

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

New Hampshire Sunoco,

Appellant,

v.

Case Number: C0204722

Retailer Operations Division,

Respondent.

FINAL AGENCY DECISION

The U.S. Department of Agriculture, Food and Nutrition Service (FNS), finds that there is sufficient evidence to support the determination by the Retailer Operations Division to impose a permanent disqualification against New Hampshire Sunoco (hereinafter Appellant) from participating as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP).

ISSUE

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with Title 7 of the Code of Federal Regulations (CFR) § 278.6(a), (c) and (e)(1)(i), when it imposed a permanent disqualification against Appellant on April 3, 2018.

AUTHORITY

According to 7 U.S.C. § 2023 and its 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

By letter dated January 19, 2018, the Retailer Operations Division charged Appellant with trafficking based on a series of irregular SNAP transaction patterns that occurred in June 2017 through November 2017. The letter noted that the penalty for trafficking is permanent disqualification as provided by 7 CFR § 278.6(e)(1). The letter also noted that the 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 counsel, responded to the charges in a letter dated January 30, 2018, that did not request or include documentation in support of a CMP. The Retailer Operations Division notified Appellant by letter dated April 3, 2018, that the firm was permanently disqualified from participation as a SNAP retailer in SNAP 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 April 9, 2018, Appellant, through counsel, appealed the Retailer Operations Division's assessment and requested administrative review. The appeal was granted. Subsequent correspondence dated May 18, 2018, 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 Part 278. In particular, 7 CFR Part 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 SNAP benefits.

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."

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." Trafficking is defined in part as, "The buying, selling, stealing, or otherwise effecting an exchange of SNAP benefits for cash or consideration other than eligible food". Trafficking includes "Intentionally purchasing products originally purchased with SNAP benefits in exchange for cash or consideration other than eligible food".

7 CFR §278.6(i) states: "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: “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 a civil money penalty in lieu of a permanent disqualification for trafficking and submit documentation and evidence of its eligibility within the specified 10 days, the firm shall not be eligible for such a penalty.

SUMMARY OF THE CHARGES

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. The charges on review were based on an analysis of SNAP EBT transaction data during the six month period of June 2017 through November 2017. This involved two patterns of EBT transaction characteristics indicative of trafficking:

1. Multiple transactions were made from individual benefit accounts in unusually short time frames.
2. Excessively large purchase transactions were made from recipient accounts.

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 owner denies any charge of trafficking. **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**;
- The firm has a clear policy in place that trafficking is prohibited, but there is nothing in the regulations that prevents the owner for selling \$X dollars of lawful merchandise over a short period of time. The Training Manual warns owners not to restrict or prejudice SNAP customers. It is requested that USDA provide the statutory and regulatory authority to charge the firm with trafficking since there are no allegations in the USDA charge letter that money was exchanged for SNAP benefits;
- The owner was unaware of any trafficking or other illegal trading of SNAP benefits for cash. There is no evidence that demonstrates any intent by the owner to violate the law, knowingly or otherwise, and there is no evidence that a law was violated. **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. If the firm violated the law by allowing the transaction, then there is a lack of clarity in the

regulations that would allow the firm to assume that this amount, or any of the other amounts listed, is too high. The Training Manual speaks of types of purchases, but there is no guidance as to dollar amount and the frequency of purchases;

- There is a lack of regulatory support to uphold a charge of trafficking and there is not a single allegation in the charge letter regarding money being exchanged for SNAP benefits. In light of a lack of regulatory guidance, any sanction to the owner would be unfair, unjust, and in deprivation of her Due Process rights;
- There was no prior warning about the possibility that violations were occurring per section 278.6(d)(2);
- There is no factual basis cited in the April 3, 2018, letter to support the bogus assertion that there was any violation to begin with. While the letter generically states there was no compliance policy in place, the legal conclusion drawn by the USDA was that there was a violation in the first place. This assertion is challenged. What act was in violation? Due process, even on a rudimentary level, requires notice and an opportunity to be heard. The owner has not even been informed as to why the actions in question are unlawful. Some semblance of legal reasoning or factual support would be appreciated;
- The items flagged by the USDA are not defined in the code whatsoever and the allegations are vague and overbroad. Very simply, how can anyone at the FDA [sic] put the firm on notice as to where in the Code of Federal Regulations (CRF) [sic], or in any training manual provided by the FDA [sic], a 5 U.S.C. § 552 (b)(6) & (b)(7)(C) charge is defined as excessively large. Excessively large and unusually short time frame are not defined so how can the owner train against something even the FDA [sic] has not clearly forewarned about;
- Giving the tracking technology, the more proper focal point should be the individuals actually using these cards in manners deemed suspicious;
- If the FDA's [sic] mission is for stores to engage in better practices, is it not fair to have these practices defined in writing, and disseminate them to the stores?;
- There are few options for neighborhood residents in terms of convenience store shopping so permanent disqualification would inevitably cause hardship to SNAP households under Section 278.6(f)(1);
- There is no personal allegation that the owner ever engaged in any intentional wrongdoing, or that her firm even engaged in unlawful behavior, based on the overbroad allegations, and lack of any statutory citation to any wrongdoing; and,
- Given the lack of thought in the charge letter and the adjudication letter that followed, it is our hope that on appeal, we will be informed what the firm actually did wrong and not just legal conclusions or broad citations to inapplicable sections of the CRF [sic], but actually using the law to support a decision that thus far is having an unconscionable effect.

