERT data, often failing to account for differences in shopping habits of local participants.
- Another issue is whether or not appropriate comparison stores have been selected to provide a baseline set of data against which to compare Appellant’s transactions.
- The District Courts have cautioned the Department in relying too heavily upon numbers generated by the ALERT System: *Brooklyn Mini Market vs. U.S.*, Federal Western District of New York, 12-CV-6708 ; and *Skyson USA, LLC vs. U.S.*, 2010 WL 651032 (D. Hawaii 2010).
- Recent administrative review cases discuss the precedent that should be considered in this case: *Howard’s Quik Mart vs. Retailer Operations Division* and *Gloesis Group vs. Retailer Operations Division*.
- Co-shopping is on the rise, where both adults are responsible for the groceries.
- Different households will shop separately using the same account or pick up different needs.
- Different participants will travel to the store together to make purchases and then separate their purchases to track what each party has used from the benefit account.
- Co-shopping results in a higher number of transactions that occur in a shorter than the Department expects period of time.
- On a regular basis, the participants will make significant grocery purchases from National Petroleum-mh 5 U.S.C. § 552 (b)(6) & (b)(7)(C) of receiving the deposit into their accounts.
- Patterns in the Supplemental Nutrition Assistance Program Final Report (2009), which found “[i]n an average month during fiscal year 2009, a SNAP household spent more than half of its benefit in the first week, and more than three-quarters by the second week.”

- The study found that 21.4% of the benefits were immediately pulled 5 U.S.C. § 552 (b)(6) & (b)(7)(C), then another 37% were taken out in the days following thereafter, up to seven days after issuance.
- It is not unexpected that the SNAP participants are going to spend their money quickly in this timeframe.
- Household --50 shopped and Household --69 show a pattern of conducting multiple shopping trips 5 U.S.C. § 552 (b)(6) & (b)(7)(C), likely explained by either co-shopping or the simple fact that the shopper forgot an item in his/her previous transaction.
- Multiple transactions occurring 5 U.S.C. § 552 (b)(6) & (b)(7)(C) are not inherently suspicious according to *Onukwughu v. U.S.*, however transactions that are large and for identical amounts are extremely suspicious and Appellant has no such transactions.
- Appellant has a considerable inventory.
- The store visit report and photographs clearly show that there was far more 5 U.S.C. § 552 (b)(6) & (b)(7)(C) worth of inventory on the shelves during the review period.
- The beverage cases alone, ranging from \$17.99 to \$99.99, provide a more than reasonable explanation for some of the larger transactions.
- Even if the participants were to prefer a larger store with more varieties or slightly less expensive prices, the convenience of Appellant (and growing trends in small store preferences for consumers) is going to merit some large purchases from time to time.
- That fact that all of the “large” transactions 5 U.S.C. § 552 (b)(6) & (b)(7)(C) indicates that while large purchases do occur, the size of the transactions are not so dramatic so as to indicate that trafficking is occurring.
- FNS has no meaningful comparison store, and thus has no context.
- As for ALERT’s data, the system’s conclusions are directly rebutted by the inventory and Investigator’s report.
- If Appellant was trafficking, then the inventory and stove visit report would be “inconsistent.

In support of its contentions, counsel submitted two electronic documents: C-store Average Customers 2016 and 2016 Grocery Shopping Trends.

The preceding may represent only a brief summary of the Appellant’s contentions presented 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.

ANALYSIS AND FINDINGS

Store Visit

FNS authorized National Petroleum as a convenience store on November 28, 2016. The case file indicates that in reaching a disqualification determination, the Retailer Operations Division considered information obtained during a December 16, 2017, store visit conducted by a FNS contractor to observe the nature and scope of the firm’s operation, stock, and facilities. This

information was then used to ascertain if there were justifiable explanations for the firm's irregular SNAP transactions. The store visit report and photographs documented the following store size, description, and characteristics:

- National Petroleum is approximately 2000 square feet, with additional food storage outside of public view.
- There were two shopping baskets and no shopping carts for customer use.
- There was one point-of-sale device.
- There was no fresh meat, poultry, or fish.
- There were packages of hot dogs, deli meat, canned meat, canned fish, and beef jerky.
- The only fresh produce was some bananas.
- Dairy included milk, cheese, butter, and ice cream.
- Other staple foods available for purchase were juice, rice, bread, beans, cereal, pasta, and canned goods.
- Much of the remaining stock consisted of accessory foods such as candy, spices, and carbonated and uncarbonated drinks.
- Ineligible items included gas, tobacco products, health and beauty products, cleaning products, and automobile products.

