

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

New Dekalb Deli & Grocery Inc,

Appellant,

v.

Case Number: C0168491

Retailer Operations Division,

Respondent.

FINAL AGENCY DECISION

It is the decision of the U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS) that there is sufficient evidence to support a finding that the permanent disqualification of New Dekalb Deli & Grocery Inc. (New Dekalb Deli & Grocery 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 May 27, 2014, 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 January 2014 through March 2014. 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, through its previous counsel, replied to the charges by letter dated June 18, 2014, and requested documents under the Freedom of Information Act (FOIA). FNS responded to the FOIA request by letter dated July 22, 2014. On August 28, 2014, counsel appealed the Agency's FOIA response. FNS provided its final response to the FOIA on February 8, 2018. Appellant was then provided with ten days to provide a final reply to the charges. On February 14, 2018, Appellant's current counsel provided its final response to the charges. 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 14, 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 17, 2018, Appellant, through counsel, appealed the Retailer Operations Division's determination and requested an administrative review. The appeal was granted.

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 January 2014 through March 2014. This involved the following SNAP transaction patterns which are indicative of trafficking:

- There were an unusual number of transactions ending in a same cents value.
- There were multiple purchase transactions made too rapidly to be credible.
- 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 17, 2018, administrative review request, Appellant, through counsel, provided the following summarized contentions, in relevant part:

- The USDA has wrongfully concluded that the firm engaged in trafficking activities.
- The erroneous conclusion was based solely on a faulty analysis of records, with no additional investigation.
- The firm denies that anyone engaged in trafficking.
- Since there are no specific violations committed by personnel and there has been no prior action to warn the firm about the possibility of the violations, then the only remaining basis is evidence of intent according to 278.6(d).
- There is no evidence that shows intent.
- Seventy percent of the firm's business is from SNAP and the firm would not jeopardize this by engaging in illegal activity.
- The business is staffed by five full-time employees with one cash register and all employees have been trained and tested concerning SNAP requirements.

- The firm's unblemished record is evidence of its compliance with the law and its training and supervision of its employees.
- The store is well stocked and sells fruits, vegetables, and other cooking ingredients, including rice, beans, and pasta.
- Appellant has deli case selling a vast array of cold sandwiches which are the firm's best-selling items.
- Appellant should qualify for a hardship CMP because a disqualification would cause hardship to SNAP households as there are no other similar providers or SNAP authorized retailers in the immediate area.
- The owner provides the necessary items to the community including numerous large multi-family apartment houses and homeless shelters.
- The closest supermarket is .25 miles away.
- The baby food items are expensive including cans of Enfamil selling at \$20.00; \$24.99; and \$34.99.
- Regular customers will often call the store to place their large grocery orders, and then personally pick up these orders at which time they pay for their telephone orders and purchase additional items, which they cannot do at a supermarket.
- Attachment #1
 - This is the business model of the owner.
 - The sandwiches sell at 00 cents and soft drinks at 50 cents.
 - The owner was never informed that pricing items at same cents was not allowed.
 - It is unconscionable that the owner can be permanently disqualified based on a business judgement, without any other proof of wrongdoing, despite the number of same cents transactions being outside of the agency's acceptable computer analysis.
- Attachment #2
 - The business has two registers.
 - The first transaction is always the smaller amount which can be done in a minute or two and therefore the transactions were not conducted too rapidly to be credible.
- Attachment #3
 - The use of the EBT card is not within the control of Appellant.
 - Some customers let others use their card.
 - Most of the customers do not own vehicles and need to make multiple trips to the store to transport their purchases.
 - FNS never informed the owner that EBT card holders are not allowed to use their card more than once per day.
- Attachment #4
 - The average purchase 5 U.S.C. § 552 (b)(6) & (b)(7)(C) which is not unusual.
 - When the weather is hot during the summer, customers did not want to go out in the heat and therefore they make bulk purchases.
 - Although there are supermarkets in the area, they are not preferred because they are crowded with long lines and selling the same items for similar prices.
 - There is nothing unusual about a customer using a grocery store instead of a large supermarket, because they are more convenient, open longer, and competitively priced.

