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

Nazma Deli and Grocery Store, Inc,

Appellant,

v.

Office of Retailer Operations and Compliance,

Respondent.

Case Number: C0228368

FINAL AGENCY DECISION

The U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS), finds that there is sufficient evidence to support the determination by the Office of Retailer Operations and Compliance to impose a permanent disqualification against Nazma Deli and Grocery Store, Inc. (hereinafter Appellant) from participating as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP).

ISSUE

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

AUTHORITY

According to 7 U.S.C. § 2023 and the implementing regulations at 7 CFR § 279.1, "A food retailer or wholesale food concern aggrieved by administrative action under § 278.1, § 278.6 or § 278.7 . . . may . . . file a written request for review of the administrative action with FNS."

CASE CHRONOLOGY

USDA conducted an investigation of the compliance of Appellant with federal SNAP law and regulations during the period June 30, 2020, through July 21, 2020. The investigation determined that personnel at the Appellant firm accepted items purchased with 5 U.S.C. § 552 (b)(6) & (b)(7)(C) SNAP benefits in exchange for 5 U.S.C. § 552 (b)(6) & (b)(7)(C) cash taken from the firm's cash register in Exhibits D and E as noted in the letter of charges. Intentionally exchanging SNAP benefits for cash or purchasing products originally purchased with SNAP benefits in exchange for cash or consideration other

than eligible food are defined as trafficking under 7 CFR § 271.2. These transactions were deemed clearly violative and warrant a permanent disqualification. Additionally, personnel at the Appellant firm also accepted SNAP benefits in exchange for ineligible merchandise on one separate occasion (Exhibit A). The ineligible items sold are best described in regulatory terms as common nonfood items. The investigative report shows that the owner handled the transaction involving the ineligible items in Exhibit A while the owner and a clerk were involved with the trafficking violations in Exhibits D and E. On two occasions (Exhibits B and F), the clerks refused to allow the purchase of ineligible items using SNAP while on one occasion (Exhibit C), the clerk refused to exchange SNAP benefits for cash. However, it is noted that the same clerk from Exhibits B and C subsequently offered to purchase products originally purchased with SNAP benefits from the investigator in Exhibit C and then intentionally purchased products originally purchased with SNAP benefits in exchange for cash in Exhibit E. This clerk was subsequently identified by the owner in her December 16, 2020, email as being her husband. This email also identified the owner of record as being the clerk in Exhibits A and D.

As a result of evidence compiled from this investigation, the Office of Retailer Operations and Compliance informed Appellant, in a letter dated December 11, 2020, that the firm and its ownership were charged with violating the terms and conditions of the SNAP regulations, 7 CFR § 278.6(e)(1). The letter of charges states, in relevant part, "As provided by Section 278.6(e)(1) of the SNAP regulations, the sanction for trafficking . . . is permanent disqualification." The letter also states that "under certain conditions, FNS may impose a civil money penalty (CMP) . . . in lieu of permanent disqualification of a firm for trafficking."

Appellant responded to the charges in an email dated December 16, 2020, that did not request or provide any supporting documentation for a CMP. The Office of Retailer Operations and Compliance notified Appellant by letter dated January 27, 2021, that the firm was permanently disqualified from participation as a SNAP retailer in accordance with 7 CFR § 278.6(c) and 278.6(e)(1) for trafficking violations. This letter also stated that Appellant was not eligible for the CMP because insufficient evidence was submitted to demonstrate that it had established and implemented an effective compliance policy and program to prevent SNAP violations.

By letter dated February 5, 2021, Appellant, through counsel, appealed the Office of Retailer Operations and Compliance decision and requested an administrative review of this action. The appeal was granted. Subsequent correspondence dated March 5, 2021, was received.

STANDARD OF REVIEW

In an appeal of an adverse action, Appellant bears the burden of proving by a preponderance of evidence that the administrative action should be reversed. That means Appellant has the burden of providing relevant evidence that a reasonable mind, considering the record as a whole, would accept as sufficient to support a conclusion that the argument asserted is more likely to be true than untrue.

CONTROLLING LAW

The controlling law in this matter is contained in the Food and Nutrition Act of 2008, as amended (7 U.S.C. § 2021), and implemented through regulation under Title 7 CFR Section 278. In particular, Sections 278.6(a) and Part 278.6(e)(1)(i) establish the authority upon which a permanent disqualification may be imposed against a retail food store or wholesale food concern in the event that personnel of the firm have engaged in trafficking of SNAP benefits.