The available food was primarily of a low-dollar value. The four most expensive food items were cereal (\$8.99), coffee (\$7.49); 4-pack Red Bull (\$7.49); and jerky (\$6.99). The SNAP eligible food stocked by the store was generally of a low dollar value consisting mainly of inexpensive canned and packaged goods, snack foods, single-serving food items and accessory food items. Given the available inventory, there was very little sign that the firm would be likely to have SNAP redemption patterns that differed significantly from those of similar-sized competitors, especially competitors that sell similar or identical food items.

Charge Letter Attachments

Each attachment furnished with the charge letter represents the questionable and unusual patterns of SNAP transactions indicative of trafficking which were conducted at the Appellant firm during the review period. As there is more than one pattern of irregular transactions, the case of trafficking becomes more convincing.

Charge Letter Attachment 1. Multiple transactions were made from individual benefit accounts in unusually short time frames. This attachment documents 25 sets of transactions **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** in SNAP benefits that meet the parameters of this scan. Multiple transactions conducted by the same household account within a short period of time is a method which violating stores use to avoid single high dollar transactions that cannot be supported by a retailer's inventory and structure.

Although it is not uncommon for customers to have more than one transaction per day, it is not common that such multiple transactions are for large dollar amounts. The SNAP transactions noted in the charge letter are questionable not because they exceed any limits for use, but rather because they display characteristics of use inconsistent with the nature and extent of Appellant's

stock and facilities and are therefore indicative of trafficking. The photographs from the store visit offer no explanation as to why SNAP customers would routinely shop at Appellant multiple times during a short period or purchase such a large volume of items, there being no great variety of products, price advantage, profusion of large packages, or significant bulk items for sale. The second and third transactions in each set are too large to consist of forgotten items.

Counsel explains that co-shopping results in a higher number of transactions that occur in a shorter period of time than expected. Co-shopping may occur but it is unlikely the reason that Appellant has more frequent large transactions by the same household than other similar stores during the review period. This would manifest itself in comparable firms having similar transaction patterns, but this is not the case. The Retailer Operations Division compared Appellant to three nearby stores located within a one-mile radius. There were only three similar transactions sets conducted by one of these other stores during the review period. It is unlikely that households would be more likely to co-shop at Appellant than at other similar stores.

Counsel explains that different participants will travel to the store together to make purchases and then separate their purchases to track what each party has used from the benefit account. However, there are only two transactions sets that occurred 5 U.S.C. § 552 (b)(6) & (b)(7)(C) and may have occurred during the same visit. This does not explain the majority of the transactions sets. As indicated earlier, Appellant has not provided any explanation for why this type of behavior would occur at Appellant rather than at nearby stores. Moreover, it is unlikely that a family relying on SNAP to supplement their nutritional needs would share these benefits with another family that purchases and prepares meals separately.

Counsel reasoned that Household --50 and Household --69 shopped on the same days each month and that their multiple transactions can be explained by either co-shopping or that the shopper forgot an item in his/her previous transaction. However, a review of the transaction history of these two households shows that they were both shopping at super stores on the same day as their transactions conducted at Appellant. Thus, these household were not relying on Appellant for their shopping needs. These transactions are questionable given Appellant's low dollar value food inventory. For example, household --50 transacted 5 U.S.C. § 552 (b)(6) & (b)(7)(C) on October 10 and 11, 2018, at Appellant while also visiting a national chain super store. Spending a large portion of one's SNAP benefit allotment in a convenience store, when there are larger stores at which one also shops that carry more variety of foods at a lower cost, is unreasonable customer behavior.

Appellant has not offered any evidence to show that the transactions listed in Attachment 2 were legitimate purchases of eligible food.

Charge Letter Attachment 2: Excessively large purchase transactions were made from recipient accounts. This attachment lists 367 transactions 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Appellant's SNAP total dollar volume was 5 U.S.C. § 552 (b)(6) & (b)(7)(C) higher than the average for convenience stores in California during the review period. Appellant's average SNAP transaction was also 33% greater than the average SNAP transaction amount for convenience stores in California. There is no evidence that the firm would be likely to have SNAP redemption patterns that differ considerably from similar-sized competitors. These large

transaction amounts are also not consistent with the store's inventory. There was no fresh meat, poultry, or produce and the only fresh produce was bananas. Most of the food products in the store consisted of accessory food items such as snack foods, candy, and soda and inexpensive staple foods such as canned and packaged goods. The frequency of high-dollar purchases in a six-month period calls into question the legitimacy of these transactions.

