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

Oakland Express #2,

Appellant,

v.

Case Number: C0215055

Retailer Operations Division,

Respondent.

FINAL AGENCY DECISION

It is the decision of the U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS) that a permanent disqualification of Oakland Express #2 (hereinafter "Appellant") from participation as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP) was properly imposed by the Retailer Operations Division.

ISSUE

The issue accepted for review is whether or not the Retailer Operations Division, in its administration of SNAP, took appropriate action, consistent with Title 7 Code of Federal Regulations (CFR) Part 278, when it imposed a permanent disqualification against Oakland Express #2.

AUTHORITY

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

SUMMARY OF CHARGES

The Appellant was charged with trafficking and subsequently permanently disqualified based on an analysis of EBT transaction data from July 2018 through December 2018. This involved the following transaction patterns which are common trafficking indicators:

- There were multiple transactions made from the accounts of individual SNAP households within a set time period.
- The firm conducted EBT transactions that were large based on observed store characteristics and recorded food stock.

CASE CHRONOLOGY

The agency's record shows that FNS initially authorized Oakland Express #2 for SNAP participation as a convenience store on April 8, 2008. In a letter dated March 26, 2019, 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 between the months of July 2018 and December 2018. The letter noted that the penalty for trafficking is permanent disqualification as provided by 7 CFR § 278.6(e)(1). The letter also stated that the Appellant could request a civil money penalty (CMP) in lieu of permanent disqualification for trafficking, but noted that such a request must be made and supporting documentation submitted within 10 days of receipt of the charge letter under the conditions specified in 7 CFR § 278.6(i).

In correspondence between April 2, 2019, and April 29, 2019, the Appellant responded to the charges. In its response, the Appellant did not specifically deny the trafficking allegations, but certainly implied as much, explaining that the evidence it compiled, such as inventory invoices, photos, and written customer statements were sufficient to explain the transactions in question. The Appellant stated that the store is located in a low-income part of town and that most customers who shop at the store use EBT benefits. The Appellant further stated that most customers walk to the store several times a day and claimed that the store was the only SNAP-authorized store in Charleston, Mississippi until around February 2019. Upon realizing this, the Appellant started offering more special orders, particularly since some customers were disabled or did not have transportation to out-of-town grocery stores. Special orders included cases of chicken wings, pizza sticks, and batter for chicken. Other special orders included fruit trays, pineapple boats, banana pudding, salads, etc. The store also sells cold pizza, which the firm heats up for the customer after purchase. Add these items to the firm's normal food sales, including groceries, snacks, drinks, cake orders, and Krispy Krunchy Chicken, and the firm does a brisk business. The Appellant further stated that the store's prices are "really high," and so it does not take much for a transaction 5 U.S.C. § 552 (b)(6) & (b)(7)(C), especially if the household has a few children.

In support of its response, the Appellant submitted inventory purchase summaries and invoices from nine different vendors, a photo of hot food items for sale in the store, and written statements from 11 apparent SNAP customers listing the items they purchase from Oakland Express #2.

After reviewing the Appellant's response and further considering the evidence in the case, the Retailer Operations Division concluded that trafficking had occurred as charged and issued a determination letter dated June 11, 2019. This letter informed the Appellant that it would be permanently disqualified from SNAP upon receipt of the letter in accordance with 7 CFR

§ 278.6(c) and § 278.6(e)(1). The letter also stated that the Retailer Operations Division considered the Appellant's eligibility for a trafficking CMP according to the terms of Section 278.6(i) of the SNAP regulations, but that a CMP was not appropriate in this case because the Appellant failed to submit sufficient evidence to demonstrate that the firm had established and implemented an effective compliance policy and program to prevent SNAP violations.

In a letter postmarked June 24, 2019, the Appellant, now through counsel, appealed the Retailer Operations Division's determination by requesting an administrative review. The request was granted.

It should be noted that with its request for review, Appellant's counsel submitted a request for case file information in a request made under the Freedom of Information Act (FOIA). The agency's response to this FOIA request was delivered to Appellant's counsel on August 29, 2019. On September 18, 2019, Appellant's counsel submitted a three-page brief outlining its contentions in this matter.