7 CFR § 271.2 states that: Eligible foods means any food or food product intended for human consumption except alcoholic beverages, tobacco, and hot food and hot food products prepared for immediate consumption.

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

7 CFR § 278.6(a) states that: FNS may disqualify any authorized retail food store . . . if the firm fails to comply with the Food and Nutrition Act of 2008, as amended, or this part. Such disqualification shall result from a finding of a violation on the basis of evidence that may include facts established through on-site investigations.

7 CFR § 278.6(e)(1)(i) reads, in part, "FNS shall . . . . [d]isqualify a firm permanently if . . . personnel of the firm have trafficked as defined in § 271.2." Trafficking is defined, in part, in 7 CFR § 271.2, as, "The buying, selling, stealing, or otherwise effecting an exchange of SNAP benefits . . . for cash or consideration other than eligible food, either directly, indirectly, in complicity or collusion with others, or acting alone . . . ." Trafficking is further defined, in 7 CFR § 271.2, to include "(5) Intentionally purchasing products originally purchased with SNAP benefits in exchange for cash or consideration other than eligible food."

7 CFR § 278.6(f)(1) states in relevant part, "FNS may impose a civil money penalty as a sanction in lieu of disqualification when the firm is selling a substantial variety of staple food items, and the firm's disqualification would cause hardship to SNAP households. A civil money penalty for hardship to SNAP households may not be imposed in lieu of a permanent disqualification."

7 CFR § 278.6(i) states, inter alia: "FNS may impose a civil money penalty in lieu of a permanent disqualification for trafficking . . . if the firm timely submits to FNS substantial evidence which demonstrates that the firm had established and implemented an effective compliance policy and program to prevent violations of the Program."

7 CFR §278.6(b)(2)(ii) states, inter alia: "Firms that request consideration of a civil money penalty in lieu of a permanent disqualification for trafficking shall have the opportunity to submit to FNS information and evidence . . . that establishes the firm's eligibility for a civil money penalty in lieu of a permanent disqualification in accordance with the criteria included in §278.6(i). This information and evidence shall be submitted within 10 days, as specified in §278.6(b)(1)." Part 278.6(b)(2)(ii) further states that if a firm fails to request consideration for a

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

In addition, 7 CFR § 278.6(i)(2) states in relevant part, "As specified in Criterion 3 above, in determining whether a firm has established an effective policy to prevent violations, FNS shall consider written and dated statements of firm policy which reflect a commitment to ensure that the firm is operated in a manner consistent with this part 278 of current FNS regulations and current FSP policy on the proper acceptance and handling of food coupons." This section goes on to state, "As required by Criterion 2, such policy statements shall be considered only if documentation is supplied which establishes that the policy statements were provided to the violating employee(s) prior to the commission of the violation." This section further states, "A firm which seeks a civil money penalty in lieu of permanent disqualification shall document its training activity by submitting to FNS its dated training curricula and records of dates training sessions were conducted . . ."

APPELLANT'S CONTENTIONS

The following may represent a summary of Appellant's contentions in this matter; however, in reaching a decision, full attention and consideration has been given to all contentions presented, including any not specifically recapitulated or specifically referenced herein:

The December 16, 2020, email response by the owner to the charge letter:

- The owner admitted to allowing the sale of the spoons in Exhibit A as she was busy and thought they were eligible since they are used to eat the other products purchased; and,
- In Exhibit C, the investigator tried to get cash off EBT multiple time, but was refused. A friend of the owner was in the store that day and told the investigator that he would pay for Red Bull since he drinks about four cans a day as long as it's for a cheaper price. The investigator did not say where or what method of payment he was going to use for the Red Bull. The friend was not in the store in Exhibit D when the investigator brought the Red Bull so the owner called her husband and told him and then paid the investigator 5 U.S.C. § 552 (b)(6) & (b)(7)(C) from the register for the friend. The investigator did not mention that he used his EBT to purchase the Red Bull or mention a receipt. The friend came in two days later to take the drinks and give the owner the cash for them. There may have been a miscommunication with the slight language barrier, but the owner is certain the investigator did not mention that he used EBT at BJ's. In Exhibit E, two more cases were brought in by the investigator and kept by the owner's husband for the friend who had placed the order. Again, no mention of how or where the items were purchased was brought up.