Counsel reports that the store visit missed other expensive items such as a cases of Red Bull that sold for \$99.99 and cases of Monster Energy that sold for \$89.99. The store visit report was completed with the store personnel and it is unlikely that more expensive items were missed and not pointed out by the store employee. The cases shown in the store visit photographs indicate that these items were located behind the hot food section and in an area used for storage. If Appellant did sell the before mentioned drinks in bulk, it is unlikely that these accounted for many of the questionable SNAP transactions. There is a supermarket located just .08 miles from Appellant, with shopping carts, more register space to place items, and a better selection of beverages, that would be the more likely location to make large drink purchases.

Counsel contends that because all of the large transactions **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**, the size of the transactions is not so dramatic so as to indicate that trafficking is occurring. However, violating retailers commonly break up large, suspicious transactions into multiple, smaller transactions to avoid detection. Neither the Food and Nutrition Act of 2008, as amended, nor the accompanying regulations cite any minimum dollar amount of cash or SNAP benefits, or number of occurrences, for such exchanges to be defined as trafficking. A firm's explanation and evidence for why these larger than average transactions are occurring in a convenience store should be both rational and compelling. That the transactions amounts **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** is not evidence that the listed transactions were for eligible food items only.

Appellant, through counsel, has stated that ALERT's conclusions are directly rebutted by the inventory and sales records provided. Appellant argues that if the store were trafficking, then its inventory and sales data would be inconsistent. However, Appellant did not provide any inventory and sales records. Thus, there is no way of knowing if the firm's inventory and sales data is consistent or not. Given that Appellant does have a small inventory of staple foods as well as some eligible accessory foods, such as soft drinks and snacks, 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)**. However, as noted earlier, there is no evidence that the firm would be likely to have SNAP redemption patterns that differ considerably from similar-sized competitors, especially considering the lack of high-priced food items or unique food items.

Counsel reports that on a regular basis, participants will make significant grocery purchases from National Petroleum-mh **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** of receiving the deposit into their accounts. A government report¹ on SNAP benefit redemption patterns revealed that households most often redeemed their benefits at supermarkets and superstores with only four percent of all households never shopping in a supermarket or super store. Thus, when a supermarket or super store is available, it is highly unlikely that a SNAP recipient would conduct excessively large

¹ "Benefit Redemption Patterns in the Supplemental Nutrition Assistance Program," report prepared by Mathematica Policy Research for the Food and Nutrition Service, February 2011.

SNAP transactions at a convenience store with a limited selection of staple foods like Appellant. The Retailer Operations Division determined that there is a super store actually located 0.08 miles from Appellant. In fact, within a one-mile radius of Appellant there are 14 other convenience stores, three small groceries, one medium grocery, and one superstore. Thus, households who shop at Appellant have access to and do shop at large grocery stores, supermarkets and super stores, among all other types of authorized stores.

The record shows that the Retailer Operations Division did compare Appellant to the two nearest convenience stores and a large small grocery. The Retailer Operations Division determined that each of the two transaction patterns of Appellant, described in each of the charge letter attachments, exceed the other authorized stores. Appellant's total SNAP redemptions were greater than the other three stores. Appellant also had a greater average SNAP transaction amount than the three other stores. The data from these nearby stores provided adequate evidence to demonstrate that the transaction patterns at the Appellant firm were highly unusual and indicative of possible trafficking violation. There is no evidence to suggest that the Appellant offers any special services or food products that would make it superior or unique in comparison to nearby competitors.

The Retailer Operations Division examined three households identified in the charge letter to analyze their shopping patterns at National Petroleum compared to their shopping patterns at other SNAP authorized stores. However, despite this access to better stocked stores, each of the four households conducted excessively large transactions at National Petroleum 5 U.S.C. § 552 (b)(6) & (b)(7)(C) of shopping at a supermarket or super store. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). It is questionable as to why households would conduct large transactions at Appellant, a gas station/convenience store, when these households had just visited or planned to visit larger stores with a better selection of fresh meat and produce and likely better prices.

In summary, Appellant's layout, business structure, and food inventory do not support a high percentage of transactions markedly exceeding the average SNAP transaction amount of similar type stores. 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. Therefore, based on this empirical data, and in the absence of evidence to legitimize such transaction patterns, a conclusion can be drawn, through a preponderance of evidence that the "unusual, irregular, and inexplicable" transactions and patterns cited in the letter of charges evidence trafficking as the most likely explanation.