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

ANALYSIS AND FINDINGS

Each Attachment furnished with the letter of charges represents the questionable and unusual patterns of SNAP transactions indicative of trafficking which were conducted at the Appellant business during the review period. As patterns of unusual transactions appear across multiple Attachments, the case of trafficking becomes more convincing.

Store Background and FNS Store Visit

FNS authorized the business as a convenience store on July 15, 2015. The case file indicates that in reaching a disqualification determination, the Retailer Operations Division considered information obtained during a November 11, 2017, store visit conducted by a FNS contractor to observe the nature and scope of the firm's operation, stock, and facilities. This information was then used to ascertain if there were justifiable explanations for the business's suspicious SNAP transactions. The store visit documented the following store size, description, and characteristics:

- The business was a moderate sized store offering a very limited quantity and variety of staple foods and carrying no unique items or offering any distinctive services.
- There were no shopping carts or handheld baskets for customer use seen during the visit making it difficult for customers to carry large amounts of food to the checkout area.
- The checkout area consisted of a night window set into a plastic security wall with an opening approximately 1.0 feet wide with a shelf approximately 1.0 feet deep in front for customers to place their purchases. The very small size of the checkout area would make it problematic to process large orders.
- The checkout counter had a cash register, POS terminal, and optical scanner as confirmed by a store employee.
- No food packages, bundles, case sales, bulk items, or other sales were evident that would explain the unusual transactions and no cased items were available for purchase except for cases of bottled water.
- The business had a very limited stock of staple foods that also included many single serving and pre-packaged items with a significant portion of inventory in accessory foods (primarily soda, candy, and other drinks), snacks, single serving soups, and many ineligible items.
- The business had a no fresh unprocessed meats/seafood, no frozen unprocessed meats/seafood, a very limited quantity and variety of processed meats and seafood (canned meat/poultry/fish, three packages of hot dogs, and jerky), no deli meats, no sausages, no bacon, no packaged lunch meats, no frozen entrees, no frozen dinners, no eggs, no fresh/frozen fruits or vegetables except for five bananas, no vegetable juices, a limited selection of single

serving nuts, a limited stock of canned soups, a very limited quantity and variety of canned and packaged staple food items, no baking mixes, only two loaves of bread, no rolls, no tortillas, only two small packages of flour, no rice, no corn meal, only three packages of cold cereal, only three containers of fresh milk (1 gallon, 2 half gallons), no deli cheeses, very limited packaged cheeses, only one butter, no margarine, only five yogurt, no sour cream, no baby foods or infant formula, and almost no expensive eligible food items.

- Ineligible items included: tobacco, gasoline, lottery, Keno, household products, paper products, auto products, health and beauty items, ATM, clothing, hot drinks, phones/phone cards, electronics accessories, sunglasses, Styrofoam coolers, diapers, propane tanks, and incense while accessory foods included: candy, condiments, tea (four boxes), spices, and un/carbonated drinks.
- Signage was in English and there were no SNAP posters (anti-fraud, eligible items, reporting trafficking, etc.) visible in the store.
- The business's hours of operation were open 24/7 as confirmed by a store employee.
- Many food items were priced with all visible staple food prices ending in .x9 cents except for a very limited number of items priced differently such as jerky at \$6.35 and single serving drinks at two for \$3.00. Comments on the FNS store visit report by the contract reviewer specifically stated that most of the food prices ended in .x9 cents. A price ending in .x9 cents is the most common pricing structure for stores of this type.
- The FNS store visit report listed the four most expensive items costing more than \$5.00 for sale in the store as being a four pack of Red Bull priced at \$7.99, a case of bottled water priced at \$14.99, a 3.25 ounce package of jerky priced at \$6.35, and olive oil priced at \$5.29. This listing of the most expensive items was provided by a store employee during the store visit.
- The store was a not a WIC vendor.
- The store visit photographs showed that several shelves and a cooler were marginally stocked.