- All goods in New York City are costly.
- It is ludicrous for the agency to refuse to allow the owner to sell large containers of Enfamil without risking allegations of trafficking.
- The decision to permanently disqualify Appellant will cause irreparable injury and damage and the decision is inconclusive and arbitrary.
- The EBT transactions should require a more careful review before making such a major decision based totally upon computer generated reports which only create an unfounded inference and presumption of wrongdoing.
- FNS failed to establish intent, which is an essential element to permanently disqualify this owner.
- The letter of charges relates to incidents that occurred in 2014, the owner no longer has access to receipts, surveillance videos, or records due to the time gap.

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 New Dekalb Deli & Grocery as a convenience store on May 30, 2012. The case file indicates that in reaching a disqualification determination, the Retailer Operations Division considered information obtained during a November 15, 2013, 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:

- New Dekalb Deli & Grocery is approximately 700 square feet, with no additional food storage outside of public view.
- There were no shopping or shopping carts for customer use.
- There was one cash register and one point-of-sale device.
- There was no scanner for the quick processing of transactions.
- The check-out counter space was small.
- There were no meat/seafood specials or bundles that might sell for high prices.
- There was no fresh unprocessed meat, poultry, or fish.
- There was canned fish, deli meat, bacon, and hot dogs.
- There was limited fresh produce including apples, tomatoes, and lettuce (the latter two items were likely used for the preparation of the prepared food items.)
- Dairy included milk, ice cream, cheese, and butter.
- Other staple foods available for purchase were juice, bread, pasta, and limited canned goods.
- Much of the remaining stock consisted of accessory foods such as candy, spices, and carbonated and uncarbonated drinks.

- There was an extensive menu of prepared food items.
- The non-food items included tobacco products, health and beauty products, paper, cleaning products, and hot food.

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 as noted above, there is no indication from the store visit report that the store would be likely to have SNAP redemption patterns significantly different from similar-sized competitors.

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. There were an unusual number of transactions ending in a same cents value. During the review period, there were 893 transactions ending in 00 cents and 416 transactions ending in 50 cents that meet the parameters of this attachment. When such patterns are unsupported by special pricing structures, they are a strong indicator of trafficking in SNAP benefits.

Counsel explains that their highest selling items are sold at prices ending in 00 cents (sandwiches) and 50 cents (soda). However, the photographs from the store visit shows many items ending in a 9 cent value. The photographs show bread priced at \$2.19 and \$1.59, sub rolls 2 for \$1.00, tea -\$5.99, coffee - \$3.99, Tropicana juice - \$1.75, and Naked juice - \$4.00. The store's inventory contains almost exclusively inexpensive food items and accessory foods. It is possible that some of the smaller transactions are the result of purchasing one same cent item and this could explain some of the lower dollar same cent transactions. However, the larger transactions cited in the charge letter would most likely consist of the purchase of several relatively inexpensive items and it is unlikely that these purchases would routinely total to an amount ending in same cents. SNAP transactions consisting of multiple products are more likely to result in a random statistical spread **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. Consequently, when many transactions end in a same cents amount, it appears that these transaction amounts are contrived and in the absence of compelling evidence to the contrary, are suggestive of trafficking.

Appellant failed to provide a credible explanation for the same cent transactions listed on Charge Letter Attachment #1.

Charge Letter Attachment 2. Multiple purchase transactions were made too rapidly to be credible. This attachment lists 20 sets of SNAP transactions that met the parameters of this scan. Appellant was rapidly processing consecutive SNAP transactions many of which were high dollar transactions. The steps required to process a legitimate SNAP purchase include the following:

1. unloading items from a cart or basket however Appellant had neither;
2. separating eligible items and ineligible items;
3. handling by the cashier of individual items and scanning items or manually entering price;
4. bagging the items for carry out;
5. handing the customer bagged items to make room for more food items the customer is bringing to the counter;
6. informing the customer of the total;
7. pressing the “SNAP transaction key” on the point-of-sale device;
8. swiping the card;
9. entering by the customer of the required PIN;
10. cashier entry of the purchase amount;
11. confirming customer has a sufficient benefit balance;
12. processing and approval of the transaction by the system;
13. printing out register and EBT receipts;
14. accepting an alternate form of payment for nonfood items and possibly handling cash change; and
15. removing products from the checkout area so the next customer in line can begin another transaction.

