

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

Not Guilty, Inc,

Appellant,

v.

Case Number: C0180332

Retailer Operations Division,

Respondent.

FINAL AGENCY DECISION

The U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS) finds that there is sufficient evidence to support the determination by the Retailer Operations Division (“ROD”) to impose a permanent disqualification from participating as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP) against Not Guilty, Inc. (“Appellant”).

ISSUE

The purpose of this review is to determine whether the ROD 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 November 9, 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 April 20, 2015, the ROD charged Appellant with trafficking, as defined in Section 271.2 of the SNAP regulations. This charge was based on a series of SNAP transaction patterns that “establish clear and repetitive patterns of unusual, irregular, and inexplicable activity for your type of firm.” This letter of charges states: “As provided by Section 278.6(e)(1) of the SNAP regulations, the sanction for trafficking is permanent disqualification.” The letter also states that

“ . . . under certain conditions, FNS may impose a civil money penalty (CMP) . . . in lieu of a permanent disqualification of a firm for trafficking.”

Appellant replied to the ROD’s charges in writing. The record reflects that the ROD received and considered the information provided prior to making a determination. The ROD determined that Appellant’s contentions did not outweigh the evidence that the store was trafficking. Based on the preponderance of evidence, the ROD concluded that trafficking is the most probable explanation for the questionable transactions listed in the charge letter attachments.

The ROD issued a determination letter dated November 9, 2017. This letter informed Appellant that it 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. The letter also states the ROD considered Appellant’s eligibility for a trafficking civil money penalty (CMP) according to the terms of Section 278.6(i) of the SNAP regulations. The ROD determined that Appellant was not eligible for the CMP because Appellant had not submitted sufficient evidence to demonstrate that it had established and implemented an effective compliance policy and program to prevent SNAP violations.

On November 14, 2017, Appellant appealed the ROD’s determination and requested an administrative review of this action. The appeal was granted.

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 § 278.6(a) and (e)(1)(i) establish the authority upon which a permanent disqualification may be imposed against a retail food store or wholesale food concern in the event that personnel of the firm engaged in trafficking of SNAP benefits.

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(a) states, in part:

Any firm considered for disqualification ... under paragraph (a) of this section... shall have full opportunity to submit to FNS information, explanation, or evidence concerning any instances of noncompliance before FNS makes a final administrative determination. The FNS regional office shall send the firm a letter of charges before making such determination. The letter shall specify the violations or actions which FNS believes constitute a basis for disqualification The letter shall inform the firm that it may respond either orally or in writing to the charges contained in the letter within 10 days of receiving the letter . . .

7 CFR § 278.6(c) reads, in part:

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

7 CFR § 278.6(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 7 CFR § 271.2, 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”

Also at 7 CFR § 271.2, eligible food is defined as:

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

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

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

7 CFR § 278.6(b)(2)(iii) states:

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

SUMMARY OF CHARGES

The charges under review were based on an analysis of SNAP Electronic Benefit Transfer (EBT) transaction data during the period from July 2014 through December 2014. This analysis identified the following patterns of SNAP transaction activity that indicate trafficking:

- An inordinate number of transactions ending in same-cents values;
- Multiple transactions made from the same accounts in unusually short time frames;
- Transactions that depleted the majority or all of a recipient's monthly SNAP benefits made in unusually short timeframes; and,
- Excessively large transactions.

The attachments enclosed with the charge letter specify the questionable and unusual SNAP transactions indicative of trafficking which were conducted at Appellant during the review period.

