

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

Natural Supermarket Corp,

Appellant,

v.

Case Number: C0207780

Retailer Operations Division,

Respondent.

FINAL AGENCY DECISION

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

ISSUE

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

AUTHORITY

7 U.S.C. § 2023 and its implementing regulations at 7 CFR § 279.1 provide that “[A] food retailer or wholesale food concern aggrieved by administrative action under § 278.1, § 278.6 or § 278.7 . . . may file a written request for review of the administrative action with FNS.”

SUMMARY OF CHARGES

The Appellant was charged with trafficking and subsequently permanently disqualified based on an analysis of EBT transaction data from October 2017 through February 2018. This involved the following transaction patterns which are common trafficking indicators:

- There were an unusual number of transactions ending in a same cents value.
- There were multiple purchase transactions made too rapidly to be credible.
- There were multiple transactions made from the accounts of individual SNAP households within a set time period.

- The majority or all of an individual recipient's SNAP benefits were exhausted in unusually short periods of time.
- Excessively large purchase transactions were made from recipient accounts.

CASE CHRONOLOGY

The agency's record shows that FNS initially authorized Natural Supermarket Corp. for SNAP participation as a convenience store on July 6, 2017. In a letter dated May 15, 2018, and received by the firm on May 16, 2018, the Retailer Operations Division charged the Appellant with trafficking, as defined in Section 271.2 of the SNAP regulations, based on a series of irregular SNAP transaction patterns that occurred between the months of October 2017 and February 2018. The letter noted that the penalty for trafficking is permanent disqualification as provided by 7 CFR § 278.6(e)(1). The letter also stated that the Appellant could request a civil money penalty (CMP) in lieu of permanent disqualification for trafficking, but noted that such a request must be made within 10 days of receipt of the charge letter under the conditions specified in 7 CFR § 278.6(i).

In written correspondence between May 23, 2018, and June 5, 2018, the Appellant, through counsel, responded to the trafficking charges, insisting that trafficking was not occurring at the store. The Appellant provided a 12-page written response to the charges; a sworn affidavit from owner 5 U.S.C. § 552 (b)(6) & (b)(7)(C); approximately undated 50 photographs of the store's inventory; and roughly 200 pages of inventory purchase invoices and receipts, most of which were outside the five-month review period. The Appellant argued that its evidence showed that the transactions that were deemed suspicious by FNS were simply a "normal measure of the transactions that occur daily" at the store. The Appellant requested that the trafficking charges be dismissed, or in the alternative requested a civil money penalty in the amount of \$15,000 or disqualification for a period of one year.

After reviewing the Appellant's response and documentation and further considering the evidence in the case, the Retailer Operations Division concluded that trafficking had occurred as charged and issued a determination letter dated June 25, 2018. This letter informed the Appellant that it would be permanently disqualified from SNAP upon receipt of the letter in accordance with 7 CFR § 278.6(c) and § 278.6(e)(1). The letter also stated that the Retailer Operations Division considered the Appellant's eligibility for a trafficking CMP according to the terms of Section 278.6(i) of the regulations, but determined that a CMP was not appropriate in this case because the Appellant failed to submit sufficient evidence to demonstrate that the firm had established and implemented an effective compliance policy and program to prevent SNAP violations.

In a letter postmarked July 6, 2018, the Appellant, through counsel, appealed the Retailer Operations Division's determination by requesting an administrative review. The request was granted.

STANDARD OF REVIEW

In an appeal of adverse action, such as disqualification from SNAP participation, an appellant bears the burden of proving by a preponderance of the evidence that the administrative action

should be reversed. This means that an appellant has the burden of providing relevant evidence which a reasonable mind, considering the record as a whole, would accept as sufficient to support a conclusion that the matter asserted is more likely to be true than not true.