STANDARD OF REVIEW

In an appeal of adverse action, such as disqualification from SNAP participation, an appellant bears the burden of proving by a preponderance of the evidence that the administrative action should be reversed. This means that an appellant has the burden of providing relevant evidence which a reasonable mind, considering the record as a whole, would accept as sufficient to support a conclusion that the matter asserted is more likely to be true than not true.

CONTROLLING LAW AND REGULATIONS

The controlling law in this matter is found in the Food and Nutrition Act of 2008, as amended (7 U.S.C. § 2021), and promulgated 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.

7 U.S.C. § 2021(b)(3)(B) states, in part:

...[A] disqualification under subsection (a) shall be...permanent upon...the first occasion or any subsequent occasion of a disqualification based on the purchase of coupons or trafficking in coupons or authorization cards by a retail food store or wholesale food concern or a finding of the unauthorized redemption, use, transfer, acquisition, alteration, or possession of EBT cards...

7 CFR § 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, [or] evidence obtained through a transaction report under an electronic benefit transfer system** [Emphasis added.]

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.

7 CFR § 271.2 states, in part:

Trafficking means: The buying, selling, stealing, or otherwise effecting an exchange of SNAP benefits issued and accessed via Electronic Benefit Transfer (EBT) cards, card numbers and personal identification numbers (PINs), or by manual voucher and signature, for cash or consideration other than eligible food, either directly, indirectly, in complicity or collusion with others, or acting alone...

7 CFR § 271.2 states, in part:

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

7 CFR § 278.6(b)(1) 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) states, 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(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.

7 CFR § 278.6(i) states, in part:

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...

APPELLANT'S CONTENTIONS

The Appellant, through counsel, made the following summarized contentions in its request for administrative review, in relevant part:

- USDA's finding of trafficking is incorrect. The basis of the findings is flawed and is based on demonstrably inaccurate findings and supported by testimony that has no indication of reliability.
- Upholding the agency's ruling amounts to nothing less than willful ignorance of absence of reliable evidence and the evidence provided by the Appellant.
- USDA does not provide a guideline for how much items should cost, but rather conducts a review of the available merchandise and compares it to transactions in the store.
- The field agent's report contains incorrect information, and thus any comparison to the prices in the store are invalid. For example, the reports lists the four highest priced foods as deli turkey, Aquafina water, soda, and deli cheese. This is false. As noted in its initial response to the charges, the Appellant began ordering items in bulk for customers who were disabled or otherwise unable to get out of town. The firm special ordered cases of chicken wings, pizza sticks, and chicken batter, as well as fruit trays, pineapple boats, banana pudding, and salads. This shrewd business decision was not only successful in growing the business but also provided a valuable service to the community.
- While bulk items are priced better because they're in bulk, they are still pricey in comparison to products sold individually.
- The fact that bulk items could be purchased would not have been readily apparent to a stranger like a government agent. To the firm's core customers, however, these items are a part of life.