APPELLANT'S CONTENTIONS

Appellant's responses regarding this matter are essentially as follows:

- Appellant denies the allegations;
- There are few stores that can provide a meaningful comparison with Appellant;
- Appellant offers Middle Eastern, Latin, and Jamaican/West Indies food;
- SNAP participants are more likely to shop at convenience stores and small grocery stores, and customers of these stores are among the most loyal customers;
- Customers typically shop at Appellant when running errands at night or on the way to work or school;
- Customers make multiple purchases because they forgot an item or decided to purchase additional items;
- Household members shop together, but make purchases separately;
- Some participants go on a spending spree, making back-to-back purchases;
- Convenience stores and similar stores had a 3% increase in customers over 2015. Appellant provided U.S. Grocery Shopper Trends 2017 slideshow presentation;
- The determination was made entirely on ALERT system data;
- The ALERT system has not been independently proven accurate in finding fraud. Data analysis is prone to error without accurate context. The analyst overly relied on the results of the ALERT system when issuing a charge of trafficking;
- Appellant sells a lot of expensive meats;

- *Brooklyn Mini Market v. U.S.* and *Skyson USA, LLC v. U.S.* caution against relying too much on the ALERT system;
- The case analysis document incorrectly labels prepared foods as hot foods;
- Same-cents transactions are due to rounding off;
- If the store were trafficking, it would not go through the effort of breaking up larger transactions into smaller transactions;
- The suspicious transactions account for only a small percentage of the firm's sales;
- At times, households participate in co-shopping where different household members split benefits evenly or proportionately and separately shop at Appellant during a short period of time;
- SNAP customers spend most of their benefits during the first week of issuance. Most of the suspicious transactions occurred during this period of time;
- Purchases involving larger items are precalculated;
- Participants purchase food for friends or other people who live in shelters with them;
- Transactions that occur on consecutive days are not suspicious;
- There are no restrictions on how a participant spends SNAP benefits;
- Disqualification would pose a severe hardship to Appellant;
- Staff have been trained on proper handling of SNAP transactions. Appellant described its SNAP compliance training program;
- This is the first allegation of wrongdoing involving SNAP;
- The store is well stocked;
- Customers regularly place phone orders and pay for those phone orders separately from other purchases;
- Same-cents transactions are due to the store's pricing;
- Large purchases are from well-known customers making large purchases to feed large families;
- There is insufficient evidence of trafficking;
- The determination is arbitrary and capricious;
- Appellant is conveniently located near a variety of large public facilities. Appellant is located near busy transportation hubs, shelters, a courthouse and low-income residents. Appellant provided a SNAP household profile; and,
- Disqualification poses a hardship to SNAP participants.

These explanations may represent only a brief summary of Appellant's contentions. However, in reaching a decision, full consideration has been given to all contentions presented, including any others that have not been specifically listed here.¹

ANALYSIS AND FINDINGS

Regarding Appellant's denial of violations, this review examines the relevant information regarding the determination. Once the ROD establishes trafficking occurred, Appellant bears the

¹ Appellant's supplementary response dated April 13, 2018 asserts it is providing documents that were not actually submitted, such as a Convenience Store News study. Only the documents referenced above were submitted in support of Appellant's contentions.

burden of providing relevant evidence to support a conclusion, considering the record as a whole, that that it did not engage in trafficking. If this is not demonstrated, the case will be sustained. Without supporting evidence and rationale, assertions that the firm has not violated program rules do not constitute valid grounds for overturning the determination.

Appellant stated the case analysis document incorrectly labels prepared foods as hot foods. A review of case analysis document fails to support Appellant's statement.

Store Characteristics

In reaching a disqualification determination, the ROD considered information obtained during an April 11, 2014 store visit conducted by a USDA contractor to observe Appellant's operation, stock, and facilities. This store visit information was used to ascertain if there were justifiable explanations for the firm's irregular SNAP transaction patterns. The store visit report documented the following store size, description, and characteristics:

- Store size is approximately 600 square feet with no food stored outside of public view. It is in an urban, commercial area;
- Available inventory of SNAP-eligible food items showed stock composed predominantly of inexpensive items, which is typical of a convenience store;
- Only one cash register and one electronic SNAP terminal device;
- No shopping carts or hand baskets;
- No scanners or conveyor belts;
- No evidence of a wholesale business such as posted prices or separate entrances for wholesale customers; and,
- No meat or seafood specials or bundles.

In addition, the store's checkout counter space area was cluttered and small allowing very little surface area to place large purchases and making it impractical to process more than one customer at a time.