CONTROLLING LAW AND REGULATIONS

The controlling law in this matter is found in the Food and Nutrition Act of 2008, as amended (7 U.S.C. § 2021), and promulgated through regulation under Title 7 CFR Part 278. In particular, 7 CFR § 278.6(a) and (e)(1)(i) establish the authority upon which a permanent disqualification may be imposed against a retail food store or wholesale food concern.

7 U.S.C. § 2021(b)(3)(B) states, in part:

...[A] disqualification under subsection (a) shall be...permanent upon...the first occasion or any subsequent occasion of a disqualification based on the purchase of coupons or trafficking in coupons or authorization cards by a retail food store or wholesale food concern or a finding of the unauthorized redemption, use, transfer, acquisition, alteration, or possession of EBT cards...

7 CFR § 278.6(a) states, in part:

FNS may disqualify any authorized retail food store...if the firm fails to comply with the Food and Nutrition Act of 2008, as amended, or this part. Such disqualification shall result from a finding of a violation on the basis of evidence that may include facts established through on-site investigations, inconsistent redemption data, [or] evidence obtained through a transaction report under an electronic benefit transfer system....

7 CFR § 278.6(e)(1)(i) states:

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

7 CFR § 271.2 states, in part:

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

7 CFR § 271.2 states, in part:

Eligible foods means: Any food or food product intended for human consumption except alcoholic beverages, tobacco and hot food and hot food products prepared for immediate consumption...

7 CFR § 278.6(b)(1) states, in part:

Any firm considered for disqualification...under paragraph (a) of this section...shall have full opportunity to submit to FNS information, explanation, or evidence concerning any instances of noncompliance before FNS makes a final administrative determination. The FNS regional office shall send the firm a letter of charges before making such determination. The letter shall specify the violations or actions which FNS believes constitute a basis for disqualification.... The letter

shall inform the firm that it may respond either orally or in writing to the charges contained in the letter within 10 days of receiving the letter...

7 CFR § 278.6(c) states, in part:

The letter of charges, the response, and any other information available to FNS shall be reviewed and considered by the appropriate FNS regional office, which shall then issue the determination. In the case of a firm subject to permanent disqualification under paragraph (e)(1) of this section, the determination shall inform such a firm that action to permanently disqualify the firm shall be effective immediately upon the date of receipt of the notice of determination from FNS, regardless of whether a request for review is filed in accordance with part 279 of this chapter.

7 CFR § 278.6(b)(2)(ii) states, in part:

Firms that request consideration of a civil money penalty in lieu of a permanent disqualification for trafficking shall have the opportunity to submit to FNS information and evidence... that establishes the firm's eligibility for a civil money penalty in lieu of a permanent disqualification in accordance with the criteria included in § 278.6(i). This information and evidence shall be submitted within 10 days, as specified in § 278.6(b)(1).

7 CFR § 278.6(b)(2)(iii) states:

If a firm fails to request consideration for a civil money penalty in lieu of a permanent disqualification for trafficking and submit documentation and evidence of its eligibility within the 10 days specified in § 278.6(b)(1), the firm shall not be eligible for such a penalty.

7 CFR § 278.6(i) states, in part:

FNS may impose a civil money penalty in lieu of a permanent disqualification for trafficking...if the firm timely submits to FNS substantial evidence which demonstrates that the firm had established and implemented an effective compliance policy and program to prevent violations of the Program...

APPELLANT'S CONTENTIONS

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

- The Retailer Operations Division based its disqualification decision on the firm's failure to establish and implement an effective compliance policy because – upon mere suspicion – trafficking may have occurred.
- Appellant requests reversal of the disqualification decision or the assessment of a civil money penalty in lieu of permanent disqualification in the amount of \$15,000 or other just penalty in the event other violations have occurred other than trafficking but do not require permanent disqualification.
- Appellant refers to its contentions that were originally submitted in response to the charge letter and requests a review of that information.
- Appellant contends that the Retailer Operations Division failed to consider the entire record and abused its discretion when it permanently disqualified the firm.