- The Appellant has provided ample documentation to support these claims, including customer statements, receipt documentation, invoices for bulk purchases, and testimonial evidence from the Appellant itself.
- All of the testimonial evidence collected by USDA is suspect.
- The right to confront one's accusers is enshrined in the Sixth Amendment of the United States Constitution. USDA's heavily redacted agent report denies the Appellant even the most basic ability to confront and respond to the accusations of any witness reports. The documents provided in response to the Appellant's FOIA request had many portions redacted. Thus, the Appellant is unable to provide specific basis to reject the agency's conclusions.
- There are no guarantees of trustworthiness in the statements provided to the USDA field agent. The Appellant has no oath, no notarized affidavit, no extrinsic reason whatsoever cause the Appellant to trust the statements at all. Further, there are many reasons why persons may lie to investigators.
- The Appellant owner is an outsider to the people of Charleston, Mississippi. His race and background cannot be ruled out as motivating factors for those in the community to bear false witness. There may also be economic reasons, such as relationships to the Appellant's competitors who would benefit from the Appellant being put out of business. Finally, the Appellant cannot discount the effect of a government agent asking incriminating questions to patrons of the store. It is possible that in reaction to this stressful event, the Appellant's customers may have misspoken or otherwise incorrectly stated the facts.
- All of these arguments come from the assumption that the field agent who generated the agent report accurately and completely encapsulated the entirety of the witnesses' statements. This is a large assumption, and given the Appellant's inability to review both the claims and the persons making them, the Appellant cannot verify that the statements provided by USDA are the same that were provided by the witnesses. This gap in the Appellant's knowledge should not be overlooked and represents a glaring deficiency in the agency's decision.
- In its original response to the charges, the Appellant provided a justifiable explanation for the firm's success. This explanation was supported by more than the minimum documentation to support the fact that these purchases were above board.
- USDA appears to make quite a point that some transactions end in .00 and falsely conflates this with trafficking. As noted in the agent report, the firm has a deli counter. This allows the firm to sell literally any amount of meat, and the onsite scale allows the firm to precisely determine how much meat and its subsequent price. This allows customers to get the most bang for their buck. For example, customers who have only 5 U.S.C. § 552 (b)(6) & (b)(7)(C) remaining on their EBT card may make miscellaneous purchases and then buy just enough deli meat and cheese to clean out their EBT for the month. On a receipt, it would reflect spending 5 U.S.C. § 552 (b)(6) & (b)(7)(C) exactly, even though there were separate and distinct qualifying purchases that added up to that amount.
- USDA's conclusion that the transactions in question constituted trafficking is based on a faulty field agent report containing demonstrably incorrect information regarding pricing at the store. These false findings were supported by testimonial evidence that was not given any guarantee of trustworthiness. Moreover, this testimonial evidence

has not and cannot be fully evaluated for bias, faulty memory, proper identification, or any of the myriad of factors that a person making a final determination must know to make an informed decision.

The preceding may represent only a brief summary of the Appellant's contentions presented in this matter. However, in reaching a decision, full attention was given to all evidence and contentions presented, including any not specifically summarized or explicitly referenced herein.

ANALYSIS AND FINDINGS

The primary issue for consideration in a case based on suspicious SNAP redemption data is whether or not the Retailer Operations Division adequately established that the Appellant firm engaged in the violation of trafficking. In other words, did the Retailer Operations Division, through a preponderance of the evidence, establish that it is more likely true than not true that the irregular and unusual transactions cited in the charge letter were the result of trafficking?

Contractor Store Visit

The case file indicates that in reaching a disqualification determination, the Retailer Operations Division considered not only the Appellant firm's EBT transactions, but also information obtained from an October 24, 2018, store visit which was conducted by an FNS contractor to observe the nature and scope of the firm'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 and photographs documented the following store size, description, and characteristics:

- Oakland Express #2 is a standard convenience store/gas station, roughly 3,250 square feet in size, operating in the city of Charleston, Tallahatchie County, Mississippi.
- At the time of the contractor's visit, the firm did not have any shopping carts or handheld shopping baskets, which is typical for stores of this size. Customers shopping in such stores generally purchase only as much food as they can carry in their arms.
- The store visit photographs show two cash registers and agency records reflect the use of two EBT point-of-sale terminals for SNAP purchases.
- According to the contractor's report, the store's staple food stock is not sufficient for ongoing program eligibility (see 7 CFR § 278.1(b)(1)). While the firm has sufficient inventory in three of the four staple food categories, it is deficient in the dairy category, carrying only milk and cheese. Had the firm not been disqualified for program violations, it is likely that the firm's authorization would have been withdrawn for failure to maintain proper levels of staple food inventory.
- The contractor's report clearly indicates that the store's primary food emphasis is the sale of snack foods and drinks, such as carbonated and uncarbonated drinks, crackers, chips, and candy. The store also sells a large volume of ineligible items, including hot food, gasoline, alcoholic beverages, tobacco products, automotive products, cleaning supplies, and other miscellaneous household merchandise.