There was no indication that SNAP households were inclined to visit the store regularly to purchase large quantities of grocery items. The available food was primarily of a low-dollar value and there was no hint that the firm sold items in bulk. Given the available inventory, there was no sign that Appellant would be likely to have SNAP redemption patterns that differed significantly from those of similarly-sized competitors.

Same-Cents Transactions

An interesting characteristic of questionable transactions is that many of them end in a same-cents value. Sets of repeating digits are highly unorthodox and do not regularly occur in legitimate transactions; such transaction structuring is a common hallmark of trafficking activity. In the absence of any compelling rationale to the contrary, these patterns strongly indicate that the firm is trafficking in SNAP benefits.

Attachment 1 to the charge letter documents transactions ending in same-cents values. A review of the store visit record indicates that the store did not promote any specials that could explain the pattern of large numbers of transactions ending in these values. This attachment includes 664 same-cents transactions **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**.

5 U.S.C. § 552 (b)(6) & (b)(7)(C).

A number of households whose transactions were cited in other attachments to the charge letter also consistently made transactions that ended in same-cents values. Transactions appearing in more than one attachment to the charge letter are more suspicious as they display multiple patterns common to trafficking transactions.

At one point Appellant's contends that transactions ending in same-cents values are the result of the normal practice of the firm to end a transaction in the same-cents value **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** and subsequently Appellant contends it sometimes rounds off prices on transactions or specific items in even-dollar or half-dollar amounts. The assertion that the firm rounds off transaction amounts is not supported by the evidence as two-thirds of transactions were not even-dollar transactions. Unlike stores that regularly round off prices to build customer loyalty, it is unclear why Appellant would round off prices in the apparently random manner in Appellant's second contention. It is also interesting that the transactions the owner selected to round off also happen to have other characteristics common to trafficking transactions.

Appellant contends same-cents transactions are due to the store's pricing. The prices evident in the store visit photos show a pricing structure typical of convenience stores, where items are often priced to end in ".x9" cents. With such a pricing structure, it is unlikely for transactions to naturally end in "50" cents or even-dollar values with the frequency they occurred during the review period. Even if many of Appellant's prices were for even-dollar amounts, the purchase of even a single additional item that was not priced at an even-dollar amount would rule out an even-dollar transaction.

Patterns of transactions ending in same-cents amounts indicate that SNAP transaction amounts are contrived. Random data, which legitimate transaction activity approximates, is extremely difficult to produce intentionally; it is very difficult to avoid repetitive patterns when attempting to create the appearance of normal, near-random transactions. That various customers each repeatedly had totals with identical cents values during the review period strains the credibility of Appellant's declaration that this activity reflected the acceptance of SNAP benefits in exchange for eligible food items. As Appellant has offered no rational explanation for why such patterns might exist, it is reasonable to conclude that these same-cents transactions are the result of trafficking.

Repeat Transactions by the Same Household

Attachment 2 to the charge letter documents the same household conducting back-to-back transactions in unusually short time frames. Violating stores may conduct multiple transactions

from the same household account within a 5 U.S.C. § 552 (b)(6) & (b)(7)(C) period to avoid the detection of single, high-dollar trafficking transactions. There are 374 repeat transactions 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

The record reflects that customers conducting rapid, repetitive, and large transactions at Appellant frequently spent SNAP benefits at better-stocked and more competitively-priced grocery stores, sometimes on or about the same day they shopped at Appellant.

Appellant stated customers typically shop at Appellant when running errands at night or on the way to work or school; Appellant is conveniently located near a variety of large public facilities and there are few stores that can provide a meaningful comparison with Appellant. Appellant did not provide any evidence to support it carries a variety of uncommon ethnic goods. A review of the store visit documentation fails to support that Appellant was an ethnic store. The Case Analysis Document identifies much larger stores with more reasonable prices located within one mile of Appellant. There is no basis for unusually high customer attraction to Appellant, there being no great price advantage, profusion of ethnic goods, or special or custom services rendered. Oddly, some SNAP households spent considerably less at the larger stores than at Appellant.

