

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

Nobel Deli Inc,

Appellant,

v.

Case Number: C0201995

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 Nobel Deli 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 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 September 19, 2017.

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

In a letter dated September 1, 2017, the Retailer Operations Division charged the Appellant with trafficking, as defined in Section 271.2 of the SNAP regulations, based on a series of irregular SNAP transaction patterns that occurred during the

months of January 2017 through June 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 responded to the charges in a letter received on September 15, 2017, by the Retailer Operations Division, but the response neither requested nor contained any evidence to be considered in support of the CMP. The Retailer Operations Division notified Appellant in a letter dated September 19, 2017, that the firm was permanently disqualified from participation as an authorized retailer in SNAP in accordance with Section 278.6(c) and 278.6(e)(1) for trafficking violations. This determination letter also stated that Appellant's eligibility for a trafficking CMP according to the terms of Section 278.6(i) of the SNAP regulations was considered. However, the letter stated ". . . you are not eligible for the CMP because you failed to submit sufficient evidence to demonstrate that your firm had established and implemented an effective compliance policy and program to prevent violations of the Supplemental Nutrition Assistance Program."

By letter dated September 21, 2017, Appellant appealed the Retailer Operations Division's assessment and requested an administrative review of this action. The appeal was granted. No subsequent correspondence was received from Appellant.

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 of SNAP benefits.

7 U. S. Code § 2021(a)(2) states, "Regulations promulgated under this chapter shall provide criteria for the finding of a violation of, the suspension or disqualification of and the assessment of a civil penalty against a retail food store or wholesale food

concern on the basis of evidence that may include facts established through on-site investigations, inconsistent redemption data, or evidence obtained through a transaction report under an electronic benefit transfer system.”

In addition, 7 CFR § 278.6(a) states, in part, “FNS may disqualify any authorized retail food store . . . if the firm fails to comply with the Food and Nutrition Act of 2008, as amended, or this part. Such disqualification shall result from a finding of a violation on the basis of evidence that may include facts established through on-site investigations, inconsistent redemption data, evidence obtained through a transaction report under an *electronic benefit transfer system*” (Emphasis added.)

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(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.

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 January 2017 through June 2017.

This involved three patterns of EBT transaction characteristics indicative of trafficking:

1. There were an unusual number of transactions ending in a same cents value.
2. Multiple transactions were made from individual benefit accounts in unusually short time frames.
3. Excessively large purchase transactions were made from recipient accounts.

APPELLANT'S CONTENTIONS

In the response to the letter of charges, and in the request for administrative review, Appellant has stated as its position in the matter the following:

- The transactions were done in the course of business and there was no intention of misusing SNAP benefits. The business allows customers to make purchases of eligible foods as long as they have benefits in their account;
- Often, there are families or neighbors who shop together. Customers sometimes make large purchases once or twice a week and sometimes quite arbitrarily. The business accommodates these requests and does not dictate to customers how to spend their benefits;
- The USDA computer must see what kinds of sales and transactions are happening in the business. All of the figures for the transactions, regardless of how much or how often, do not matter because any customer can use their benefits to purchase whatever is SNAP eligible;
- The business has all the records to prove all transactions is sales or items have special sales with the same amounts being the same [sic];
- There are no restrictions regarding amounts or time periods for how customers spend their benefits or the number of times they can use those benefits. To the best of the owner's training and work experience, as long as the items are eligible for SNAP benefits, the business can sell it regardless of the time, dollar amount, or the number of times the customers wants to do business; and,
- The business needs its SNAP license as much of the business depends on it and without it the business will have to close its doors. The owner would rather withdraw from the SNAP program voluntarily to avoid damaging his history with the USDA.

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

The preceding 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.