- The store also has a kitchen/deli area, where hot meals are available for purchase, including Krispy Krunchy chicken, Hunt Brothers pizza, cheeseburgers, fries, etc. The store also sell meat and cheese by the pound.
- The checkout area consists of two small countertop spaces where items can be placed for purchase. The constricted checkout area is not suitable for conducting large or rapid transactions as there is little space on the counter to place more than a few items at a time and little room for customers to maneuver with large amounts of groceries.
- There is no indication from the store visit report that the firm has a special pricing structure, although most items appear to end with a cents-value of 9. The report also states that the firm does not round transaction totals up or down at checkout.
- There is no indication from the report that the firm has special food packages for sale or that items are sold in bulk.

The available inventory of SNAP-eligible food at the time of the store visit showed stock that would be typical of a convenience store, where households normally purchase a limited number of items to supplement their overall dietary needs. There was no indication that SNAP households would be inclined to regularly visit Oakland Express #2 to purchase large quantities of groceries, especially considering the absence of shopping carts and baskets and the availability of larger grocery stores in the immediate area, including a full-line supermarket less than a tenth of a mile away that has been authorized to accept SNAP for more than 20 years. Given the available inventory and the store's characteristics, this review could find no reason why the Appellant firm's SNAP redemption patterns differed so significantly from those of its competitors.

SNAP Transaction Analysis

Charge Letter Attachment 1: Multiple transactions were made from the accounts of individual SNAP households within a set time period. This attachment lists 25 sets of transactions (61 transactions in all) 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Violating stores often conduct multiple transactions from the same household account in short periods of time to avoid the detection of single high-dollar transactions that cannot be supported by the retailer's inventory, store type and structure.

5 U.S.C. § 552 (b)(6) & (b)(7)(C)

That such repetitive SNAP transaction sets occurred at a gas station like Oakland Express #2 is highly unusual. Unfortunately, the Appellant has not offered any credible evidence, such as itemized cash register receipts, to prove that the specific transactions in question were legitimate purchases of eligible food. As such, it is the determination of this review that the patterns found in this attachment were likely the result of trafficking.

Charge Letter Attachment 2: The store conducted EBT transactions that were large based on observed store characteristics and recorded food stock. This attachment lists 380 SNAP transactions 5 U.S.C. § 552 (b)(6) & (b)(7)(C). These large transactions are not consistent with a convenience store in the state of Mississippi. The Retailer Operations Division has determined

that during the review period, the average SNAP transaction amount for a convenience store in Mississippi was $6.50. In Tallahatchie County, the average was a bit higher, at $8.69 per transaction, but the average transaction in Attachment 2 is almost five times larger than the average purchase amount for this store type.

Given that the Appellant firm has a modest inventory of staple foods as well as other SNAP-eligible items, such as snacks and drinks, it is possible that there would be an occasional purchase where the transaction amount is high, 5 U.S.C. § 552 (b)(6) & (b)(7)(C). As such, there may be some legitimate SNAP transactions sprinkled among the transactions listed in Attachment 2. However, as noted earlier, this review could find no evidence that the firm would be likely to have SNAP redemption patterns that differ significantly from similar-sized competitors, especially considering the constricted checkout areas, the absence of shopping carts and baskets, and the availability of much larger stores in the area, including a supermarket less than two blocks away. The substantial number of high-dollar transactions in a six-month period calls into question the legitimacy of these transactions.

5 U.S.C. § 552 (b)(6) & (b)(7)(C). Considering how many food items it would typically take to add up 5 U.S.C. § 552 (b)(6) & (b)(7)(C), and considering the store's characteristics, this review finds it unlikely that all of these transactions are valid SNAP purchases.

Included in Attachment 3 are several unusually repetitive transaction totals.
5 U.S.C. § 552 (b)(6) & (b)(7)(C). Considering that the firm conducted almost 4,000 SNAP transactions during the six- month review period, it is reasonable to expect that transaction totals would occasionally be duplicated. But these transactions stand out as particularly unusual given their frequency, large size, and even-dollar amounts. It should be noted that on the day of the contractor's visit, store personnel indicated that the store does not offer bulk items at special even-dollar prices and does not round transaction totals up or down at checkout.