Appellant argues households participate in co-shopping where different household members split benefits evenly or proportionately and separately shop at Appellant during a short period of time. That members of a household share the chore of grocery shopping (“co-shopping”) means that household members take turns doing the shopping, not that both shoppers shop on or about the same day. This would defeat the purpose of why households typically share the chore of grocery shopping. A household is one that purchases and prepares meals together, so there would be no need to split benefits. Households that purchase and prepare meals separately are considered separate households.

Appellant contends the back-to-back transactions are due to customers sharing benefits with others, household members shopping together and making purchases separately, and participants going on spending sprees. Appellant has offered no evidence whatsoever that SNAP households share their cards with friends or go on spending sprees. As previously stated, there is no reason for members of the same household to make separate purchases. Appellant has also not provided any explanation for why, if such behaviors were occurring, these purchases would occur at Appellant rather than at nearby, larger stores. It is unlikely that a family relying on SNAP to supplement their nutritional needs would share these benefits with another family that purchases and prepares meals separately. An unsubstantiated argument such as this does not provide a valid basis for dismissing the charges or for mitigating the penalty imposed.

Appellant contends that customers regularly place phone orders and pay for those phone orders separately from other purchases. It is highly unusual for customers to call in phone orders to a convenience store. Even if customers decided to do so, there is no logical reason why they would purchase those items from other items they picked up at the store. Perhaps there were occasions that customers did make phone orders, purchased those items, and saw something at the checkout and decided to purchase it after already having completed a transaction. There also may have been occasions when customers make an additional purchase because they forgot an item. In

such instances, it is reasonable to expect the subsequent purchase would be for a nominal amount. This is because it is quite rare to find very expensive items positioned at the checkout area, especially in smaller stores. Also, forgotten goods purchased immediately after a prior transaction typically consist of only one or two items. However, the subsequent transactions exceeded any minor amount. In some cases, the amounts of subsequent transactions equaled or exceeded the preceding transaction total.

Appellant asserts that transactions that occur on consecutive days are not suspicious. While there are legitimate reasons why a SNAP recipient might return to a convenience store in a short period of time, the examples in Attachment 2 indicate a series of purchases that total to large amounts. SNAP benefits are intended to supplement the food budget for households whose net income is near or below the Federal Poverty Level. It is difficult to believe customers who must rely on SNAP benefits to make ends meet prefer to pay higher prices and spend considerable amounts of their benefits at a convenience store. Spending sizable portions of one's SNAP benefit allotment in a convenience store - when there are larger stores at which one also shops that carry more variety of foods at a lower cost - is unreasonable customer behavior. Moreover, households listed in this attachment conducted this strange shopping pattern of making substantial purchases at Appellant multiple times during the review period. Appellant argues that if the store were trafficking, it would not go through the effort of breaking up larger transactions into smaller transactions. On the contrary, given the common practice of violating retailers breaking up large, suspicious transactions into multiple, smaller transactions to avoid detection, a firm's explanation and evidence for why these transactions are occurring in a 5 U.S.C. § 552 (b)(6) & (b)(7)(C) period in a convenience store should be both rational and compelling. Appellant's explanation is neither.

SNAP Benefit Depletions

Attachment 3 to the charge letter documents the same household exhausting all or nearly all its benefits in rapid order. There are 268 transactions 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

In some cases, SNAP customers depleted SNAP account balances to within pennies of a zero balance and/or depleted balances during the first week of the month. It is highly implausible that customers would desire, or be able, to regularly conduct large transactions that deplete balances to within pennies of a zero balance. The likelihood that these transactions were the result of the legitimate sale of only eligible foods only is extremely small.