- The Appellant did not need to prove that it has a compliance system. The regulations mandate that proof a compliance system is necessary only when trafficking or other violation has been proven to occur.
- The Retailer Operations Division incorrectly concluded that the reason for the permanent disqualification is a direct consequence of the failure to submit a compliance policy. The Retailer Operations Division did not conclude that trafficking had occurred or that it did not occur. It is silent on that matter.
- Further, a compliance policy does not need to be shown in the event that the Appellant rebuts the Retailer Operations Divisions' suspicions that trafficking was occurring. A review of the record reveals that no trafficking occurred or could have occurred. The evidence, including an affidavit from the Appellant owner denying that trafficking was occurring, as well as receipts and the square footage of the premises, should have been enough to dispel any suspicions of trafficking. Likewise, the lack of evidence from USDA and its failure to provide even one instance of trafficking other than mere suspicion by way of its detection software should also have been enough to dispel any suspicions of trafficking.
- Although it is true that trafficking may be detected through a detection system, the overwhelming evidence submitted by the Appellant in response to the charges disproves that trafficking has occurred.

In support of these contentions, the Appellant resubmitted its entire response and accompanying documentation that was earlier submitted to the Retailer Operations Division.

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

ANALYSIS AND FINDINGS

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

Contractor Store Visit

The case file indicates that in reaching a disqualification determination, the Retailer Operations Division considered not only the Appellant firm's EBT transactions, but also information obtained during a March 26, 2018, store visit which was conducted by an FNS contractor to observe the nature and scope of the firm's operation, stock, and facilities. This store visit information was used to ascertain if there were justifiable explanations for the firm's irregular SNAP transaction patterns. The store visit report and photographs documented the following store size, description, and characteristics:

- Natural Supermarket Corp. is a small convenience store, approximately 900 square feet in size, operating in Brooklyn, Kings County, New York.

- At the time of the contractor's visit, the firm had no shopping carts or hand-held shopping baskets for customer use, which is not unusual for stores of this size. Customers shopping in such stores generally purchase only as much food as they can carry in their arms.
- The store visit photographs show one cash register for food purchases and agency records reflect the use of one EBT point-of-sale device.
- It appears that the firm does not use optical scanners to process transactions.
- The store's staple food stock is sufficient in each of the four staple food categories.
- SNAP-eligible, non-staple accessory food items available at the store include carbonated and uncarbonated drinks, snacks, candy, and condiments. The store also sells ineligible, nonfood items, including lottery tickets, tobacco products, alcoholic beverages, and miscellaneous household merchandise.
- The store also sells hot and cold prepared foods, including deli sandwiches, fresh salads, wraps, and smoothies. The firm also sells sliced deli meat and cheese by the pound.
- The checkout area consists of a small, cluttered countertop where items can be placed for purchase. The constricted checkout area is not suitable for conducting large or rapid transactions as there is very little space on the counter to place more than a few items at a time and little room for customers to maneuver with large amounts of groceries.
- There is no indication from the store visit report that the firm has a special pricing structure. From all indications, most prices appear to end in 9, and according to store personnel, the firm does not round transaction totals up or down at checkout.
- According to the contractor's report, the most expensive food items available for purchase include sliced roast beef for \$11.99 per pound; sliced turkey for \$8.99 per pound; and deli cheese for \$7.99 per pound.

The available inventory of SNAP-eligible food at the time of the store visit showed stock that would be typical of a small convenience store or corner market, where households normally purchase a limited number of items to complement their overall dietary needs. There was no indication that SNAP households would be inclined to regularly visit Natural Supermarket Corp. to purchase very large quantities of groceries, especially considering the absence of shopping carts and baskets, the very constricted checkout area, and the availability of larger SNAP-authorized grocery stores in the area, including both a superstore and a supermarket located less than a quarter of a mile away. Given the available inventory and the store's characteristics, this review could find no reason why the Appellant firm's SNAP redemption patterns would differ so significantly from those of nearby, similar-sized competitors.