The Appellant has argued that even dollar transactions may be the result of the firm selling deli meat and cheese for precise amounts. For example, the Appellant argues that customers who have only 5 U.S.C. § 552 (b)(6) & (b)(7)(C) remaining on their EBT card may make miscellaneous purchases and then buy just enough deli meat and cheese to clean out their EBT balance for the month. On a receipt, it would reflect spending 5 U.S.C. § 552 (b)(6) & (b)(7)(C) exactly, even though there were separate and distinct qualifying purchases that added up to that amount.

Unfortunately, the Appellant has not offered any evidence of this claim. It has provided no cash register receipts, let alone any receipts that show just enough meat and cheese to round a transaction total to an even dollar amount. The store visit clearly shows that most prices in the store end with a cents value of 9. To have so many even-dollar transactions with such a pricing structure is very unusual. Without some kind of evidence to show what actually occurred at the point of sale, it is reasonable for this review to conclude that trafficking was a likely reason for such strange transaction patterns.

As for the Appellant's inventory records, these are almost all summary reports and provide very few specifics regarding the food items that were purchased by the store. Only one report, from

Sysco Corporation, listed actual food products, and the majority of the products on the report appeared to be items for use in the preparation of hot meals rather than for sale individually. Inventory records can be useful for a firm to demonstrate to FNS that it had sufficient stock to cover the total amount of its SNAP redemptions during a review period. However, invoices alone, particularly summary documents, rarely persuade a reviewer to reverse a disqualification determination as they offer little insight into what transpired at the point of sale.

The Appellant contends that the contractor who conducted the store inspection failed to properly identify the most expensive items available for sale in the store. The Appellant argues that some of its inventory is regularly sold in bulk, such as chicken wings, pizza sticks, chicken batter, fruit trays, pineapple boats, etc. The Appellant contends that the fact that bulk items could be purchased would not have been readily apparent to a stranger like a government agent. But to the firm's core customers, these items are a part of life.

With regard to this contention, there is no evidence that the contractor's findings were faulty. The report, which was supported by more than 40 photographs, clearly indicates that questions related to bulk foods and pricing were completed in collaboration with store personnel. Had expensive bulk items been available for purchase at the time of the contractor's visit, it stands to reason that store personnel would have mentioned this to the contractor or allowed such items to be photographed for inclusion in the report. Aside from its anecdotal claims regarding bulk food offerings and pricing, the Appellant has offered no relevant evidence to prove that such items were available or to counter the contractor's report.

This review does not doubt that Oakland Express #2 sells eligible food items and conducts legitimate SNAP transactions. There is no evidence that this has ever been questioned. But when unusually large transactions form patterns that are substantially different from similar-sized and similarly-stocked stores, convincing evidence from the Appellant is warranted to verify that there is not something more, such as trafficking, taking place.

The transactions identified in the charge letter are highly irregular and substantially different from other convenience stores. In an appeal of adverse action, the onus is on the Appellant to prove, by a preponderance of the evidence, that the administrative action should be reversed. This means submitting sufficient and compelling evidence that would lead a reviewer to conclude that trafficking did not occur. Unfortunately the Appellant's evidence does not meet this standard, and thus, the Appellant has not proven by a preponderance of the evidence that trafficking did not take place during the review period.

Customer Statements

As to the 11 customer statements submitted by the Appellant in response to the charge letter, such documentation is largely unconvincing. Customers engaging in trafficking violations are unlikely to admit to such conduct. Furthermore, customer statements, even if well-intentioned, do not typically represent a household's actual shopping behavior, as households generally do not retain records of transactions and often do a poor job of recalling spending patterns at a particular location.