Appellant is correct that a government report on SNAP shopping patterns² indicates that after the first day of benefit issuance, on average, 80 percent of a household's allotment remains unspent. Even after seven days, 40 percent of benefits still remain unspent. It typically takes 14 days to deplete 80 percent of one's benefits, and 21 days to deplete 90 percent. Appellant implies that as most of the suspicious transactions occurred during this period of time this must reflect legitimate purchases. Yes, this report also revealed that households most often redeemed their

²U.S. Department of Agriculture, Food and Nutrition Service, Office of Research and Analysis, *Benefit Redemption Patterns in the Supplemental Nutrition Assistance Program*, by Laura Castner and Juliette Henke. Project officer: Anita Singh, Alexandria, VA: February 2011.

benefits at supermarkets and supercenters, with only four percent of all households never shopping in a supermarket.

Appellant contends that SNAP participants are more likely to shop at convenience stores and small grocery stores than non-SNAP participants, and customers of these stores are among the most loyal customers. Appellant did not provide any evidence in support of these contentions. Even if true, this does not support that SNAP participants make large purchases at these smaller stores.

Appellant asserted convenience stores and similar stores had a 3% increase in customers over 2015. Appellant cited a 2016 U.S. Grocery Shopper Trends report, but provided U.S. Grocery Shopper Trends 2017 slideshow presentation. This presentation shows a 2% decline from 2016 in customers for convenience stores and similar stores. This report also supports that customers are much more likely to shop at supermarkets and superstores.

It is extremely doubtful that a SNAP household making a legitimate purchase would choose to spend a large portion of its monthly allotment at a convenience store with likely higher prices and substantially less inventory than what would be found at a supermarket or superstore. Although many SNAP households do shop early in the month as opposed to later in the month, most households do not spend all or a majority of their monthly benefits in only a few transactions or a single day. Depleting a large portion of one's SNAP balance early in the benefit month, leaving little to purchase food for the remainder of the month, is inconsistent with the normal shopping behavior of SNAP households.

Large Transactions

Appellant argues that the store is well stocked and large purchases are from well-known customers making large purchases to feed large families. The food stock and facilities of Appellant as reported in the store visit documentation do not appear sufficient to provide for all of one's food needs. People generally do not spend large sums at such stores. They usually stop at convenience stores to pick up a few staple food items, such as bread, milk, or a can or two of food that they may consider are not worth a trip to the supermarket to purchase. It is rare for a convenience store such as Appellant's to have purchases like those included in Attachment 4 to the charge letter. This attachment cites 879 EBT transactions during the six-month period of investigation 5 U.S.C. § 552 (b)(6) & (b)(7)(C). 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

These transactions significantly exceed the state's average SNAP transaction, which was \$9.45 for this type of store during the six months of the review period. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Appellant's average transaction is significantly higher than the state's average transaction. As previously stated, Appellant has a limited food stock typical of a convenience store and does not have any features that would induce people to spend substantially more than the typical convenience store purchase amount.

Its large transactions during the review period were also much more frequent than those of similar stores in the state. 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

Based on the store layout, infrastructure, and available inventory, it is not credible that the Appellant would so frequently conduct large transactions closely resembling those typically found at a supermarket or superstore. It is not plausible that the firm's customers would regularly carry very large amounts of merchandise around the store without the benefit of shopping carts or shopping baskets, especially since larger, better stocked stores are readily available and in the vicinity of the Appellant firm. Appellant is not set up to process high-dollar transactions, as indicated by its lack of equipment to facilitate large transactions and limited counter space. There are no legitimate bases for SNAP customers' unusual attraction to the firm such as a superior selection of staple foods, price advantages, package specials, bulk or promotional items, an extensive variety of otherwise unavailable ethnic food items, or special services rendered. Appellant failed to provide convincing evidence to establish the legitimacy of these excessively large transactions, such as itemized cash register receipts. Based on all of these factors discussed in this section, the large volume of transactions for high-dollar amounts is unlikely to indicate a pattern of legitimate food purchases.

Expensive Offerings

Appellant asserts it sells a lot of expensive meat and cheese which explain the large purchases. Appellant also stated that precalculating the prices of these items explain the rapid purchases. The evidence does not support this contention. The store review report documented that the firm did not have meat or seafood specials or bundles. Appellant does sell meat and cheese by the pound, but these items are also used for its prepared sandwiches and other offerings. Appellant did not provide any receipts or invoices in support of its contentions.

