

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

Papalilo Deli Grocery Corp,

Appellant,

v.

Case Number: C0205308

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 Papalilo Deli Grocery Corp (hereinafter Appellant) from participating as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP).

ISSUE

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with Title 7 of the Code of Federal Regulations (CFR) § 278.6(a), (c) and (e)(1)(i), when it imposed a permanent disqualification against Appellant on April 5, 2018.

AUTHORITY

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

CASE CHRONOLOGY

By letter dated February 6, 2018, the Retailer Operations Division charged Appellant with trafficking based on a series of irregular SNAP transaction patterns that occurred in September 2017 through December 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 dated February 15, 2018, that admitted to offering credit. This response also requested a CMP and submitted a one page training document as evidence to be considered in support of the CMP. Upon receipt of Appellant's response, the Retailer Operations Division requested evidence of credit accounts by letter dated February 26, 2018, that was received by the firm on the following day. Appellant responded to this request in correspondence submitted via fax on March 9, 2018. The Retailer Operations Division notified Appellant by letter dated April 5, 2018, that the firm was permanently disqualified from participation as a SNAP retailer in SNAP in accordance with 7 CFR § 278.6(c) and 278.6(e)(1) for trafficking violations. This letter also stated that Appellant was not eligible for the CMP because insufficient evidence was submitted to demonstrate that it had established and implemented an effective compliance policy and program to prevent SNAP violations.

By letter dated April 15, 2018, Appellant appealed the Retailer Operations Division's assessment and requested administrative review. The appeal was granted. No subsequent correspondence was received.

STANDARD OF REVIEW

In an appeal of an adverse action, Appellant bears the burden of proving by a preponderance of evidence that the administrative action should be reversed. That means Appellant has the burden of providing relevant evidence that a reasonable mind, considering the record as a whole, would accept as sufficient to support a conclusion that the argument asserted is more likely to be true than untrue.

CONTROLLING LAW

The controlling law in this matter is contained in the Food and Nutrition Act of 2008, as amended (7 U.S.C. § 2021), and implemented through regulation under Title 7 CFR Part 278. In particular, 7 CFR Part 278.6(a) and Part 278.6(e)(1)(i) establish the authority upon which a permanent disqualification may be imposed against a retail food store or wholesale food concern in the event that personnel of the firm have engaged in trafficking SNAP benefits.

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

7 CFR § 278.6(e)(1)(i) states: "FNS shall disqualify a firm permanently if personnel of the firm have trafficked as defined in § 271.2." Trafficking is defined in part as, "The buying, selling, stealing, or otherwise effecting an exchange of SNAP benefits for cash or consideration other than eligible food". Trafficking includes "Intentionally purchasing products originally purchased with SNAP benefits in exchange for cash or consideration other than eligible food".

7 CFR § 278.2(f) states, inter alia: “Coupons [SNAP benefits] shall not be accepted by an authorized retail food store in payment for items sold to a household on credit.”

7 CFR §278.6(i) states: “FNS may impose a civil money penalty in lieu of a permanent disqualification for trafficking . . . if the firm timely submits to FNS substantial evidence which demonstrates that the firm had established and implemented an effective compliance policy and program to prevent violations of the Program.”

7 CFR §278.6(b)(2)(ii) states: “Firms that request consideration of a civil money penalty in lieu of a permanent disqualification for trafficking shall have the opportunity to submit to FNS information and evidence that establishes the firm’s eligibility for a civil money penalty in lieu of a permanent disqualification in accordance with the criteria included in §278.6(i). This information and evidence shall be submitted within 10 days, as specified in §278.6(b)(1).” Part 278.6(b)(2)(ii) further states that if a firm fails to request a civil money penalty in lieu of a permanent disqualification for trafficking and submit documentation and evidence of its eligibility within the specified 10 days, the firm shall not be eligible for such a penalty.