While such transactions may be conducted in succession, performing these actions on large transactions cannot be done rapidly. The amount of time required is generally proportional to the dollar amount of the transaction; typically, the larger the dollar amount transacted the longer the time period between transactions. Appellant processed orders considerably faster than supermarkets typically process them, yet it has only one small checkout counter and none of the logistical tools (such as conveyor belts, rotating bagging platforms or order separators) that are routinely used in rapid operations. It is therefore unlikely that these multiple large transactions occurring within one minute could involve solely the sale of eligible foods.

Counsel provides inconsistent information indicating at one time that the store has one cash register and then later in the document indicates that Appellant has two cash registers. It is likely that the store has one cash register and two registers do not explain the questionable transactions.

Appellant did not provide any compelling justification or evidence that all the irregular transactions cited in Charge Letter Attachment 2 were for eligible food items only. It is more likely true than not true that these patterns are a result of the firm trafficking in SNAP benefits.

Charge Letter Attachment 3. Multiple transactions were made from individual benefit accounts in unusually short time frames. This attachment documents 58 sets of transactions conducted by 43 different SNAP households **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. 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.

Appellant, through counsel, contends that there are no regulations preventing such shopping patterns. This is true. However, 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. 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 photographs from the store visit offer no legitimate 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, third, and fourth transactions in each set are too large to consist of a forgotten item or two.

Appellant explains that these transactions may be due to participants who are allowing a third party to use their card. Although such activities do occur, they usually do not occur in only one store in an area. If any significant number of large dollar transactions is occurring as a result of such customer activity, one would expect that such customers would be doing the same thing at other stores at which they also shop. However, the other stores in the area do not have SNAP transactions that display patterns indicative of trafficking as Appellant.

Counsel explains that most of its customers do not have vehicles and need to make multiple trips to Appellant. A review of client shopping data for the review period shows that clients shopping at New Dekalb Deli & Grocery are also shopping at other area groceries, as well as supermarkets and super stores that offer the customers a much larger quantity and variety of eligible food items. In fact, 29 out of the 43 households listed on this Attachment conducted a SNAP transaction at a large grocery, supermarket, or super store on the same day as its flagged transaction at Appellant. Based on these shopping patterns, transportation to other stores is not an issue for these EBT customers. Yet, these customers continue to shop and spend high dollar amounts in short time frames at Appellant, often on the same day, of their purchases at better-stocked stores.

In the absence of any other reasonable explanation, the irregular transaction patterns are more likely than not to be a result of trafficking in SNAP benefits.

Charge Letter Attachment 4: Excessively large purchase transactions were made from recipient accounts. This attachment lists 457 transactions, 5 U.S.C. § 552 (b)(6) & (b)(7)(C). 5 U.S.C. § 552 (b)(6) & (b)(7)(C). These large transaction amounts are not consistent with the store's inventory with no fresh unprocessed meat and limited fresh produce. Therefore, the substantial number of high dollar purchases calls into question the legitimacy of these transactions.

Counsel explains that the store is well stocked and sells fruits, vegetables, and other cooking ingredients, including rice, beans, and pasta. The FNS store visit report shows Appellant stocks an extremely limited selection of fresh fruits and vegetables consisting of a small bowl of apples at the checkout counter and a minimal quantity of lettuce and tomatoes, no frozen fruits and vegetables, only one can of beans (no dried beans), no rice, and the only pasta was Ramen noodles, cup of noodles, macaroni and cheese, and some canned pasta. Thus, Appellant was not

as well stocked as counsel describes.

Counsel reported that Appellant also sells baby formula. The evidence from the store visit photographs and report do not support that Appellant sold infant formula. Regardless, it would be unusual for a SNAP household to purchase infant formula with SNAP benefits, as households who participate in SNAP would also be eligible to participate in the Special Supplemental Nutrition Program for Women, Infants and Children (WIC). WIC has a more lenient income threshold for participation than SNAP. Thus, it is unlikely that the sale of infant formula can explain many of the store's excessively large transactions.

The Retailer Operations Division compared Appellant to three nearby convenience stores. Appellant conducted a greater number of SNAP transactions during the review period than each of the three other stores. In addition, Appellant conducted more than triple the average number of SNAP transactions conducted by convenience stores in Kings County.