While there may have been occasions when Appellant sold expensive meats and cheese items and pretotaled these purchases, based on the low price of these items relative to the large transactions, evidence from the store visit, and lack of corroborating receipts or invoices, it is more likely true than not true that the sale of expensive items does not explain the large and rapid SNAP transactions that occurred at Appellant. Trafficking is a more likely explanation for the unusual and irregular pattern of high-dollar transactions.

Appellant's Responsibilities

Appellant insists staff have been trained on proper handling of SNAP transactions. When ownership signed the FNS application to become an authorized SNAP retailer, this included a certification and confirmation that the owner(s) would "accept responsibility on behalf of the firm for violations of the SNAP regulations, including those committed by any of the firm's employees, paid or unpaid, new, full-time or part-time." The violations listed on this certification document include maintaining credit accounts and trafficking. Regardless of whom the ownership of a store may choose to handle store business, ownership is accountable for the proper handling of SNAP benefit transactions.

No Applicable Mitigating Factors

Appellant asserts that this is the first time there has been an issue related to SNAP. A record of program participation with no documented previous violations, however, does not constitute valid grounds for mitigating the impact of the present serious determination of trafficking.

Appellant also argues that the suspicious transactions account for only a small percentage of the firm's sales. Neither the Food and Nutrition Act of 2008, as amended, nor the accompanying regulations 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 extremely serious, 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 must 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.

No Control Over Benefit Use

Appellant insists there are no restrictions on how SNAP customers spend their benefits. In truth, SNAP households have no limits on the number of times they may use their SNAP cards or how much eligible food they may purchase. The SNAP transactions of Appellant are questionable not because they exceed any limits for use. Rather, they display characteristics not typically found at convenience stores and are indicative of trafficking.

No Undue Hardship to Appellant

Appellant maintains that disqualification would pose an extreme hardship to the firm. Economic hardship is a likely consequence whenever a store is permanently disqualified from SNAP participation. However, there is no provision in the SNAP regulations for reducing an administrative penalty on the basis of possible economic hardship to the firm resulting from such a penalty. To excuse Appellant from an assessed administrative penalty based on purported economic hardship to the firm would render the enforcement provisions of the Food and Nutrition Act of 2008 and the enforcement efforts of the USDA virtually meaningless.

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

No Undue Hardship to SNAP Participants

Appellant asserts that disqualification would be a hardship to SNAP households who rely on the store. Some degree of inconvenience to SNAP benefit users is inherent in the disqualification from SNAP of any participating food store, since the normal shopping pattern of such SNAP participants may be changed due to the disqualification. Section 278.6(f)(1) of SNAP regulations provides for Civil Money Penalty (CMP) assessments in lieu of disqualification in cases where disqualification would cause “hardship” to SNAP households because of the unavailability of a comparable participating retail food store in the area to meet their needs. However, this regulation also sets forth the following specific exception: “A CMP for hardship to SNAP households may not be imposed in lieu of a permanent disqualification.” Because the matter at hand involves a permanent disqualification, this CMP provision is not applicable.

Earlier Court Decisions

Appellant contends *Brooklyn Mini Market v. U.S.* and *Skyson USA, LLC v. U.S.* support that USDA should not rely overmuch on information generated by the ALERT system. Neither case is applicable to Appellant’s case. In *Brooklyn Mini Market v. U.S.* the court found USDA failed to compare the firm to other similarly-situated local grocers. This did not occur in Appellant’s case. Contrary to Appellant’s contention that *Skyson USA, LLC* held that data compiled by ALERT was unreliable, the court analyzed all the evidence in support of the disqualification, including additional documents that had not been previously provided to USDA, and determined that the particular evidence in that case did not support a finding of trafficking. The evidence in *Skyson* differs significantly from the evidence in this case.

Evidence of Trafficking

Appellant argues there is insufficient evidence of trafficking, the ALERT system has not been independently proven accurate in finding fraud, that data analysis is prone to error without accurate context, and the determination is arbitrary and capricious. As previously stated, 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.)