  Appellant submitted no evidence or other rationales in support of these contentions.

The March 5, 2021, brief and affidavits:

- This case was issued subsequent to the USDA's new rules regarding FOIA. Specifically, the

Appellant was not permitted FOIA requests and the abatement of this matter therewith. This is a violation of the regulations. 7 CFR § 278.6(b)(1) states in clear terms, "Any firm considered for disqualification… shall have full opportunity to submit to FNS information, explanation or evidence concerning any instances of non-compliance before FNS makes a final administrative determination." Appellant cited a Final Agency Decision from 2016 as evidence that the Appellant was not afforded the opportunity to submit a response to the charges. Appellant further states that it appears to be FNS's position that it can now make a decision prior to the retailer receiving a FOIA response – thereby depriving the retailer of a full opportunity to respond;

- The Department sent a charge letter dated December 11, 2020, to store ownership alleging a misuse of SNAP benefits and set forth two allegations of trafficking. The Appellant timely responded to the charges, but a permanent disqualification was issued and it was also determined that the store did not qualify for a hardship CMP;
- The store operates as a small grocery store and is in an economically depressed area surrounded by poverty and many low-income families. The store sells a variety of staple foodstuffs, nearly all of which qualify under SNAP. Appellant cited demographic data for area residents including statistics on households with children or older members as well as the median income of SNAP households;
- This case is an attempt to exploit 7 CFR § 271.2's definition of trafficking, which includes under subsection 5, an extension of the definition to include, "Intentionally purchasing products originally purchased with SNAP benefits in exchange for cash or consideration other than eligible food." The language plainly imputes intent into an element of the violation. Furthermore, it's logical that the "intent" component relates to "the purchase of products originally purchased with SNAP benefits." In order for the Department to prevail on a Red Bull case like this, there are three elements that have to be settled by a preponderance of the evidence in favor of the presence of a violation: 1. Did the retailer's personnel purchase the Red Bull from the investigator? 2. Was the retailer's personnel aware of what payment method the Red Bull was purchased with? 3. Did the retailer intend to purchase items that were bought using EBT? If store personnel were unaware that the items were purchased using EBT, then whether or not the transaction was completed is moot. Disqualification is entirely dependent upon knowledge on the part of the retailer's personnel. Anything less than that is simply inadequate;
- Furthermore, where the purchaser is not affiliated with the store, trafficking cannot be considered as the responsibility of the retailer. As noted in the clerk's affidavit, the purchaser in this case was a customer and friend of the clerk and not affiliated in any way with the store. He has never been employed by the store, never worked the register or otherwise been in a position where he could be considered "store personnel." The customer was speaking to the clerk when the investigator approached, but he decidedly was not working at the store;
- Despite no change in the language or definition from Congress, the Department wished to try to capture additional facially valid transactions within the definition of trafficking under the belief that the intent was to defraud the program. A reading of the stated language clearly indicates that the intent is to capture transactions which are intended for store use, and not to capture transactions for personal use. However, this infringes upon personal property ownership laws within the state. The purchase of items, such as Red Bull, from a retailer are governed by the Uniform Commercial Code – in this case by the State of Connecticut's

Section 42a-2-401 [sic]. This law, entitled *Passing of Title; Reservation for Security; Limited Application of this Section*, notes under subsection (2) that title of goods (personal property) passes to the buyer at the time and place at which the seller physically delivers the goods, after which the Buyer retains power to transfer the personal property under Sec 42a-2-403, *Power to Transfer; Good Faith Purchase of Goods; "Entrusting.*" Sec 42a-2-403(1) states specifically that "a purchaser of goods acquires all title which his transferor had or had power to transfer." That means that the buyer of personal property, such as Red Bull, has the same authority to transfer title of the goods to a third party that the seller from whom they purchased the goods. So, if the SNAP participant purchases Red Bull from BJ's (for example), by state law they take all rights to the property that BJ's had to it prior to the purchase. Such rights include the ability to re-sell the items if they so choose. The fact that the item was purchased with EBT benefits does not change the state laws that control right and entitlement to property, nor do federal regulations then supersede state law to place a limitation on personal property conveyance. Accordingly, for the USDA to limit a participant's rights to property post purchase, it would have to base such authority upon Congressional grant. However, the statute which governs participant's use of EBT benefits, 7 U.S.C. §2015(b), merely states that participants shall use the benefits to purchase food from retail food stores at prices prevailing in such stores. Jurisdiction over items purchased on EBT ends with the sale of the items to the participant by the retailer. If Congress had intended the Department to restrict transactions after the purchase of the eligible item by the participant, it would not have gone to such great lengths to avoid such language in the statute. In short, and though it's likely an issue that exceeds this office's authority or control, the regulation under which this case proceeds is in excess of FNS's authority;