5 U.S.C. § 552 (b)(6) & (b)(7)(C). The Retailer Operations Division considered this an indicator of trafficking considering Appellant's eligible food stock, infrastructure, and proximity to larger, better stocked stores this.

Counsel contends that the nearest supermarket is more than .25 miles away. It is true that sometimes a firm may have higher than average SNAP transactions amounts due to the lack of access to other SNAP authorized stores. However, the Retailer Operations Division determined that there is a supermarket actually located 0.08 miles from Appellant. In fact, there are 41 other stores within a one-half mile radius, including three medium groceries, one large grocery, five supermarkets, and one superstore. The Retailer Operations Division also determined that 123 households of the 222 households listed on this Attachment conducted a transaction at a super store, supermarket or large grocery store on the same day as their flagged transaction at Appellant. Moreover, of the 482 households listed in total on all the charge letter attachments, 432 households conducted a SNAP transaction at a super store, supermarket or large grocery store within three days of its flagged transaction at Appellant. 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.

Lastly, the Retailer Operations Division analyzed the shopping patterns of four households that conducted transactions listed on the charger letter attachments. All of these households had access to, and shopped at supermarkets and super stores. However, despite this access to better stocked stores, all of the sampled households conducted excessively large transactions at New Dekalb Deli & Grocery **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** of shopping at a supermarket or super store. It is not plausible that the firm's customers would regularly purchase large amounts of merchandise at Appellant when larger, better stocked stores are readily available and in the vicinity of the Appellant firm.

5 U.S.C. § 552 (b)(6) & (b)(7)(C). The SNAP transactions noted in this Attachment are not presumed to be trafficking because they exceed a set dollar amount; they are questionable because they are inconsistent for this type of store and the store's stock. Households in this Attachment are regularly shopping at much larger stores and conducting transactions of large dollar amounts, yet are conducting comparable or higher dollar value transactions at Appellant's

smaller and minimally stocked business. Since Appellant's business carries no fresh or frozen unprocessed meat or seafood, minimal fresh produce, and minimal staple food stock, these patterns are deemed to be suspicious. Moreover, Appellant has a small checkout area and no shopping baskets or carts thereby making it difficult to facilitate the quantities of eligible food items required to make up these high dollar transactions. Therefore, it is unlikely that the food items purchased in these large dollar amounts could be carried to the register without the use of baskets or carts and more likely that the amounts were contrived.

While some households may have conducted legitimate transactions at Appellant, insufficient evidence was presented to support this argument. 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.

Decrease in Questionable Transactions

The Retailer Operations Division determined that upon receipt of the charge letter on May 28, 2014, Appellant's transactions that met the parameters of each Charge Letter Attachment decreased significantly. If each of the questionable transactions in the charge letter were legitimate food purchases, then there should not be a drastic decrease in these types of transactions following receipt of the charge letter. Appellant's total SNAP dollar volume and average SNAP transaction amount also decreased after receiving the charge letter. As such, unexplained and drastic declines of transaction patterns as a result of receiving compliance related correspondence are often indicative of trafficking.

Evidence

Counsel contends that the EBT transactions should require a more careful review before making such a major decision based totally upon computer generated reports which only create an unfounded inference and presumption of wrongdoing. It is true that the charge letter attachments are derived from transaction reports under the electronic benefit transfer system. Specifically, FNS uses 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.

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.]

Appellant must provide a preponderance of evidence 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 furnished no itemized cash register receipts for the period under review to document the legitimacy of these excessively large transactions and no evidence was provided of SNAP eligible store stock via receipts of products taken into inventory for the relevant review months. 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.

No Previous Violations

Appellant contends that it has not had any previous SNAP violations. A record of participation in the SNAP with no previously documented instance of violations does not constitute valid grounds for dismissal of the current charges of violations or for mitigating the impact of the violations upon which they are based. There is no provision in the Act or regulations that reverses or reduces a sanction based upon a lack of prior violations by a firm and its owners, managers and/or employees.