ANALYSIS AND FINDINGS

The Retailer Operations Division presented a case that Appellant trafficked SNAP benefits. 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

The FNS initially authorized the Appellant business on April 6, 2015, and the business is classified as a small grocery store. The file indicates that in reaching a disqualification determination, the Retailer Operations Division considered information obtained during a July 18, 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 EBT transactions at Appellant's store that formed patterns indicative of trafficking. The store review summary documented the following store size, description, and characteristics:

- The business was a very small 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.
- The checkout counter was approximately one foot by 1.5 feet with displays on both sides leaving little or no space for customers to place their purchases. The extremely small size of the checkout area would make it problematic to process large orders.
- The checkout counter had one cash register and one point-of-sale (POS) terminal.
- No food packages, bundles, case sales, bulk products, or other sales were evident that would explain the unusual transactions and no SNAP eligible cased items were available for sale.
- The store had a very limited stock of staple foods that consisted of many single serving and pre-packaged items with the majority of inventory in accessory foods (primarily soda, candy, and other drinks), snacks, and ineligible items.
- The store had a large refrigerated deli display case and a kitchen/food prep area containing a cooktop grill, exhaust hood, toaster, microwave oven, prep tables, commercial slicer,

- commercial scale, etc.
- A large menu board advertised a variety of hot/cold sandwiches and hot breakfast items.
- Dairy items included: single serving milk drinks, canned milk, fresh milk, half and half, deli cheeses, single serving ice cream, and cheese-based chip dip.
- There were no fresh or frozen fruit and vegetables other than bananas for sale at the checkout counter. The business also stocked an extremely limited quantity and variety of canned and packaged fruit and vegetables.
- The store had no fresh unprocessed meats or seafood, no frozen unprocessed meats or seafood, a very limited quantity and variety of processed meats and seafood (canned meat/fish/poultry, deli meats, and jerky), no bacon, no hot dogs, no frozen entrees, no frozen dinners, no yogurt, no sour cream, no packaged cheese, no packaged lunch meats, no butter/margarine, no fresh fruits or vegetables except for a small number of bananas at the checkout, no frozen fruits or vegetables, an extremely limited quantity and variety of canned and packaged staple food items, no cocoa, a minimal quantity and variety of cold cereals, no hot cereals, no flour, no corn meal, no rice, no baking mixes, no mac&cheese, no baby foods or formula, and no expensive eligible food items.
- Ineligible items included: tobacco, alcohol, lottery, hot food, household products, paper products, pet products, health and beauty items, ATM, diapers, and electronics accessories while accessory foods included: candy, spices, condiments, coffee, tea, and carbonated/uncarbonated drinks.
- The store was not a WIC vendor.
- Signage in the store was in English.
- Most food items were priced with all visible prices
5 U.S.C. § 552 (b)(6) & (b)(7)(C). Comments on the FNS store visit report by the contract reviewer specifically stated that most of the food prices
5 U.S.C. § 552 (b)(6) & (b)(7)(C). 5 U.S.C. § 552 (b)(6) & (b)(7)(C).
- A store employee reported that transaction totals are never rounded up or down.
- The FNS store visit report listed the most expensive items costing more
5 U.S.C. § 552 (b)(6) & (b)(7)(C) for sale in the store as being a 14 ounce container of Haagen Dazs ice cream priced at \$5.99, deli cheeses priced at up to \$7.99/pound, and deli meats priced at up to \$10.99 per pound. This listing of the most expensive items was provided by a store employee during the store visit.
- Store hours were confirmed by the contracted reviewer with a store employee during the FNS store visit as being open 24/7.
- The quantity and variety of the store's staple food inventory was less than that seen during the previous FNS store visit conducted on April 2, 2015.

Unusual numbers of transactions ending in a same cents value

This attachment lists 666 transactions ending in a same cents value 5 U.S.C. § 552 (b)(6) & (b)(7)(C). 5 U.S.C. § 552 (b)(6) & (b)(7)(C). When such repetitive patterns are unsupported by special pricing structures they are a strong indicator of trafficking in SNAP benefits. The FNS store report and photographs revealed no signs posted to indicate special food packages, bundles, case sales, or other sales that would explain the unusual number of transactions ending in these same cents values and no bulk items were available for purchase. The high percentage of same cent transactions combined with the large number of high dollar transactions is irregular and suspicious for this type store. Appellant provided no documentation or explanation to support the legitimacy of the listed transactions in this Attachment.