For example, 5 U.S.C. § 552 (b)(6) & (b)(7)(C) indicated that she purchased bags of chicken, chips, pizzas, mayonnaise, oil, 2-liter sodas, candy, chicken wings, fish, "wedges," milk, and bread. If many of these items had been purchased all at once, the transaction total could have been quite large.
However, according to agency records, 5 U.S.C. § 552 (b)(6) & (b)(7)(C) made 107 purchases with her EBT card during the six-month review period. Of those 107 purchases, just 22 occurred at Oakland Express #2, 5 U.S.C. § 552 (b)(6) & (b)(7)(C), w5 U.S.C. § 552 (b)(6) & (b)(7)(C) – very typical for purchases made at a convenience store. The largest transaction made by 5 U.S.C. § 552 (b)(6) & (b)(7)(C) at Oakland Express #2 5 U.S.C. § 552 (b)(6) & (b)(7)(C). This is the only transaction that appeared on the charge letter attachments (see line 319 of Attachment 2). Since 95 percent of 5 U.S.C. § 552 (b)(6) & (b)(7)(C) transactions do not appear in the charge letter, her statement does little to convince this review that the transactions in Attachments 1 and 2 were not trafficking.

Another customer, 5 U.S.C. § 552 (b)(6) & (b)(7)(C), reported that she purchased bags of shrimp, chicken wings, pizza sticks, potato wedges, chips, and corn on the cob. She also claims to have purchased "big salads" and gallons of milk. According to agency records, 5 U.S.C. § 552 (b)(6) & (b)(7)(C) had 43 SNAP transactions during the review period. Of those, 25 took place at Oakland Express #2, 5 U.S.C. § 552 (b)(6) & (b)(7)(C). This is slightly higher than the average transaction amount at convenience stores in Tallahatchie County. And yet, only one of 5 U.S.C. § 552 (b)(6) & (b)(7)(C) transactions appeared on the list of transactions in the charge letter – 5 U.S.C. § 552 (b)(6) & (b)(7)(C) (see line 134 of Attachment 2). As such, her claims regarding large purchases are doubtful.

This review contends that repetitive or large transactions are generally not suspicious when they occur on an occasional or intermittent basis. But when such transactions form questionable patterns on a consistent basis over a substantial period of time, such activity is considered highly irregular, and a firm's intent to comply with program regulations is called into question.

As for the other customers who submitted statements, they had very similar shopping patterns. In most cases, the customers reserved their largest purchases for supermarkets or superstores and appeared to make typical convenience store-sized purchases at Oakland Express #2. Two of the customers who submitted statements did not have any transactions at Oakland Express #2 at all during the review period.

In short, the 11 customer statements provided by the Appellant do not persuade this review that trafficking did not occur, as their claims of large purchases at Oakland Express #2 do not match their actual SNAP redemption data and do not account for the vast majority of the transactions listed in the charge letter.

Trafficking Case based on EBT Data

One of the key issues in this case appears to be the Appellant's misunderstanding of how the allegations of trafficking came to be. The Appellant contends that all of the testimonial evidence

collected by USDA is suspect. The Appellant makes several arguments regarding witness reports and statements given to the USDA "field agent." The Appellant claims that there may be several reasons why persons might lie to an investigator and even proposes that some people in the town of Charleston may be willing to bear false witness against the owner due to his race and background or as a favor to competitors who would like to see Oakland Express #2 go out of business. The Appellant further states that patrons of the store might be intimidated by a government agent asking incriminating questions.

The Appellant further states that the right to confront one's accusers is enshrined in the Sixth Amendment of the United States Constitution. According to the Appellant, the documents provided by FNS in response to the Appellant's FOIA request had many portions redacted, which denies the Appellant the ability to confront witnesses and properly respond to the accusations.

This review cannot speak to the Appellant's reputation or to responses that may be given by persons questioned by government officials. However, that is not how this case came into existence. No witnesses were questioned by FNS, and the only "field agent" involved was a contractor hired by FNS to conduct a store visit. Aside from visiting the store, taking photographs, and compiling a report detailing the visit, the contractor had no involvement in this case. Instead, the allegations of trafficking are the result of a desk analysis of the firm's inconsistent SNAP redemption data.

It is noted that FNS employs a computerized fraud detection tool to identify EBT transactions that form patterns having characteristics indicative of trafficking. However, this tool does not, by itself, determine or conclude that trafficking has occurred. FNS's Retailer Operations Division must still analyze the transaction data and patterns with other factors, such as observations from a store visit, an online analysis of customer shopping behavior, and a comparison with similar stores in the area, and then render a determination as to whether or not the questionable transactions were, more likely than not, the result of trafficking.