- After reviewing the investigator's affidavits and descriptions of the transactions, the Appellant contests that the transactions ever occurred the way presented. The investigator's statement is that (1) the investigator suggested buying items for the store with his food stamps to sell to the store; which (2) the owner agreed with; (3) the investigator told the clerk he could get him Red Bull and Monster and the clerk gave the investigator case and quantity specifics, and (4) the clerk set the price 5 U.S.C. § 552 (b)(6) & (b)(7)(C) per case. The investigator claims that the clerk came up with the idea of buying Red Bull. That's what the plain language of the affidavit says. So magically this clerk, along with the hundreds of other Red Bull cases RIB has been pushing through for the last two years, just comes up with the idea to buy Red Bull (not Enfamil or other high dollar items) all on his own – just like every other clerk across the country involved in these investigations? That's incredibly unlikely. It is more likely that the investigator suggested the purchase of Red Bull cases to the clerk – a difference which is not as slight as it might appear as it attributes intent to the clerk which was not actually there: the identification of a product he would like to purchase;
- The Appellants flat [sic] deny the allegation of trafficking. The person who bought the Red Bull was not affiliated with the store, was not the store's owner, and did not buy the items with any understanding that they had been bought on EBT. The store's personnel went to great lengths to avoid violations of any type – saying "I don't want to get in trouble" when the investigator attempted to traffick. Affidavits from the owner, the clerk, and the customer paint a very different – and frankly more logical and credible – picture.
  5 U.S.C. § 552 (b)(6) & (b)(7)(C) affidavit confirms that an investigator came to the store on June 30, 2020, and that he did not request that the investigator purchase anything. As mentioned above, the investigator did not approach the owner or speak to her, and instead

spent time talking with the clerk and the customer. These two direct witnesses to the transaction verify: (1) the purchaser was the customer, not the store employee; (2) the owner was not involved in the transaction at all, despite what the RIB affidavits state; and (3) there was never a mention that the Red Bull had been bought on EBT. The Investigator just walked into the store with the items and tried to sell them on the spot – the way so many SNAP and homeless people do when they're trying to get cash by selling their possessions;

- These statements are "hearsay" by definition (an out of court statement made by a declarant offered to prove the truth of the matter asserted). Hearsay may only be relied upon in administrative matters where the proponent (in this case, the Investigator or the Department) has to show that (1) the Investigator was not biased and had no interest in the result of the case; (2) that the owner, 5 U.S.C. § 552 (b)(6) & (b)(7)(C), could have obtained the information contained in the statement before the hearing and subpoenaed the investigator; (3) the information is not inconsistent on its face; and (4) the information has been recognized by the courts has inherently reliable. Appellant referenced two court case pertaining to hearsay;
- Furthermore, the investigative records completely lack any evidence of trafficking. There are no pictures of eligible food items, no notes about the disposition of items, and no photos of the alleged cash that was received is completely absent from the records altogether. As such, there's an inadequate amount of evidence in the record to justify a permanent disqualification. The Department has failed to make any of those showings in general, but the fact is plain on the face of the documents presented by the Department as there is no reasonable opportunity for the Appellant to subpoena or otherwise depose the witness because the Department has redacted all of that information prior to sending the charge letter. Therefore, the document (and indeed all of the documents) cannot and should not be relied upon by this Department in determining whether or not trafficking has occurred. As such, the government lacks admissible evidence to sustain allegations of trafficking;
- Appellant referenced Administrative Review Branch case, *Circle Seven Food & Grocery Market vs. Office of Retailer Operations and Compliance, Case No: C0223624*, it is the Department's burden to prove its case and issue a disqualification. Id at 3. In that case, the Department had little more than a he-said-she-said set of allegations wherein the investigator alleged that trafficking had occurred (an exchange of cash for Red Bull purchased on EBT). Id. The Retailer flatly denied the transactions, noting inconsistencies with the transaction descriptions. Id. Ultimately, Administrative Review Officer Proulx found that the record was inadequate for purposes of issuing permanent disqualifications: "A review of the Office of Retailer Operations and Compliance's case file indicated the determination cannot be supported based on the evidence." Id. A more recent case, *7-Eleven Inc. F 34537A vs. Retail Operations Division, Case No C0225055*, decided February 16, 2021, determined that where the RIB investigation made similar allegations to those which are present in that case, the evidence was insufficient to satisfy the Department's burden where the retailer stated that the store personnel were unaware the items were sold on EBT. In that matter, the investigator represented that he was in town for his mother's funeral, that he was a military veteran who had items to sell for cash, and where the investigator was unsuccessful in getting the retailer to traffick using cash-back or card purchasing efforts. This case mirrors *Circle Seven* and *7-Eleven* in that the documentation here is inadequate, and where RIB had the opportunity and authority to be more thorough in its documentation and recording of the transactions, the burden must continue to be borne by the Department. Inaccuracies, vagaries, and forgotten