Multiple transactions in unusually short time frames

This Attachment documents 45 individual transactions in 16 sets of two or more transactions conducted by eight different households in a short period of time.

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

5 U.S.C. § 552 (b)(6) & (b)(7)(C). One set is comprised of seven individual transactions, one set is comprised of four individual transactions, six sets are comprised of three individual transactions, and the remaining eight sets are comprised of two individual transactions. It is not a usual shopping pattern to see so many purchases, in a short period of time, by the same recipients as documented in this Attachment. 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. These sets of transactions appear to be in amounts which are indicative of trafficking.

5 U.S.C. § 552 (b)(6) & (b)(7)(C). It is therefore improbable that large dollar value transactions for the purchase of legitimate food items which would consist of a substantial number of lower priced items based on Appellant's stock could be processed in the times listed in this Attachment. The large transaction dollar amounts and the short interval between transactions in this Attachment demonstrate the improbability of these being legitimate eligible food purchases and suggest trafficking as the most likely explanation.

SNAP households have no limit on the number of times they may use their benefits or the dollar value of eligible food they may purchase. The SNAP transactions listed in this Attachment 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 a convenience store's stock and facilities and are thus indicative of trafficking. These transaction sets do not contain the characteristics associated with a household purchasing a forgotten item right after checking-out or of household members/friends shopping together 5 U.S.C. § 552 (b)(6) & (b)(7)(C). 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

It is certainly not unusual for a small number of SNAP households to conduct multiple transactions in a short period of time. However, it is unusual that the subsequent transaction dollar amount is for a substantial amount in all of these transaction sets and that they nearly equal or exceed the dollar amount of the first transaction in 11 of the 16 sets. It is also unusual based on the limited food stock that all of the transaction sets in this Attachment 5 U.S.C. § 552 (b)(6) & (b)(7)(C) when the comparable average convenience store SNAP transaction amount in Montgomery County during the period under review was \$7.32. These multiple transactions indicate that the amounts were contrived in an attempt to avoid suspiciously high transactions that would be indicative of trafficking by breaking them into multiple, smaller amounts. FNS transaction data shows that this same pattern of multiple transactions in unusually short time frames is not evident at other nearby like type grocery stores further supporting that trafficking was occurring at the Appellant business during the period under review.

The inventory report and photographs from the FNS store visit show the Appellant business offers a very limited stock of staple foods. Additionally, the business was noted as carrying few expensive eligible food items making it questionable that such a large number of high dollar SNAP transactions could be for legitimate food purchases. The store visit report also specifically notes that Appellant's pricing structure has food prices ending in .x9 cents which was confirmed by the many photographs included with the report. The purchase of several items with prices ending in .x9 cents would most likely not result in a total ending in a same dollar amount of .00 or .99 cents as multiples of nine seldom have a value ending in these amounts making it statistically impossible that this many store transactions would end in these amounts with legitimate food purchases.

There may be legitimate reasons why a SNAP household might return to a store during a short period of time, but the examples in this Attachment indicate a series of SNAP purchases that total to large dollar amounts. Multiple transactions over a short period of time, especially those of high dollar values, are indicative of attempts to obscure trafficking by dividing a large dollar

value transaction into a series of smaller dollar value transactions and are a method which violating stores use to avoid high dollar transactions that cannot be supported.

High Dollar Value Transactions

5 U.S.C. § 552 (b)(6) & (b)(7)(C). The substantial number of high dollar transactions is uncharacteristic for a convenience store offering a very limited stock of staple foods and calls into question the legitimacy of these transactions. The SNAP transactions listed in this Attachment are all substantially higher than the average SNAP transaction amount of \$7.32 for this store type in Montgomery County. The 109 excessively large SNAP EBT transactions at Appellant's business for the review months represents 82.9 percent of all SNAP redemptions at Appellant's business during the period under review. This is unusual and indicative of trafficking.