SNAP Transaction Analysis

Charge Letter Attachment 1: There were an unusual number of transactions ending in a same cents value. This attachment lists 960 transactions ending in .00, 5 U.S.C. § 552 (b)(6) & (b)(7)(C). As noted earlier, the contractor's report shows that most prices end with a cents-value of 9, and the contractor specifically noted that the firm does not round transaction totals up or down at checkout. As such, the likelihood that so many transactions, which would logically consist of random items from the store's shelves, would so frequently and legitimately end in .00 or .50 is very low.

The Appellant did not address the transactions in Attachment 1 in any of its correspondence with the Retailer Operations Division or in its request for administrative review. Without a reasonable explanation or compelling evidence to demonstrate that the transactions in Attachment 1 were legitimate purchases of eligible food, this review has little option but to conclude that the transactions listed in Attachment 1 were likely due to trafficking violations.

Charge Letter Attachment 2: Multiple purchase transactions were made too rapidly to be credible. This attachment lists 73 sets of transactions (146 transactions in all) 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in SNAP benefits.

Considering the fact that this store has just one cash register, one EBT point-of-sale device, no optical scanner, and no conveyor belt, and considering the number of items that it would typically take to add up to the dollar amounts found in this attachment, it is unlikely that legitimate transactions could have occurred in such short periods of time.

For example, 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Attachment 2 is filled with similar examples.

Considering how long it takes for a typical clerk to process a transaction for 5 U.S.C. § 552 (b)(6) & (b)(7)(C) or more without an optical scanner or conveyor belt, it seems highly unlikely that such a large transaction could have legitimately occurred so soon after another customer's transaction.

In short, it does not seem to be logistically possible for the households in Attachment 2 and the store's staff to have conducted the following action steps in the limited timeframes listed:

- Transport a large number of food items by hand to the checkout area without the benefit of a shopping cart or basket;
- Place each item on the very limited counter space for processing;
- Separate food items from nonfood items;
- Manually enter the price of each item into the cash register;
- Bag the merchandise and move it off the counter space area; and
- Process the sale on the EBT point-of-sale terminal 5 U.S.C. § 552 (b)(6) & (b)(7)(C) after the completion of a separate household's transaction.

The Appellant, through counsel, has offered only conjecture as to why such transactions might have occurred. For example, it contends that the transactions might have resulted from customers purchasing a few high-priced items, or on the occasion when the two transactions were conducted by the same household, such transactions may have been the result of a customer making a small initial purchase because they did not know how much money was available on their EBT card.

Unfortunately, the Appellant has offered no evidence to verify that the specific transactions in this attachment were for legitimate purchases of eligible food. Such evidence might have included itemized cash register receipts to prove what was purchased during each transaction. Without such evidence and because the transaction patterns in Attachment 2 are so unusual in comparison to other stores in the area, it is reasonable to conclude that the transactions in Attachment 2 were likely due to trafficking.

Charge Letter Attachment 3: Multiple transactions were made from the accounts of individual SNAP households within a set time period. This attachment lists 57 sets of transactions (128 transactions in all) 5 U.S.C. § 552 (b)(6) & (b)(7)(C). 5 U.S.C. § 552 (b)(7)(E).

For example, 5 U.S.C. § 552 (b)(6) & (b)(7)(C), an extraordinary amount for a small convenience store like Natural Supermarket Corp., which has no shopping carts or baskets, very few expensive food items, and a significantly cramped checkout area. 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

Considering the amount of food it would take to add up to these transaction totals, and considering that the firm has no shopping carts or baskets, it seems very unlikely that these could be legitimate transactions.

The Appellant has stated that the transactions could be the result of customers adding items to their order after an initial transaction, or simply that they returned to the store at a later time to purchase additional food.

As with the contentions for Attachment 2, the Appellant's arguments could be valid, but it has offered no evidence to support the claim. Anecdotal explanations without supporting documentation do little to convince this review that the transactions in Attachment 3 were legitimate purchases.