Economic Hardship

Appellant states that the disqualification will be a hardship and cause irreparable injury. It is recognized that economic hardship is a likely consequence whenever a store is disqualified from participation in SNAP. However, there is no provision in the SNAP regulations for a waiver or reduction of an administrative penalty assessment on the basis of possible economic hardship to the firm resulting from imposition of such penalty. To excuse ownership from assessed administrative penalties based on purported economic hardship to the firm would render virtually meaningless the enforcement provisions of the Food and Nutrition Act of 2008 and the enforcement efforts of the USDA.

Moreover, giving special consideration to economic hardship to the firm would forsake fairness and equity, not only to competing stores and other participating retailers who are complying fully with program regulations, but also to those retailers who have been disqualified from the program in the past for similar violations. Therefore, Appellant’s contention that the firm will incur economic hardship based on the assessment of an administrative penalty does not provide any valid basis for dismissing the charges or for mitigating the penalty imposition.

Intent to Violate

Counsel contends that since there are no specific violations committed by personnel and there has been no prior action to warn the firm about the possibility of the violations, then the only remaining basis is evidence of intent according to 278.6(d). The three criteria in SNAP regulations at section 278.6(d) are not bases to be met in order for a firm to be disqualified, but

are factors that FNS considers in determining the appropriate sanction level for firms that have violated SNAP regulations and could include temporary or permanent disqualification. While a firm that has previously received warnings of possible violations or that has been sanctioned before could receive a more severe penalty, SNAP regulations do not provide any grounds for dismissing or reducing penalties for firms that have not received warnings or previously been sanctioned. SNAP regulations do not require evidence of intent in order to disqualify a retail store for trafficking. Therefore, whether or Appellant or its employees intended to violate SNAP regulations by exchanging cash for SNAP benefits is irrelevant.

Age of Transactions

Appellant argues that since the letter of charges relates to incidents that occurred in 2014, the owner no longer has access to receipts, surveillance videos or records due to the time gap. There is no statute of limitations with regards to an administrative action against a firm, although the agency does strive to take such actions as soon as they are able. Further, the charges were brought in a timely manner given that the charge letter was issued within two months of the review period. In response to the charges, Appellant's previous attorney requested a FOIA and appealed the results of that FOIA. The Retailer Operations Division held this case in abeyance during Appellant's appeal. It was only once Appellant's appeal was resolved, in February 2018 that the Retailer Operations Division issued a determination. The time elapsed between the charge letter and the determination letter does not have any effect on the potency or validity of the charges.

Household Hardship

Counsel states that Appellant should be eligible for a hardship CMP. As indicated, the Retailer Operations Division determined that there are 45 other SNAP authorized stores within a one-half-mile radius of Appellant. There is no evidence that Appellant provides any unique services or unique staple food items. Where there is a hardship to SNAP households, FNS may impose a hardship CMP on a firm in lieu of a disqualification where there is a lack of authorized stores in the area. However, the regulations at 7 CFR §278.6(f)(1) clearly state that "a civil money penalty for hardship to [SNAP] households may not be imposed in lieu of a permanent disqualification." Because the Retailer Operations Division has taken action to permanently disqualify Appellant's firm, a hardship CMP in lieu of disqualification cannot be granted.

CIVIL MONEY PENALTY

The Retailer Operations Division determined that the firm was not eligible for a civil money penalty in lieu of permanent disqualification because it did not submit sufficient evidence to demonstrate that the firm had established and implemented an effective compliance policy and training program to prevent SNAP violations.

Appellant, through counsel, has claimed that it continuously trains and tests its employees concerning SNAP regulations, and has done so from the time the store was authorized. It also claims that the firm has maintained an exemplary record, which is evidence of the Appellant's continued compliance with the law and with its training and supervision of its employees.

In accordance with regulation at 7 CFR § 278.6(b)(2), in order for a civil money penalty to be considered, a firm must not only notify FNS that it desires the agency to consider the sanction of a CMP in lieu of permanent disqualification for trafficking, but the firm must also submit appropriate documentation within designated timeframes as required by the regulation. Appellant offered no evidence to support its claim of continuous training and testing of its employees.

Therefore, in accordance with 7 CFR § 278.6(b)(2)(iii), Appellant is not eligible for a civil money penalty in lieu of permanent disqualification for trafficking.

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 is also sustained.

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 12, 2018