The inventory report and photographs from the July 18, 2017, FNS store visit show the business offered a very limited quantity and variety of SNAP eligible food items with the majority of its inventory in snacks, accessory foods and ineligible items. Additionally, the business carried no expensive eligible food items making it questionable that such a large number of high dollar value SNAP transactions could be for legitimate food purchases. Most food items at the Appellant business were priced and comments on the FNS store visit report by the contract reviewer specifically stated that most of the food prices 5 U.S.C. § 552 (b)(6) & (b)(7)(C). 5 U.S.C. § 552 (b)(6) & (b)(7)(C). No food packages, bulk products, bundles, case sales, or other sales/promotions of eligible items were evident during the store visit that would explain these unusual same cents transactions. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). When there are a disproportional amount of transactions ending in a same cent value, it appears that these transaction amounts are contrived and therefore, in the absence of any compelling rationale to the contrary, are indicative of trafficking. Also, the three page store visit questionnaire completed by the contract reviewer includes a section where the most expensive items available for sale at the store based on information provided by a store employee are listed; the most expensive food items were Haagen Dazs ice cream priced at \$5.99, deli cheeses priced at up to \$7.99/pound, and deli meats priced at up to \$10.99 per pound. The store employee also reported that transaction totals are never rounded up or down.

While some of the transactions in this Attachment may have been for legitimate staple food purchases, particularly those in the lower dollar amounts, there is insufficient evidence that these repeating same cent transactions are legitimate. When many transactions end in a same cents amount, it appears that these transaction amounts are contrived and therefore, in the absence of compelling evidence to the contrary, are suggestive of trafficking. As such, the transactions in this Attachment have not been adequately documented as legitimate and therefore do not constitute valid grounds for dismissal of the current charges of violations or for mitigating their impact.

Multiple transactions in unusually short time frames

This Attachment documents 73 individual transactions in 24 sets of two or more transactions conducted by 15 different households in a short period of time. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Six transaction sets are comprised of four individual transactions, 13 sets are comprised of three individual transactions, and the remaining five 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. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). These sets of transactions appear to be in amounts which are indicative of trafficking.

Appellant contends that often there are families or neighbors who shop together. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). The business accommodates these requests and does not dictate to customers how to spend their benefits. There are no restrictions regarding amounts or time periods for how customers spend their benefits or the number of times they can use those benefits. To the best of the owner's training and work experience, as long as the items are eligible for SNAP benefits, the business can sell it regardless of the time, dollar amount, or the number of times the customers wants to do business.

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. Although it is not uncommon for customers to have more than one transaction per day, the SNAP transactions listed in this Attachment are questionable and therefore suspicious because they are large transactions being conducted by a specific household in a short period of time at a small grocery store with a very limited quantity and variety of staple foods and display characteristics of use inconsistent with the nature and extent of the store's stock and facilities and are thus indicative of trafficking. 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. 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

The July 18, 2017, FNS store visit offers no legitimate explanation for why SNAP customers would routinely shop at the business multiple times during a short period of time as it shows the business offers a very limited stock of staple foods consisting of many pre-packaged and single serving items with the majority of inventory in snacks, accessory foods, and a variety of ineligible items. There were no fresh or frozen meats or seafood, no fresh or frozen fruits or vegetables except for bananas at the checkout, no frozen dinners or entrees, and an extremely limited quantity and variety of canned and packaged staple food items making the Appellant business unlikely to be the grocery store of choice for SNAP recipients especially when there are many larger stores nearby. The business also offers no great variety of products, price advantage, profusion of large packages, or

significant bulk items for sale leaving no explanation for the large dollar transactions amounts. The store visit inventory report and photographs show no expensive eligible foods in stock that would account for these large amounts as well as showing the store has extremely limited checkout counter space and no shopping carts or hand baskets in which to transport the large number of low priced items required to make-up these large transaction amounts. Without these, it is unlikely such large dollar value transactions could be for actual food purchases and more likely they involve trafficking.