documentation should not be permitted in the way that this case has been. Accordingly, this matter should be dismissed: and,

- Alternatively, the Appellant contends that a CMP should have been issued in this case, as the firm complied with 7 CFR § 278.6.

Appellant submitted affidavits from the owner, a store clerk (actually the owner's husband), and a customer in support of these contentions.

ANALYSIS AND FINDINGS

It is important to clarify for the record that the purpose of this review is to either validate or to invalidate the earlier decision of the Office of Retailer Operations and Compliance and is limited to what circumstances were at the basis of the Office of Retailer Operations and Compliance action at the time such action was made. In an appeal of an adverse action, the Appellant bears the burden of proving by a preponderance of evidence that the administrative action should be reversed. That means the Appellant has the burden of providing relevant evidence that a reasonable mind, considering the record as a whole, would accept as sufficient to support a conclusion that the argument asserted is more likely to be true than untrue. Assertions that the firm has not violated program rules, by themselves and without supporting evidence and rationale, do not constitute valid grounds for dismissal of the current charges of violations or for mitigating their impact.

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

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

was using SNAP for purchases at the Appellant firm, offered to purchase items for the store using SNAP benefits and would then agree to sell the items to the store at a greatly reduced price.

It is noted that in the March 5, 2021, brief, the Appellant incorrectly references the State of Connecticut when discussing personal property ownership laws, since the Appellant firm is, in fact, located in New York.

The investigative report states that the male clerk in Exhibits B, C, and E identified himself to the investigator as being the owner while the female clerk in Exhibits A and D identified herself as being the owner's wife. However, the owner of record's (5 U.S.C. § 552 (b)(6) & (b)(7)(C)) December 16, 2020, reply to the charges clearly identified the male clerk as being her husband and the clerk in Exhibits A and D as being the owner. A review of FNS records for 2016 found that the owner previously identified 5 U.S.C. § 552 (b)(6) & (b)(7)(C) as being her husband, but not an owner. Accordingly, these proven identities will be used going forward.

The investigative report shows that the clerk in Exhibit A allowed the sale of ineligible, nonfood items using SNAP with no questions or concerns. This clerk was subsequently self-identified as being 5 U.S.C. § 552 (b)(6) & (b)(7)(C), the owner of record, in the December 16, 2020, reply to the charges. That the owner readily permitted this violative SNAP transaction for a complete stranger is strong evidence that this was a normal business practice at the Appellant firm indicating an ongoing pattern of SNAP violations. This is further supported by the fact that the Appellant firm was found to have allowed the sale of ineligible, nonfood items using SNAP benefits during an undercover FNS investigation in 2019 and was awarded a hardship CMP in lieu of a six month period of disqualification. It is therefore not surprising that the owner and a second clerk, the owner's husband, would agree to purchase items for cash that the investigator would buy using SNAP benefits. In fact, the owner's husband in Exhibit C even mentioned to the investigator that he trusted the investigator because the investigator was in the store a lot. The owner's husband stated that he had just gone shopping, but asked the investigator if he could get energy drinks. The investigator replied that Red Bull and Monster could both be bought and the owner's husband told the investigator to buy four cases of Monster and that he would pay the investigator 5 U.S.C. § 552 (b)(6) & (b)(7)(C) per case clearly proving intent.