ALERT

Appellant makes multiple contentions regarding the agency's ALERT system. The ALERT system is a computerized fraud detection tool to identify SNAP transactions that form patterns having characteristics indicative of trafficking. However, this tool does not by itself determine or conclude that trafficking has occurred. The Retailer Operations Division must still conduct an extensive analysis of the transaction data and patterns, often with other factors such as, in this

case, observations from store visits, an analysis of customer shopping behavior and a comparison of stores in the area, and render a determination whether the questionable transactions were, more likely than not, the result of trafficking. Lastly, Appellant is always given a chance to explain the specific transaction patterns before the determination letter is issued and during the administrative review.

The legality of this method is supported by 7 CFR §278.6(a) which 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.]

The documentation and evidence provided by the Retailer Operations Division was thoroughly examined. From all indications, the Retailer Operations Division obtained the EBT data (provided by ALERT), found it to be suspicious in comparison to other area stores of similar size, and then undertook a thorough investigation before concluding that trafficking was likely occurring. Appellant’s implication that the Retailer Operations Division simply charged a store with trafficking violations simply because it was listed on some computerized reports is unfounded.

Appellant bears the burden of demonstrating by a preponderance of the evidence that the administrative actions should be reversed and that the transactions detailed in the charge letter were more likely than not due to the legitimate sale of eligible food in exchange for SNAP benefits. Appellant offered no relevant evidence to prove that the transactions listed in the charge letter were legitimate purchases of eligible food. In the absence of compelling information or documentation weighed in comparison to the evidence provided by the Retailer Operations Division, the evidence weighs in favor of the Retailer Operations Division’s determination that SNAP-benefit trafficking substantially produced the transaction activity at issue in the present case.

Case Law

Appellant cites some case law which it claims supports its position on the ALERT system as well as multiple transactions. It should be noted that considerations of legal precedent through case law is beyond the scope of this review. Instead this administrative review is limited to whether the Retailer Operations Division appropriately followed the Food and Nutrition Act of 2008, as amended, and the regulations promulgated under the Act, and whether the action taken is sustainable by a preponderance of the evidence. Therefore, any application of a supposed judicial precedent would best be addressed in a judicial review in a court of law.

Earlier Administrative Review Decisions

Appellant refers to two administrative review cases that discuss the precedent that should be considered in this case: *Howard's Quick Mart vs. Retailer Operations Division* and *Gloesis Group vs. Retailer Operations Division*. The sentence quoted by Appellant in *Howard's Quick Mart* regarding trafficking being the "only plausible explanation" was incorrectly included in that decision. As stated elsewhere in that decision, as well as earlier in this decision, 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. Appellant mischaracterizes the findings of *Gloesis Group* as that decision clearly states that the determination was based on the preponderance of the evidence. The evidence in both cases differs significantly from the evidence in this case.

CIVIL MONEY PENALTY

In the charge letter, the Retailer Operations Division informed Appellant of its right to request a trafficking CMP under 7 CFR § 278.6(i). Appellant was informed that it would need to provide both the request and supporting evidence within ten calendar days of receiving the charge letter and that no extension of time could be granted for making the request or for providing the required evidence. Appellant did not request consideration for a trafficking CMP in lieu of a permanent disqualification under 7 CFR § 278.6(i), even though it was informed of the right to do so in the charge letter.

Even if a timely request had been submitted, Appellant would likely not have been eligible a trafficking CMP in lieu of disqualification because there is insufficient evidence to demonstrate that the firm had established and implemented an effective compliance policy to prevent SNAP violations. Therefore, the Retailer Operations Division's decision not to impose a trafficking CMP in lieu of disqualification is sustained as appropriate pursuant to 7 CFR § 278.6(i).

CONCLUSION

The Retailer Operations Division's analysis of Appellant's EBT transaction record was the primary basis for its determination to permanently disqualify Appellant. This data provided substantial evidence that the questionable transactions during the review period had characteristics that are consistent with trafficking violations in SNAP benefits. Therefore, based on a review of all of the evidence in this case, it is more likely true than not true that program violations did occur as charged by the Retailer Operations Division. The determination to impose a permanent disqualification against Appellant is sustained.

The Retailer Operations Division also determined that Appellant was not eligible for a trafficking civil money penalty according to the terms of 7 CFR Section 278.6(i) of the SNAP regulations. Under review, the denial of a trafficking CMP was deemed correct and proper.

RIGHTS AND REMEDIES

Applicable rights to a judicial review of this decision are set forth in 7 USC § 2023 and 7 CFR § 279.7. 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's owner resides or is 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, 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.

MARY KATE KARAGIORGOS
Administrative Review Officer

July 24, 2018