The evidence under review shows that SNAP households shopping at the Appellant business are also shopping at many full-line supermarkets and super stores, located nearby as well as at a significant distance from Appellant's location that offer a greater quantity and variety of SNAP eligible foods items for better prices than customers can find at the Appellant business. The large dollar transactions remain questionable when considering the proximity of these other SNAP authorized stores that would be better shopping options for consumers. Based on these shopping patterns, transportation does not appear to be an issue for these households. Yet, these recipients continue to shop and spend suspicious high dollar amounts at the Appellant business, where the eligible food stock is limited, 5 U.S.C. § 552 (b)(6) & (b)(7)(C) of their purchases at larger food stores.

The difference in the average SNAP transaction count and the total SNAP transaction dollar volume for Montgomery County convenience stores during the review months and at the Appellant business is significant. 5 U.S.C. § 552 (b)(7)(E). A comparison by the Retailer Operations Division of Appellant's SNAP redemptions to that of nearby convenience stores and small grocery stores that had redemptions for the review period shows similar differences. Additionally, none of these nearby stores exhibit the same suspicious transaction patterns listed in the charge letter for the Appellant business even though all are located in proximity to Appellant's location and would therefore be expected to share the same SNAP customer base and shopping patterns. This is a further indication that the SNAP transactions in this Attachment and the others do not represent legitimate food purchases. The Retailer Operations Division considered all of these to be indicators of unusual and suspicious activity.

Appellant again offered no evidence or rationales to support the legitimacy of the transactions in this Attachment.

While households residing in areas with extremely limited grocery store options may conduct high dollar value transactions at convenience stores out of necessity, this is not the case when households have better alternatives. FNS records show there are five super stores and one supermarket located within one mile of Appellant's location that offer greater quantities and varieties of staple food items at lower prices than would be found at a very minimally stocked

convenience store that offers no fresh or frozen unprocessed meats or seafood and has virtually no fresh or frozen fruits and vegetables. Additionally, there is a small grocery store located just down the street from the Appellant business. Furthermore, the Appellant business is located on New Hampshire Avenue near the intersection of Eastern Avenue both of which have scheduled fixed route bus service that would facilitate shopping at other stores.

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. An analysis of shopping patterns by the Retailer Operations Division shows that 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 the Appellant business. It would make no sense for a household that regularly shops at larger stores and apparently has no transportation limitations to spend large dollar amounts at the Appellant business since its cost of goods would be higher than that of larger stores such as supermarkets or super stores.

Information obtained during the FNS store visit on November 11, 2017, shows that the Appellant business offers a very limited quantity and variety of SNAP eligible staple food items, many accessory foods, and many ineligible items. Much of the inventory for sale consists of inexpensive snacks, beverages, and single serving foods as well as many ineligible items. Since the Appellant business offers no fresh unprocessed meats/seafood, no frozen unprocessed meats/seafood, a very limited quantity and variety of processed meats and seafood (canned meat/poultry/fish, three hot dogs, and jerky), no deli meats, no sausages, no bacon, no packaged lunch meats, no frozen entrees, no frozen dinners, no eggs, no fresh/frozen fruits or vegetables except for five bananas, no vegetable juices, a limited selection of single serving nuts, a limited stock of canned soups, a very limited quantity and variety of canned and packaged staple food items, no baking mixes, only two loaves of bread, no rolls, no tortillas, only two small packages of flour, no rice, no corn meal, only three packages of cold cereals, only three containers of fresh milk (1 gallon, 2 half gallons), no deli cheeses, very limited packaged cheeses, only one butter, no margarine, only five yogurt, no sour cream, no baby foods or infant formula, and almost no expensive eligible food items, these patterns are deemed to be suspicious. The fact that tobacco, gasoline, lottery, Keno, household products, paper products, auto products, health and beauty items, ATM, clothing, hot drinks, phones/phone cards, electronics accessories, sunglasses, Styrofoam coolers, diapers, propane tanks, and incense are not eligible for purchase with SNAP benefits also provides no justification for the high transaction amounts.

Increasing food prices make it even more unlikely that SNAP recipients, with very limited food benefits, would want to spend a considerable part of their benefits in a convenience store that does not address all of their food shopping needs when they are already shopping at larger, fully-stocked stores that would offer a greater variety of foods at lower prices. Many of these stores would also offer store brand products at lower prices, offer weekly specials, and have shopping carts and checkouts with built-in scanners and conveyor belts to facilitate processing purchases quickly. Additionally, Appellant furnished no itemized cash register and EBT 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. The Appellant business has a small checkout area and no

shopping carts thereby making it difficult to facilitate the great quantities of eligible food items required to make up these large dollar transactions. Therefore, it is improbable that the food items purchased in these high dollar amounts could be carried to the register without the use of carts and more likely that the amounts were contrived.