An analysis of the shopping patterns for the 15 households listed in this Attachment shows that these households have ready access to transportation as evidenced by their shopping at a variety of other larger food stores located nearby and at a distance from Appellant's location with all 15 households shopping at super stores and supermarkets. 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

FNS records further show there are three super stores, one large grocery store, and seven medium grocery stores located within 0.5 miles of Appellant's location that offer greater quantities and varieties of food items at lower prices than would be found at a very minimally stocked small grocery store. Two of the super stores are located within 0.15 miles of Appellant's location with records showing that 14 of the 15 households in this Attachment shopped at the closest super store located just steps from the Appellant business. The fifteenth household only shopped at other SNAP retailers located more than 0.97 miles from Appellant's location while conducting multiple transactions at three supermarkets located 1.66-2.34 miles away. This unusual behavior raises the question of why a household with ready access to transportation would opt to travel miles away from its regular shopping area to shop at a very minimally stocked small grocery store and suggests trafficking as the most likely explanation. Given the close proximity of these larger stores, there is no reason for the attraction to the Appellant business and the volume of violative transactions, especially the large dollar transactions. Appellant has failed to provide any viable explanations for the irregular shopping patterns exhibited by the households in this Attachment. Also, no explanation or rationale has been offered by Appellant as to why households that are regularly shopping at larger stores offering a greater variety and quantity of SNAP eligible food stock at lower prices and who apparently have no transportation limitations would be conducting multiple, high dollar value transactions at a small grocery store that offers a very limited selection of staple food items and has no shopping carts or hand baskets that would be needed for the large transactions in this Attachment. Common sense dictates that it is improbable that SNAP households, with limited resources, would choose to shop at the Appellant business when their SNAP eligible food needs could be met at any of the larger stores they are already regularly shopping at and therefore it is more likely than not that these households were trafficking SNAP benefits at the Appellant business and that the multiple transactions were attempts by store employees to obscure trafficking by dividing a large dollar value transaction into a series of smaller dollar value transactions. This

is a method used by stores to avoid high dollar transactions that cannot be supported.

There may be legitimate reasons why a SNAP recipient 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.

5 U.S.C. § 552 (b)(6) & (b)(7)(C).

High Dollar Value Transactions

This Attachment lists 119 individual EBT transactions r5 U.S.C. § 552 (b)(6) & (b)(7)(C). The substantial number of high dollar transactions is atypical for a minimally stocked small grocery store of this size 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 \$10.31 for this store type in New York County. The 119 excessively large SNAP EBT transactions at Appellant's business for the review months 5 U.S.C. § 552 (b)(6) & (b)(7)(C) of all SNAP redemptions at Appellant's business during the period under review. This is unusual and indicative of trafficking.

The record shows that within a 0.5 mile radius of Appellant's store there are 56 SNAP authorized retailers including: three super stores, one large grocery store, seven medium grocery stores, 13 small grocery stores, three meat specialty stores, one seafood specialty store, one bakery, eight combination grocery stores, and 19 convenience stores. The evidence under review shows that SNAP households shopping at the Appellant business are also shopping at other nearby stores, as well as at full-line supermarkets and super stores, located nearby as well as at a distance from Appellant's location that offer a greater variety and quantity 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.

This store had irregular SNAP transaction data as compared to like type small grocery stores in New York County. A comparison of Appellant's SNAP redemption data with that of New York County convenience stores using 5 U.S.C. § 552 (b)(6) & (b)(7)(C) dollar increments shows that Appellant's transaction count and dollar volume ranges are significantly higher than the average of like type stores 5 U.S.C. § 552 (b)(6) & (b)(7)(C) at which point they

become significantly lower than the average. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). While there are normally fewer transactions in the higher dollar ranges, evidence shows that most stores of this type do still have a small number of them indicating that the Appellant business may be dividing larger trafficking transactions into smaller ones as previously discussed. Dividing large transactions into a series of smaller transactions has long been a technique used by retailers to avoid suspicion. None of Appellant's contentions explain these unusual and suspicious differences. The Retailer Operations Division considered this pattern to be an indicator of unusual and suspicious activity.

As previously stated, Appellant contends customers sometimes make large purchases once or twice a week and there are no restrictions regarding amounts or time periods for how customers spend their benefits or the number of times they can use those benefits. To the best of the owner's training and work experience, as long as the items are eligible for SNAP benefits, the business can sell it regardless of the time, dollar amount, or the number of times the customers wants to do business. Appellant further stated that the business has all the records to prove all transactions is sales or items have special sales with the same amounts being the same [sic]; however, no records were provided for this review.