Charge Letter Attachment 4: In a series of transactions, the majority or all of an individual recipient's benefits were exhausted in unusually short periods of time. This attachment lists 70 sets of SNAP transactions 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

5 U.S.C. § 552 (b)(7)(E). It makes little sense that a household would spend almost the entirety of its SNAP allotment in a single transaction or in a series of rapid transactions at this store.

For example, 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

The Appellant claims that such transactions could represent persons who did their monthly shopping in a single instance. While nothing prevents a household from shopping in this manner, the question of why it would do so at a convenience store remains unanswered, particularly when such behavior is outside of normal shopping patterns.

A 2011 government report on SNAP shopping patterns indicates that on average, after the first day of benefit issuance, approximately 80 percent of a household's allotment remains unspent. Even after seven days, 40 percent of benefits still remain unspent. It typically takes about two weeks to deplete 80 percent of one's benefits, and three weeks to deplete 90 percent.¹ Depleting a large portion of one's SNAP balance in a very short period of time, especially at a small store

¹ See U.S. Department of Agriculture, Food and Nutrition Service, Office of Research and Analysis, *Benefit Redemption Patterns in the Supplemental Nutrition Assistance Program*, by Laura Castner and Juliette Henke. Project officer: Anita Singh, Alexandria, VA: February 2011.

with no shopping carts or baskets, thereby leaving little or no benefits for the rest of the month, is inconsistent with normal shopping behavior of SNAP benefit households.

Unfortunately, the Appellant has not offered any evidence specifically related to the transactions listed in Attachment 4. Such evidence might have included itemized cash register receipts to help prove that the transactions were legitimate purchases of eligible food. The transactions listed in this attachment are highly unusual, especially in comparison with nearby similar-sized stores. Without compelling evidence to demonstrate that the transactions were valid, it is reasonable for this review to conclude that that they were likely the result of trafficking violations.

Charge Letter Attachment 5: Excessively large purchase transactions were made from recipient accounts. This attachment lists 414 SNAP transactions

5 U.S.C. § 552 (b)(6) & (b)(7)(C). These large transactions are not consistent with other convenience stores in the state of New York. The Retailer Operations Division has determined that during the review period, the average SNAP transaction amount for a convenience store in New York was \$8.77. In Kings County, the average was a bit higher, at \$9.83 per transaction. 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

Given that the Appellant firm has a moderate inventory of staple foods and other SNAP-eligible foods, it is probable that there would be an occasional purchase where the transaction amount is high, perhaps exceeding 5 U.S.C. § 552 (b)(7)(E). As such, there may well be some legitimate SNAP transactions sprinkled among the transactions listed in Attachment 5. However, as noted earlier, there is no evidence that the firm would be likely to have SNAP redemption patterns that differ significantly from nearby, similar-sized competitors, especially considering the absence of shopping carts and baskets and the very limited checkout area. The substantial number of high-dollar transactions in a five-month period calls into question the legitimacy of these transactions.

5 U.S.C. § 552 (b)(6) & (b)(7)(C). Considering how many food items it would typically take to add up 5 U.S.C. § 552 (b)(6) & (b)(7)(C), and considering that the store does not have any shopping carts or baskets, and given the fact that there are much larger grocery stores in the area with substantially greater inventory and variety, this review finds it unlikely that SNAP households would legitimately choose to spend large portions of their benefit allotments at a small store such as Natural Supermarket Corp.

Attachment 5 also reveals some very unusual transaction patterns. For example, 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

The Appellant has argued that in a store where one turkey can cost \$60.00, it is not unreasonable to have such charges. The Appellant also contends that the phrase “excessively large” is a subjective characterization that has no basis in law.

It should be noted that the Appellant has offered no evidence that would suggest that customers are routinely purchasing large-ticket items, such as a \$60.00 turkey. Additionally, the Appellant's inventory evidence does not show turkeys (or any other meat item) being purchased with such regularity as to support frequent, large transactions. In fact, the evidence suggests instead that turkey and other deli items were not being sold whole, but were sold sliced, by the pound, or were used in the making of prepared sandwiches.