SUMMARY OF THE CHARGES

The issue in this review is whether, through a preponderance of evidence, it is more likely true than not true that the questionable transactions were the result of trafficking. The charges on review were based on an analysis of SNAP EBT transaction data during the four month period of September 2017 through December 2017. This involved two patterns of EBT transaction characteristics indicative of trafficking:

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

APPELLANT’S CONTENTIONS

The following may represent a summary of Appellant’s contentions in this matter; however, in reaching a decision, full attention and consideration has been given to all contentions presented, including any not specifically recapitulated or specifically referenced herein:

- The store has plenty of variety and inventory to satisfy the needs of customers with some doing all of their shopping there. It is common for customers to make multiple trips throughout the day. For example, a customer will make a big grocery purchase, return for a sandwich at lunch, and then return later to purchase heavier items they couldn’t carry on the first trip such as canned formula, bottled juices, and gallons of water. Other customers request to have two receipts when shopping with extended family members to keep track of expenses. It would be an inconvenience to these customers to deny them this option and it is not a violation. Also, many of the

transactions listed **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** should not be deemed unusual since the firm is one of the few local stores in a heavily populated area. Some customers shop multiple times throughout the day because we are a short distance from their homes. The frequency which customers is corroborated by the attached receipts for purchases;

- Given the selection of merchandise and the options provided, it is easy for a family to spend the amounts listed in the report. The neighborhood is populated by large families with many children and babies. Formula is one of the most popular and necessary products and can cost \$12.99 per can. Cold cuts are \$7.99 for a small salami and for cheese by the pound and ham starts at \$8.99 per pound. Rice is \$14.99 for a 20 pound bag and \$8.99 for a 10 pound bag, cooking oils are \$9.99-\$12.99, and milk is \$4.49. Even just three or four of these basic items can reach the amounts of some of the transactions that are allegedly too high in value;
- The only practice the firm has engaged in that may have contributed to these charges is allowing credit. Many of the families in this impoverished neighborhood run out of benefits well before their accounts are replenished. It is very difficult not to help them and we apologize if this has crossed the line. We will agree to discontinue any practice that would jeopardize the firm's relationship with SNAP. As a relatively new business, under no circumstances would we knowingly violate the terms of SNAP. Ownership apologizes for any ignorance or misinterpretation of SNAP rules regarding allowing credit and any deviation was unintentional with the purpose of helping the community;
- The evidence presented is genuine and we remain steadfast that no trafficking has occurred. Receipts are submitted detailing the specific items purchased on credit referenced in the initial report and will show that all items were SNAP eligible. Copies are also provided of the customers' SNAP ID cards. Due to the casual relationship with customers, they are identifiable by their first names when referencing the SNAP cards. Appellant would like the opportunity to provide further testimony directly from store consumers who are listed in the report. They can testify that the firm is not trafficking or taking advantage of the SNAP rules and regulations in any way. The assistance provided was only credit and not any form of trafficking;
- This is an honest business and the owner is a rule-abiding business operator. Employees are trained at least once per year on SNAP rules and regulations with a refresher course that clarifies to them that going against the rules would result in the firm's termination from SNAP and their termination as an employee. A civil monetary penalty is requested, if necessary, instead of a permanent disqualification; and,
- Please take into consideration that the business cannot survive without SNAP. The consumers are impoverished and rely on SNAP to fulfill their needs which is why we would never do anything to jeopardize our standing in the program.

Appellant submitted a one page attendance sheet for SNAP training, 22 pages of store photographs, 65 pages of inventory purchase receipts, five credit log sheets, and five copies of SNAP ID cards in support of these contentions.