It is further noted that SNAP redemptions at the Appellant business decreased following the store visit on November 11, 2017, and again following receipt of the charge letter on January 22, 2018. The average SNAP transaction dollar amount decreased 48.6 percent from October 2017 to November 2017 and 34.94 percent from January 2018 to February 2018. The volume of SNAP redemptions at the Appellant business decreased 54.74 percent from October 2017 to November 2017 and 40.28 percent from January 2018 to February 2018. A pronounced decrease in SNAP redemptions following the store visit and receipt of the charge letter is a clear indication of trafficking since, if trafficking were not occurring, there would be no abnormal fluctuations in redemption amounts.

Based on this discussion, Appellant did not provide adequate evidence to support the legitimacy of the excessively large transactions in this Attachment.

Other Contentions

Regarding Appellant's denial of trafficking, it is important to state that this review encompasses and documents the examination of the primary and relevant information in this case, the purpose of which is to determine whether Appellant demonstrates by a preponderance of the evidence, that the disqualification should be reversed. In this case, if Appellant demonstrates by a preponderance of the evidence that it did not engage in trafficking SNAP benefits, then such transactions will be considered legitimate and the disqualification reversed. If not demonstrated, the case is to be sustained. 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. Regardless of whom the ownership of a store may utilize to handle store business or their degree of involvement in store operations, ownership is accountable for the proper training of staff and the monitoring and handling of SNAP benefit transactions. The ownership remains liable for all violative transactions handled by store personnel, whether paid or unpaid, new, full-time or part-time. Additionally, a record of participation in 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 those charges.

Contrary to Appellant's contentions, the three criteria from SNAP regulations at Section 278.6(d) listed below are not bases to be met in order for a firm to be disqualified, but are those areas that FNS considers in determining the appropriate level of sanction for firms that have violated SNAP regulations, but have not trafficked. The level of sanction could include temporary or permanent disqualification.

- 1) The nature and scope of the violations committed by personnel of the firm,

- 2) Any prior action taken by FNS to warn the firm about the possibility that violations are occurring, and
- 3) Any other evidence that shows the firm's intent to violate the regulations.

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 those firms that have not received warnings or previously been sanctioned. Additionally, Section 278.6(e)(1) states that firms shall be disqualified permanently if personnel of the firm have trafficked so the criteria cited in Section 278.6(d) is not applicable in this case.

With regards to Appellant's contention that FNS should be looking into the SNAP recipients conducting the transactions listed in the Attachments, no ruling will be rendered as the scope of this review is limited solely to the factors pertaining to the permanent disqualification of New Hampshire Sunoco. Therefore, Appellant's contention regarding recipients cannot be used to reverse or mitigate the decision of the Retailer Operations Division.

The owner and the business were charged with trafficking based on a computer analysis of the store's transactions for the months of June 2017 through November 2017. The charges do not derive from the use of a confidential informant or independent investigator who visited the store and made illegal purchases to support findings of trafficking, but by a computer program used by SNAP Administrators. While traditional undercover operations are still in use by USDA, for many years federal regulations have also authorized the use of evidence consisting of EBT transaction data in investigations of SNAP retail stores to determine if trafficking is occurring.

The issue under review involves a charge of trafficking SNAP benefits based on EBT transaction data. EBT transaction data is covered in SNAP regulations at 7 CFR § 278.6(a) and is addressed below. Trafficking is always considered to be the most serious violation even if it is a first offense therefore a temporary suspension or lesser penalty would not be applicable. SNAP regulations at 278.6(e)(1) clearly state that, "FNS shall disqualify a firm permanently if personnel of the firm have trafficked as defined in § 271.2." SNAP regulations at 7 CFR § 271.2, define trafficking as, "The buying, selling, stealing, or otherwise effecting an exchange of SNAP benefits for cash or consideration other than eligible food". SNAP regulations at 7 CFR § 278.6(a) clearly state 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, inconsistent redemption data, evidence obtained through a transaction report under **an electronic benefit transfer system**" (Emphasis added). In the present case, the data presented in the Attachments is solely based on the SNAP electronic benefit transfer transactions conducted at the Appellant business during the period under review. This firm was selected as a result of a series of complex algorithms that make numerous data comparisons with other like type firms during the period under review. All of the transactions were then reviewed and analyzed by the Retailer Operations Division staff before the decision was made to issue a charge letter. This investigative process included a detailed examination of information obtained from various sources, including, but not limited to the inventory report and photographs from the FNS store visit, a transaction comparison and analysis of like type and