The legality of this method is identified in 7 CFR § 278.6(a) which 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, [or] evidence obtained through a transaction report under an electronic benefit transfer system** …." [Emphasis added.]

Prior to a disqualification determination, the accused firm is given ample opportunity to reply to the charges and provide any information it deems appropriate in justifying as legitimate the transaction activity detailed in the charge letter.

It should be noted that this reviewer has thoroughly examined the documentation and information provided by the Retailer Operations Division and has found no evidence to suggest that the agency simply manufactured numerical data and declared it to be trafficking. From all indications, the Retailer Operations Division obtained the EBT data, found it to be suspicious in

comparison to other area stores of similar size, and then completed a thorough analysis before concluding that trafficking was likely occurring.

It is important to restate here that in an appeal of adverse action, the onus is on the Appellant to prove by a preponderance of the evidence that the administrative action should be reversed. Despite being presented with a specific list of questionable transactions, the Appellant's has offered no persuasive evidence, such as cash register receipts or other evidence from the point of sale, to prove that the transactions listed in the charge letter were legitimate purchases of eligible food.

As to the Appellant's frustration with the agency's FOIA response and redacted pages from the Retailer Operations Division's analysis, it should be noted that this review has no authority relating to agency FOIA responses. As such, no opinions or findings can be rendered. When a FOIA response is given, if the requester is not satisfied with the response or feels that information that should have been released was improperly withheld, it has the option of appealing the FOIA response. This review is not aware of any such appeal made by the Appellant.

As to confronting witnesses, it should be noted that in September 2003, revisions to parts 278 and 279 of the SNAP regulations eliminated in-person hearings as part of the administrative review process. Administrative reviews that are conducted in accordance with regulation are done in writing. Neither the Food and Nutrition Act of 2008 nor SNAP regulations contemplate formal discovery procedures and an adversary hearing as part of the administrative review process. Thus, there is no provision for confrontation with Department witnesses and cross-examination of any such witnesses during an administrative review. However, due process rights are protected by the provision within the Act which provides for judicial review. Once a final agency decision has been made, if the Appellant is dissatisfied with the determination, 7 U.S.C. § 2023 provides for the right to a judicial review and a trial de novo.

Civil Money Penalty

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

In accordance with regulations at 7 CFR § 278.6(b)(2), in order for a civil money penalty to be considered, a firm must not only notify FNS that it desires the agency to consider a trafficking CMP in lieu of permanent disqualification, but it must also submit appropriate documentation within designated timeframes. The case record shows that the Appellant did not request a trafficking CMP when it replied to the charge letter and there is no evidence that the Appellant submitted any documentation that would indicate that the firm had a compliance policy or training program of any kind.

Therefore, in accordance with 7 CFR § 278.6(b)(2)(iii) and § 278.6(i), a civil money penalty in lieu of permanent disqualification for trafficking is not an option in this case.

CONCLUSION

An analysis of the Appellant's EBT transaction record was the primary basis for the decision by the Retailer Operations Division to permanently disqualify Oakland Express #2 from SNAP participation. This data provided sufficient evidence for this review to conclude that the questionable transactions and patterns listed in the charge letter were more likely than not the result of trafficking violations committed by the Appellant. Likewise, the Appellant has not proven, by a preponderance of the evidence, that the administrative action should be reversed.

Based on a review of all available information in this case, the decision to impose a permanent disqualification against the Appellant, Oakland Express #2, under the ownership 5 U.S.C. § 552 (b)(6) & (b)(7)(C), is sustained.

RIGHTS AND REMEDIES

Applicable rights to a judicial review of this decision are set forth in Section 14 of the Food and Nutrition Act of 2008 (7 U.S.C. § 2023) and in Section 279.7 of the SNAP regulations. If a judicial review is desired, the complaint, naming the United States as the defendant, must be filed in the U.S. District Court for the district in which the Appellant owner resides or is engaged in business, or in any court of record of the State having competent jurisdiction. If a complaint is filed, it must be filed within 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.

JON YORGASON
Administrative Review Officer

September 30, 2019