The contractor's store visit report shows a large amount of food available for purchase, but there was no evidence that the firm sells bundles of meat, or cases of food or beverages at high prices. Rather, the appearance is that food items are sold individually at relatively small prices. For a large number of randomly-selected items to repeatedly add up to 5 U.S.C. § 552 (b)(6) & (b)(7)(C) is extraordinarily unlikely.

As for the contention that the phrase "excessively large" has no basis in law, it is true that regulations do not limit the amount of benefits that can be spent in a single transaction. However, the firm has not been charged with exceeding any spending limitations. Rather, the patterns of spending that take place at the Appellant firm are highly irregular in comparison to other area stores. When such unusual patterns exist over a long period of time, suspicions of Program violations are aroused. Furthermore, as stated earlier, the Appellant has not offered a single piece of evidence, such as itemized cash register receipts or other documentation, to prove that the specific transactions cited in Attachment 5 were legitimate purchases of eligible food.

It is the finding of this review that the attachments furnished with the charge letter adequately identify the irregular patterns of SNAP transactions which indicate that trafficking was likely taking place. The transactions listed in the charge letter are highly unusual and substantially different from comparable stores in the area. Based on these and other factors, such as the store's physical characteristics and inventory, the case of trafficking is convincing.

In an appeal of adverse action, the onus is on the Appellant to prove, by a preponderance of the evidence, that the administrative action should be reversed. This means submitting sufficient and compelling evidence that would lead a reviewer to conclude that trafficking did not occur. Unfortunately, the Appellant's evidence is inadequate and its contentions do not sufficiently address the specific transactions listed in the charge letter. Therefore, it is the conclusion of this review that the transactions in the charge letter were, more likely than not, the result of trafficking violations committed by the Appellant.

Trafficking Case based on EBT Data

One of the chief arguments by the Appellant relates to USDA's use of a fraud detection system known as ALERT. The Appellant contends that the allegations of trafficking lack evidence and are based on mere suspicion by way of the agency's detection software. In its original reply to the charge letter, the Appellant argued that the allegations of trafficking lack statements from investigators confirming that an employee of the firm agreed to and did, in fact, exchange SNAP benefits for cash or otherwise. Similarly, the Appellant argued that there were not such statements from the general public confirming trafficking, nor was there any video evidence of violations. The Appellant further claims that FNS did not make a comparison with similar stores

in the community. From the Appellant's perspective, FNS relied solely on hyperbole and conjecture without any direct evidence. The Appellant said, "Essentially, the agency has said that since it does not understand the charges, [t]rafficking must be occurring."

With regard to these contentions, this review acknowledges that a conclusion of trafficking cannot be drawn from EBT data alone, nor would it be possible to do so in a case based primarily on inconsistent redemption data. It is noted that USDA employs a computerized fraud detection tool to identify EBT transactions that form patterns having characteristics indicative of trafficking. However, this tool does not, by itself, determine or conclude that trafficking has occurred. FNS's Retailer Operations Division must still analyze the transaction data and patterns with other factors, such as observations from a store visit, an analysis of customer shopping behavior, and a comparison with similar stores in the area, and then render a determination as to whether or not the questionable transactions were, more likely than not, the result of trafficking. The legality of this method is identified in 7 CFR § 278.6(a) which states, in part, "FNS may disqualify any authorized retail food store ... if the firm fails to comply with the Food and Nutrition Act of 2008, as amended, or this part. **Such disqualification shall result from a finding of a violation on the basis of evidence that may include facts established through on-site investigations, inconsistent redemption data, [or] evidence obtained through a transaction report under an electronic benefit transfer system**" [Emphasis added.]

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

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

It is important to restate here that in an appeal of adverse action, the onus is on the Appellant to prove by a preponderance of the evidence that the administrative action should be reversed. Despite having a specific list of questionable transactions presented to the firm, it offered no relevant evidence, such as itemized cash register receipts, to prove that the specific transactions listed in the charge letter were legitimate purchases of eligible food.