larger stores, and analysis of shopping patterns for recipient households conducting transactions at the Appellant business during the review period. This analysis also included a review of the business to ensure its store classification was correct and the data comparisons with like type firms valid. Additionally, there are nearby like type stores whose transaction data does not form these suspicious patterns and are therefore not at risk of disqualification for trafficking. There is also no regulatory requirement that trafficking disqualifications be based solely on on-site undercover operations.

Based on this empirical data, and in the absence of sufficient evidence for the legitimacy of 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 charge letter evidence trafficking as the most likely explanation for the questionable transactions listed in the charge letter Attachments. It is herein determined that Appellant did not provide a preponderance of evidence demonstrating that the transactions contained in the charge letter were more likely due to eligible food sales than not. Under review, the evidence more substantially supports a conclusion that the transaction activity in the charge letter Attachments is due primarily to trafficking in SNAP benefits.

The evidence under review shows SNAP activity indicative of trafficking. Neither the Food and Nutrition Act of 2008, as amended, nor the regulations issued pursuant thereto 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 under existing regulations.

With regards to Appellant’s contention that its rights to due process were violated, section 278.6(b)(1) of the SNAP regulations provides that upon charging a firm with SNAP violations, the letter informing the firm of the charges “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.” This section further states that, “Any firm considered for disqualification, shall have full opportunity to submit to FNS information, explanation, or evidence concerning any instances of noncompliance before FNS makes a final administrative determination.” A review of the Retailer Operations Division’s administrative actions regarding this matter indicates full compliance with all applicable SNAP regulations, policies, and procedures. This disqualification is an administrative action and SNAP regulations provide for an administrative review of the action. The Act, as amended, and regulations provide that any firm aggrieved by an administrative review determination may seek judicial review of the determination in Federal court or a State court of record having competent jurisdiction. In such event, trial de novo proceedings ensure the firm of a full evidentiary hearing on the agency action at issue.

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.

Counsel for Appellant has apparently misread the April 3, 2018, determination letter. The Appellant firm was permanently disqualified from SNAP for trafficking SNAP benefits, not for a failure to establish and implement an effective compliance policy and program to prevent SNAP violations. The eligibility criteria to be eligible to receive a trafficking CMP in lieu of permanent disqualification include the establishment and implementation of an effective compliance policy and training program to prevent SNAP violations. No documentation that Appellant met this or the other criteria was advanced by Appellant during the specified time frame as required by § 278.6(i) to be eligible for a trafficking CMP. As such, Retailer Operations determined that Appellant was not eligible for a trafficking CMP in lieu of permanent disqualification.

Appellant did not request a trafficking CMP in lieu of a disqualification nor did it make any mention of how the business met any of the four criteria needed to demonstrate that the firm had established and implemented an effective compliance policy and program to prevent SNAP violations within the specified timeframe. No documentation or other evidence was received from Appellant in support of a trafficking CMP. Therefore, Appellant failed to meet the regulatory standard for a trafficking CMP required by 7 CFR §278.6(i).

CONCLUSION

The Retailer Operations Division presented a case that Appellant has likely trafficked in SNAP benefits. Their 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 consistent with trafficking violations in SNAP benefits. This is evidenced by: the suspicious patterns in two Attachments of EBT transaction data, the inadequacy of the store's staple food stock as observed during the store visit to support large transactions in short time frames, the lack of adequate evidence for customer spending habits given that there are other SNAP authorized stores located within proximity to Appellant that likely offer a greater selection of eligible food items at competitive prices, and the irregular SNAP transaction data of Appellant as compared to other like type and larger stores in the county and state.

The retailer has not provided sufficient evidence to rebut the case that Appellant most likely trafficked 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, in fact, occur as charged. Based on the discussion above, the determination to impose a permanent disqualification against Appellant is sustained. Furthermore, the Retailer Operations Division properly determined that Appellant was not eligible for a trafficking CMP according to Section 278.6(i) of the SNAP regulations.

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
Administrative Review Officer

July 3, 2018