In summary, the investigative report shows that the owner accepted SNAP benefits for the purchase of ineligible items in Exhibit A and that the owner and her husband also accepted items purchased with SNAP benefits in exchange for cash in Exhibits D and E. It is clear that the investigator started the conversation in Exhibit C by asking the owner's husband if he wanted the investigator to purchase various items for the store with food stamps in exchange for cash. It should be noted that this is not illegal, does not constitute entrapment, and is therefore allowed since the investigator is merely giving the owner's husband an opportunity to violate the program. As to Appellant's question as to why other products, like Enfamil, were not picked, it would make sense that Enfamil, which is limited only to those customers with infants being bottle fed, would be much less in demand as compared to a product such as Red Bull. Additionally, not every store carries Enfamil so it is not unusual or suspect that the investigators would use a well-known and popular product such as Red Bull that has been successful in the past. That the owner's husband and the owner were both agreeable to indirect trafficking is supported by the conversations documented in investigative report. Additionally, the narratives

throughout the investigative report document that the owner and her husband were undoubtedly aware that the energy drinks were to be purchased and had been purchased using SNAP benefits thus clearly showing that knowledge and therefore intent was present refuting Appellant's claim of the investigator not stating how the cases of energy drinks would be purchased.

Appellant's March 5, 2021, brief also incorrectly claims that, "the investigative records completely lack any evidence of trafficking. There are no pictures of eligible food items, no notes about the disposition of items, and no photos of the alleged cash that was received is completely absent from the records altogether. As such, there's an inadequate amount of evidence in the record to justify a permanent disqualification." Contrary to this claim, a review of the investigative report clearly shows the denominations for the cash paid by the owner and her husband to the investigator in both Exhibits D and E are listed in the investigative report and photos of the bills showing their serial numbers are also included in the investigative record along with photos of all items purchased at the Appellant firm, both eligible and ineligible, as well as photos of the cases of Red Bull and their receipts.

The investigative report shows that the nature and scope of the violations under review do violate SNAP regulations and a review of the report shows no errors or discrepancies. The transaction amounts cited in the report have been matched to SNAP transactions posted by the Appellant firm and by the firm selling the energy drinks on the dates in question with no disagreements and a comparison of the dates/times/amounts on the POS receipts given by the Appellant firm to the investigator correspond to the dates/times/amounts provided to FNS by the firm's EBT processor when it submitted the transactions to FNS for reimbursement. FNS evidence consisting of photos of the eligible and ineligible items purchased, photos of the POS receipts with the firm's name, photos of the cases of Red Bull and their receipts, and detailed donation records signed by a local charitable organization provides conclusive evidence supporting the details provided in the investigative report. The exchange of cash for items purchased using SNAP benefits in Exhibits D and E constitutes trafficking as previously defined in SNAP regulations with the penalty being permanent disqualification. There is no regulatory threshold for the dollar value of the items purchased or for the amounts of cash paid for them.

Appellant offered no evidence to validate its claims other than a handwritten affidavit by a clerk and a typed affidavit purportedly from a customer who allegedly purchased the cases of Red Bull from the investigator as well as a short typed affidavit by the owner. It is unusual and telling that the owner's affidavit makes no attempt to support the claims made in the other two affidavits that it was a "customer" who purchased the Red Bull and not the store. It is also unusual and suspicious that while the owner's December 16, 2020, reply to the charges does mention that the clerk in the investigative report is her husband without providing his name, the March 15, 2021, brief and the three affidavits make no mention of the fact that the clerk identified as 5 U.S.C. § 552 (b)(6) & (b)(7)(C) is actually the owner's husband. No explanation has been offered as to why this information was withheld.

Appellant has offered no credible evidence that the purchaser was actually a customer. A comparison of the facts contained in the clerk/husband's and in the customer's affidavits to the owner's December 16, 2020, reply to the charges shows significant discrepancies in the dates that certain events occurred, in the number of cases of Red Bull, and in other significant facts. In

contrast, the owner's December 16, 2020, reply to the charges does match the dates and numbers of cases of Red Bull when compared to the FNS investigative report. This, combined with the fact that the reply to the charges was sent to FNS only two days after the Appellant received the charge letter, makes it even more likely that the clerk/husband's and the customer's affidavits were fabricated in an obvious attempt to avoid the trafficking charges and therefore are without any evidentiary value. Since Appellant's other contentions are only assumptions, not facts, and no basis has been presented to substantiate them, they are found to be without merit.