Disqualification Based on Lack of Compliance Policy?

The Appellant, through counsel, has argued that the Retailer Operations Division based its disqualification decision on the firm's failure to establish and implement an effective compliance policy. According to the Appellant, the Retailer Operations Division incorrectly concluded that the reason for the permanent disqualification was a direct consequence of the firm's failure to submit a compliance policy. The Appellant further claimed that the Retailer Operations Division did not conclude that trafficking had occurred or that it did not occur; that it was silent on that matter.

With regard to these contentions, there is no evidence at all that the Retailer Operations Division's disqualification determination was based on anything other than trafficking. The June 25, 2018, determination letter clearly states in the first paragraph, "We find that the violations cited in our charge letter occurred at your firm."

If the agency was silent on anything, it was silent on whether or not the firm *had* a compliance policy. In the second paragraph of the determination letter, the reference to the firm's compliance policy and program was made only in consideration of the firm's eligibility for a trafficking civil money penalty. It is entirely possible that the Appellant firm does have a compliance policy and program. But the Retailer Operations Division determined that the Appellant did not submit sufficient evidence of such a policy and program to be eligible for a civil money penalty in lieu of permanent disqualification.

In order to be eligible for a trafficking CMP, a firm must submit "substantial evidence" that it fulfills each of the four criteria outlined in 7 CFR § 278.6(i). The standards of evidence are further detailed in § 278.6(i)(1) and (2).

It must be noted that the Appellant did not, at any time, submit evidence, let alone "substantial evidence," to demonstrate that the firm had a compliance policy and program of any kind. This review concedes that the mention of a trafficking CMP in the determination letter, when the firm did not submit evidence to be eligible for this alternative penalty, may have caused confusion and may have given an impression that the disqualification was based on the firm's failure to provide sufficient evidence of a compliance policy and program. However, this review finds no evidence that the disqualification of Natural Supermarket Corp. was based on anything but trafficking violations.

As a matter of formality, this review finds that Natural Supermarket Corp. is not eligible for a trafficking CMP because there is no evidence that the Appellant submitted documentation that would indicate that the firm had a compliance policy or training program of any kind. Therefore, in accordance with 7 CFR § 278.6(b)(2)(ii) and § 278.6(i), a civil money penalty in lieu of permanent disqualification for trafficking cannot be granted in this case.

As to the Appellant's claim that proof of a compliance program is necessary only when trafficking or other violations have been proven to occur, and its claim that a compliance program does not need to be shown if the Appellant has rebutted the allegations of trafficking, such claims have no basis in fact. Regulations at 7 CFR § 278.6(b) clearly state that at the charge letter level, if a firm wishes to be considered for a CMP in lieu of permanent disqualification for trafficking, it must make a request and submit evidence of its eligibility for a CMP within 10 days of receipt of the charge letter. Paragraph (b)(iii) of Section 278.6 states that if a firm fails to request a CMP and submit the required documentation to verify its eligibility for such a penalty within 10 days of receipt of the charge letter, it "shall not be eligible for such a penalty." There is nothing in the regulation that states a firm must first be found guilty of trafficking before it is required to submit evidence of an effective compliance policy and program. Similarly, if a firm successfully rebuts the trafficking allegations, there is no need for a CMP. In this case, the Retailer Operations Division did not find the Appellant's rebuttal to be convincing, so permanent

disqualification was imposed. Because the Appellant failed to timely submit documentation in support of its request for a CMP, that alternative penalty was not an option.

Appellant's Evidence

As noted earlier, the Appellant submitted a large amount of evidence in support of its contentions. These included inventory purchase invoices and receipts, photographs, price lists, and an affidavit from the Appellant owner. The Appellant contends that this evidence is “overwhelming,” and should have been enough to dispel any suspicions of trafficking. Finally, the Appellant contends that the Retailer Operations Division failed to consider the entire record and abused its discretion when it permanently disqualified the firm.