Government analyses of stores caught in trafficking violations during on-site investigations found that transactions involving trafficking consistently display particular characteristics or patterns. These patterns include those cited in the letter of charges. Appellant is correct that FNS employs a computerized fraud detection tool called ALERT to identify these patterns, however

Appellant is incorrect in its contention that ROD overly relied on the results of the ALERT system when issuing a charge of trafficking. This tool does not determine that trafficking has occurred. The ROD must still analyze the transaction patterns, along with other information such as store visit observations, customer shopping patterns, and comparative data from nearby stores. Only then does the ROD conclude whether questionable transactions were, more likely than not, the result of trafficking. Nevertheless, transactions with these patterns sometimes have valid explanations that support the idea they were the result of legitimate purchases of eligible food items, which is why opportunities are given to charged retailers to explain the questionable transactions cited. In this case, based on the empirical data of past trafficking investigations, the number of suspicious patterns displayed, the other evidence in the file, and in the absence of any reasonable explanations for such transaction patterns, the preponderance of the evidence supports that the “unusual, irregular, and inexplicable” transactions and patterns cited in the letter of charges are the result of trafficking.

Summary

The ROD determined that Appellant likely trafficked in SNAP benefits. The charges of violations were based on the ROD’s assessment that substantial evidence exists that the questionable transactions occurring during the review period displayed patterns inconsistent with legitimate sales of eligible food to SNAP participants. The evidence the ROD considered in support of its determination included:

- The irregular SNAP transaction data of Appellant as compared to similar stores;
- Observations made during an store visit by a USDA contractor, including the inadequacy of the firm’s staple food stock to support such large transactions;
- The availability of other SNAP-authorized stores located close to Appellant; and,
- Shopping behaviors of Appellant’s customers.

The transaction data and overall firm record demonstrate the patterns of unusual, irregular, and inexplicable SNAP activity for this firm is likely the result of trafficking.

Upon review, Appellant failed to prove by a preponderance of the evidence that the administrative action should be reversed. Appellant provided inadequate explanations for the suspicious transactions and insufficient evidence to legitimize its transaction data. It has not convincingly rebutted the ROD’s determination that Appellant most likely trafficked in SNAP benefits. The SNAP regulations are specific with regard to the action that must be taken if personnel of the firm have trafficked, which is that FNS must disqualify the firm permanently.

CIVIL MONEY PENALTY

For a firm to have the opportunity to be considered for a civil money penalty (CMP), it must request that FNS consider a CMP in lieu of permanent disqualification and submit supporting documentation within ten days of receipt of the charge letter. Appellant was advised of these provisions in the charge letter of April 20, 2015. The regulations specify that such supporting documentation must demonstrate that the firm had established and implemented an effective SNAP compliance policy and training program prior to the occurrence of violations. A review of

the administrative record indicates Appellant did not, at any time, request a CMP. Appellant also did not submit any documentation to support its eligibility for this alternative sanction, before or after the deadline.

In the absence of a request for a CMP and any supporting documentation, a CMP was not assessed by the ROD. According to the requirements stated in 7 CFR § 278.6(b)(1), § 278.6(b)(2)(ii and iii), and § 278.6(i), Appellant is not eligible for a CMP in lieu of a permanent disqualification from participation as an authorized retailer in SNAP. The determination by the Retailer Operations Division to deny Appellant a civil money penalty is sustained.

CONCLUSION

The record has yielded no indication of error in the finding by the Retailer Operations Division that Appellant trafficked in SNAP benefits. A review of the evidence supports that it is more likely true than not true that program violations occurred as charged. Based on the discussion above, the determination by the Retailer Operations Division to impose a permanent disqualification against Not Guilty, Inc. from participating as an authorized retailer in SNAP is sustained.

RIGHTS AND REMEDIES

Applicable rights to a judicial review of this decision are set forth in 7 U.S.C. § 2023 and 7 CFR § 279.7. If Appellant desires a judicial review, 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.

RICH PROULX
Administrative Review Officer

April 23, 2018