In regard to case law cited by the Appellant, considerations of relevant legal precedent through case law, or the lack thereof in relation to the present case, are beyond the scope of this review. This review relies upon the statute and regulations governing the SNAP and evaluates whether the decision to impose a disqualification upon the Appellant was in accordance with same and sustainable by a preponderance of the evidence. Appellant's case law references are acknowledged in this context only. This also applies to Appellant's claims involving the personal property ownership laws within the state of New York. The applicability of both the case law decisions and the personal property ownership laws to Appellant's case would be best decided during the judicial review process by a federal district court judge.

The Food and Nutrition Act of 2008, as amended, and the regulations issued pursuant thereto do not cite any minimum dollar amount of cash or SNAP benefits, or number of occurrences, for such exchanges to be defined as trafficking. Nor do they cite any degrees of seriousness pertaining to trafficking of SNAP benefits. Trafficking is always considered to be the most serious violation, even when the exchange of SNAP benefits for cash is dollar-for-dollar or is conducted by a non-managerial store clerk. This is reflected in the Food and Nutrition Act, which reads, in part, that disqualification "shall be permanent upon . . . the first occasion of a disqualification based on . . . trafficking . . . by a retail food store." In keeping with this legislative mandate, Section 278.6(e)(1)(i) of the SNAP regulations states that FNS shall disqualify a firm permanently if personnel of the firm have trafficked. There is no agency discretion in the matter of what sanction is to be imposed when trafficking is involved and second chances are not an authorized option.

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

Other Contentions

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

Regarding Appellant's contentions relating to the FOIA process, the FOIA is governed by current FOIA rules and regulations which fall outside of the purview of this administrative

review and so are not addressed further.

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

Appellant contends that the investigative report is hearsay, and that according to *U.S. Pipe & Foundry Co. v. Webb* and *J.A.M. Builders, Inc. v. Herman*, hearsay is only admissible in this case if it meets four criteria: "(1) the Investigator was not biased and had no interest in the result of the case; (2) that the Appellants could have obtained the information contained in the statement before the hearing and subpoenaed the investigator; (3) the information is not inconsistent on its face; and (4) the information has been recognized by the courts has inherently reliable." These cases also state hearsay must be reliable and credible. However, the cases cited by Appellant refer to the criteria for documents submitted into evidence in lieu of witness testimony in administrative hearings. Revisions to parts 278 and 279 of the Supplemental Nutrition Assistance Program regulations eliminated administrative hearings effective September 8, 2003. Accordingly, these case citations are not relevant to this administrative review.

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

CIVIL MONEY PENALTY

A CMP for hardship to SNAP households may not be imposed in lieu of a permanent disqualification as specified in SNAP regulations at 7 CFR § 278.6(f). Trafficking is a permanent disqualification so Appellant is not eligible for a hardship CMP.

The Office of Retailer Operations and Compliance determined that the Appellant was not eligible for a trafficking CMP in lieu of a disqualification under 7 CFR 278.6(i) because Appellant failed to request or to submit sufficient evidence to demonstrate that the firm had established and implemented an effective compliance policy and program to prevent SNAP violations within the specified timeframe. As such, the Office of Retailer Operations and Compliance determined that Appellant was not eligible for a trafficking CMP in lieu of permanent disqualification.

Based on the above discussion and the evidence under review, Appellant failed to meet the regulatory standard for a trafficking CMP as it did not request or provide substantial evidence

that it met all four criteria required by 7 CFR §278.6(i). Based on the above, the Office of Retailer Operations and Compliance's decision not to impose a CMP in lieu of disqualification is sustained as appropriate pursuant to 7 CFR §278.6(i).

CONCLUSION

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

Based on the discussion above, the determination by the Office of Retailer Operations and Compliance to impose a permanent disqualification against the Appellant business from participating as an authorized retailer in SNAP is sustained.

RIGHTS AND REMEDIES

Applicable rights to a judicial review of this decision are set forth in 7 U.S.C. § 2023 and 7 CFR § 279.7. If a judicial review is desired, the complaint must be filed in the U.S. District Court for the district in which Appellant's owner resides, is engaged in business, or in any court of record of the State having competent jurisdiction. This complaint, naming the United States as the defendant, must be filed within thirty (30) days of receipt of this decision.

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

ROBERT T. DEEGAN May 7, 2021
ADMINISTRATIVE REVIEW OFFICER