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 July 18, 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. There is no apparent legitimate reason for the high transaction amounts at Appellant's store given the minimal stock of staple foods and the fact that tobacco, alcohol, lottery, hot food, household products, paper products, pet products, health and beauty items, ATM, diapers, and electronics accessories are not eligible for purchase with SNAP benefits. The business carries no special foods or offers any unique services that are not also available at other nearby grocery stores making it unlikely that SNAP recipients with available transportation would make this business their grocery store of choice. Additionally, the quantity and variety of the store's staple food inventory was less than that seen during the previous FNS store visit conducted on April 2, 2015. 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

Increasing food prices make it even more unlikely that SNAP recipients, with limited food benefits, would want to spend a considerable part of their benefits in a small grocery 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 scanners and conveyor belts to facilitate processing purchases quickly. The Appellant business has an extremely small checkout area, no shopping carts, and no handbaskets thereby making it difficult to facilitate the great quantities of eligible food items required to make up these large dollar transactions. 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. Accordingly, it is improbable that the food items purchased in these high dollar amounts could be carried to the register without the use of many carts and thus more likely the amounts were contrived.

It is also noted that SNAP redemptions at the Appellant business dropped significantly following the contracted store visit on July 18, 2017. **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. A pronounced decrease in SNAP transactions immediately following 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

The store owner states that the transactions were done in the course of business and there was no intention of misusing SNAP benefits. The business allows customers to make purchases of eligible foods as long as they have benefits in their account. The USDA computer must see what kinds of sales and transactions are happening in the business. All of the figures for the transactions, regardless of how much or how often, do not matter because any customer can use their benefits to purchase whatever is SNAP eligible. The business needs its SNAP license as much of the business depends on it and without it the business will have to close its doors. The owner would rather withdraw from the SNAP program voluntarily to avoid damaging his history with the USDA.

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, as noted above, is to determine whether Appellant demonstrates, by a preponderance of the evidence, that the disqualification should be reversed. In this

case, therefore, if Appellant demonstrates by a preponderance of the evidence that it did not engage in trafficking with SNAP benefits, then such transactions will be considered legitimate and the disqualification reversed. If this is 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.

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 . . . [d]isqualify 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, either directly, indirectly, in complicity or collusion with others, or acting alone” SNAP regulations at 7 CFR § 278.6(a) clearly state, in part, 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 on July 18, 2017, 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 letter of charges evidence trafficking as the most likely explanation for the questionable transactions listed in the charge letter Attachments. It is herein determined that Appellant has not provided 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 was 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.

It is recognized that some degree of 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 waiver or reduction of an administrative penalty assessment on the basis of possible economic hardship to the firm or to ownership resulting from imposition of such penalty. To allow store ownership to be excused from an assessed administrative penalty based on purported economic hardship to the firm would render virtually meaningless the enforcement provisions of the Food and Nutrition Act of 2008, as amended, and the enforcement efforts of the USDA. Furthermore, 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 may 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 imposed.

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 Retailer Operations Division 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 a trafficking CMP 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 Retailer Operations Division determined that Appellant was not eligible for a trafficking CMP in lieu of permanent disqualification.

Appellant made no mention of how the business met any of the four criteria in either its response to the charge letter or in the request for administrative review and no documentation or other evidence of any kind, including written statements, was subsequently received from Appellant in support of a trafficking CMP. Therefore, Appellant failed to meet the regulatory standard for a trafficking CMP as it did not provide substantial evidence that it met all four criteria required by 7 CFR §278.6(i). Based on the above, the Retailer Operations Division's decision not to impose a CMP in lieu of disqualification is sustained as appropriate pursuant to 7 CFR §278.6(i).

CONCLUSION

The Retailer Operations Division has presented a case that Appellant has likely trafficked in SNAP benefits. 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. This is evidenced by: the suspicious patterns in three 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 by the Retailer Operations Division. Based on the discussion above, the determination to impose a permanent disqualification against Appellant is sustained. Furthermore, Retailer Operations properly determined that Appellant was not eligible for a trafficking CMP according to the terms of 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

January 3, 2018