ANALYSIS AND FINDINGS

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

Store Background and FNS Store Visit

FNS authorized the firm as a small grocery store on August 9, 2017. The case file indicates that in reaching a disqualification determination, the Retailer Operations Division considered information obtained during an August 3, 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 suspicious SNAP transactions. The store visit documented the following store size, description, and characteristics:

- The firm was a very small grocery store offering a minimal quantity and variety of staple foods and carrying no unique items or offering any distinctive services.
- The firm primarily stocked traditional American brands, but also had a limited stock of Hispanic (e.g. Goya) products typically found in New York City grocery stores.
- No food packages, bundles, bulk products, case sales, or other sales were evident that would explain the unusual transactions and no SNAP eligible cased items were available for purchase.
- The store visit report specifically notes that the firm is not a specialty store and that there are no meat bundles or fruit and vegetable boxes for sale.
- The firm had a limited stock of staple foods that also included numerous single serving and pre-packaged items with a significant portion of inventory in accessory foods (primarily soda, candy, snacks, and other drinks) and many ineligible items.
- There were no shopping carts or handheld baskets for customer use making it difficult for customers to carry large amounts of food to the checkout area.
- The checkout area was set into a plastic display wall and was approximately 3.5 feet wide and 1.5 foot deep. There was a large ice cream freezer directly in front of the checkout area that customers must reach over in order to place their purchases onto the checkout counter and would make it problematic to process large orders.
- The checkout counter had a cash register, no optical scanner, and a POS terminal as confirmed by a store employee.
- There was a large commercial kitchen with a wide range of equipment including a large refrigerated deli display case with a small heated display case on top of it and a kitchen/food prep area containing a cooktop grill, commercial exhaust hood, commercial slicer, deep fat fryer, prep tables, etc. A large menu board advertised a wide variety of hot/cold prepared foods, chicken wings, sides, hot drinks, and hot breakfast items.
- Per a store employee, store staple food stock such as deli meats, deli cheeses, produce, eggs, rolls, etc. are being used in the preparation of the hot/cold, ready-to-eat

prepared foods making it difficult to determine if a food item in the deli case is actually for sale or for use in hot/cold food preparation.

- The store had no fresh unprocessed meat/seafood, no frozen unprocessed meat/seafood, a very limited quantity and variety of processed meats and seafood (a limited selection of deli meats, canned meat/poultry/fish, sausages, and jerky), no bacon, no hotdogs, no packaged lunch meats, no frozen entrees, no frozen dinners, a moderate supply of eggs, a limited selection of fresh fruits and vegetables, no frozen fruits and vegetables, no packaged nuts, a limited stock of canned soups, a moderate quantity and variety of canned and packaged staple food items, baking mixes, pancake mixes, five loaves of bread, rolls, no tortillas, no tamales, no corn meal, rice, uncooked pasta/noodles, cold cereal, hot cereal, baby cereal, fresh milk, canned milk, no sour cream, a limited selection of deli cheese, no packaged cheese, no butter, margarine, a limited selection of yogurt, a limited selection of baby food, one can of powdered infant formula, and very few expensive eligible food items.
- Ineligible items included: tobacco, tobacco accessories, hot ready-to-eat foods, hot drinks, ATM, household products, paper products, pet products, health and beauty items, clothing, charcoal, Styrofoam coolers, cell phones/phone accessories, and candles while accessory foods included: candy, condiments, snacks, spices, cooking oil, sugar, tea, single serving ice cream, and un/carbonated drinks.
- Signage was in English and no SNAP posters (anti-fraud, eligible items, reporting trafficking, etc.) were visible in the store.
- The firm's hours of operation were 7:00 AM-12:00 AM daily as confirmed by a store employee.
- Many food items were priced with visible staple food prices ending in .x9 cents except for a very limited number of items priced differently such as snacks priced at two for \$1.00, oranges priced at .75 cents, and apples priced at .50 cents. Comments on the FNS store visit report by the contract reviewer specifically stated that most of the food prices ended in .x9 cents. A price ending in .x9 cents is the most common pricing structure for stores of this type.
- The FNS store visit report listed the four most expensive items costing more than \$5.00 for sale in the store as being a 12.5 ounce can of powdered infant formula priced at \$20.99, a 20 pound bag of rice priced at \$10.99, a 96 ounce container of Mazola corn oil priced at \$8.99, and a 1.1 quart bottle of Pedialyte priced at \$7.90. This listing of the most expensive items was provided by a store employee during the store visit.
- The firm was not a WIC vendor. While the firm did stock a limited selection of baby food and one container of powdered infant formula, most SNAP households with infants or small children are WIC participants and therefore would be purchasing these products using WIC vouchers, not SNAP EBT.
- The store visit photographs showed many empty or marginally stocked shelves, display racks, and coolers.