Unfortunately, this review does not agree. For instance, the majority of inventory purchase receipts are dated outside of the five-month review period of October 2017 to February 2018. Out of nearly 200 pages of inventory records, just 52 pages were from the period in question. While the applicable receipts do show a variety of food items purchased from a variety of vendors, they do not demonstrate a sufficient amount of merchandise to cover even the SNAP transactions during that period. According to the Retailer Operations Division's analysis, the receipts from the review period totaled just 5 U.S.C. § 552 (b)(6) & (b)(7)(C). The firm's SNAP redemptions during that same period totaled 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Even with a generous mark-up allowance, it is clear that the firm either failed to produce all of the inventory records from the review period or it had more SNAP redemptions than its inventory would have allowed. Because an accurate conclusion cannot be drawn, this review finds the inventory records to be of little evidentiary value.

Likewise, the photographs submitted by the Appellant are all undated and were likely taken after the firm received the charge letter. However, they are substantially similar to the photos taken by the contractor, and thus do not offer any significant insight.

The price list seems to indicate that the firm sold many high-priced items, such as cases of food and beverages. However, this is contrary to the information that was obtained by the contractor during its store visit. The contractor's store visit report was completed with the cooperation of store personnel. At that time, the most expensive item in the store was a pound of sliced roast beef for \$11.99. According to the contractor, there was no indication that the store sold expensive food items, such as meat bundles, seafood specials, and/or fruit and vegetable boxes. Accordingly, the price list showing expensive food items gives an impression of being created after receipt of the charge letter in an attempt to validate the very large and suspicious transactions listed in the charge letter attachments.

This review does not find the Appellant's evidence to be compelling or persuasive in any way. Therefore, it does not provide a valid basis for dismissing the charges or for mitigating the penalty imposed.

It should be noted here that there is no evidence that the Retailer Operations Division failed to consider the entire record in this case. The agency has produced a large volume of analytical data and narrative related to the transactions listed in the charge letter and the responses submitted by the Appellant. This review finds that the Retailer Operations Division fully complied with SNAP regulations in imposing a permanent disqualification against the firm and that the action taken in this case was consistent with penalties imposed against other retailers who have been disqualified from the program in the past for similar violations.

Hardship to SNAP Recipients

The Appellant has stated that the community would be severely harmed if the firm's ability to accept SNAP is terminated because its customers would have to travel unreasonably long distances from their home to purchase eligible food.

With regard to this contention, it is recognized that some degree of inconvenience to SNAP households is likely whenever a SNAP-authorized store is disqualified and households are forced to use their benefits elsewhere. However, there are no provisions within the regulations that would allow for a dismissal or reduction of the charges due to hardship to SNAP households. Regulations at 7 CFR § 278.6(f) do allow, in some circumstances, for a hardship civil money penalty to be imposed in lieu of disqualification when there is an absence of other SNAP-authorized retailers in the area. However, the regulations are clear that a hardship CMP may not be imposed in lieu of permanent disqualification for trafficking.

Therefore, the Appellant's claim that the community will be adversely affected does not provide a valid basis for dismissing the charges or for mitigating the penalty imposed.

CONCLUSION

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

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

RIGHTS AND REMEDIES

Applicable rights to a judicial review of this decision are set forth in Section 14 of the Food and Nutrition Act of 2008 (7 U.S.C. § 2023) and in Section 279.7 of the SNAP regulations. If a judicial review is desired, the complaint, naming the United States as the defendant, must be filed in the U.S. District Court for the district in which the Appellant owner resides or is engaged

in business, or in any court of record of the State having competent jurisdiction. If a complaint is filed, it must be filed within 30 days of receipt of this decision.

Under the Freedom of Information Act, we are releasing this information in a redacted format as appropriate. FNS will protect, to the extent provided by law, personal information that could constitute an unwarranted invasion of privacy.

JON YORGASON
Administrative Review Officer

December 18, 2018