Multiple transactions in unusually short time frames

This Attachment documents 57 individual transactions in 27 sets of two or more transactions conducted by 24 different households in a short period of time.

5 U.S.C. § 552 (b)(6) & (b)(7)(C). This Review Officer also notes that it is unusual that nearly one out of every four transaction sets ends in either .00, .20, or .30 cents based on the firm's pricing structure and inventory. The dollar amounts of the subsequent transactions in each set are all substantial and they nearly equal or exceed the dollar amount of the initial transaction in 23 of the 27 sets. 5 U.S.C. § 552 (b)(6) & (b)(7)(C) Three sets are comprised of three individual transactions while the remaining 24 sets are comprised of two individual transactions. It is not a usual shopping pattern to see so many purchases, in a short period of time, by the same recipients as documented in this Attachment. Multiple transactions conducted by the same household account within a short period of time is a method which violating stores use to avoid single high dollar transactions that cannot be supported by a retailer's inventory and structure. These sets of transactions appear to be in amounts which are indicative of trafficking.

Appellant contends the multiple transactions are because the store has plenty of variety and inventory to satisfy the needs of customers with some doing all of their shopping there. It is common for customers to make multiple trips throughout the day. For example, a customer will make a big grocery purchase, return for a sandwich at lunch, and then return later to purchase heavier items they couldn't carry on the first trip such as canned formula, bottled juices, and gallons of water. Other customers request to have two receipts when shopping with extended family members to keep track of expenses. It would be an inconvenience to these customers to deny them this option and it is not a violation. Also, many of the transactions listed are hours apart and should not be deemed unusual since the firm is one of the few local stores in a heavily populated area. Some customers shop multiple times throughout the day because the store is a short distance from their homes. The frequency which customers shop is corroborated by the attached receipts for purchases. Appellant also admits the only practice the firm has engaged in that may have contributed to these charges is allowing credit for customers. Many of the families in this impoverished neighborhood run out of benefits well before their accounts are replenished. It is very difficult not to help them and Appellant apologizes if this has crossed the line. Appellant will agree to discontinue any practice that would jeopardize the firm's relationship with SNAP. As a relatively new business, under no circumstances would the firm knowingly violate the terms of SNAP. Appellant apologizes for any ignorance or misinterpretation of SNAP rules regarding allowing credit and any deviation was unintentional with the purpose of helping the community.

SNAP households have no limit on the number of times they may use their benefits or the dollar value of eligible food they may purchase. The SNAP transactions listed in this Attachment are questionable not because they exceed any limits for use, but rather because they display characteristics of use inconsistent with the nature and extent of a small grocery store's stock and facilities and are thus indicative of trafficking. These transaction sets do not contain the characteristics associated with a household purchasing a forgotten item right after checking-out, of household members/friends shopping together and making separate purchases, or of a household making a payment on a credit account preceded or followed by a second purchase as all of the 27 transaction 5 U.S.C. § 552 (b)(6) & (b)(7)(C). This clearly refutes Appellants claim of customers shopping with extended family members and requesting separate transactions. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). These transaction sets also do not contain the characteristics

of a household returning later in the day to purchase a forgotten item or two or a couple of heavy items as all of the 27 sets have subsequent transactions **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**, far more than the cost of a forgotten or heavy item or two. Appellant's contention regarding households purchasing infant formula is also refuted as the store visit inventory report shows only one container of infant formula in stock. Additionally, as previously stated, most SNAP households with infants or small children are WIC participants and therefore would be purchasing these infant formula at a WIC vendor using WIC vouchers, not at the Appellant firm using SNAP EBT benefits. The allegation of credit will be discussed later in this decision.

It is certainly not unusual for a small number of SNAP households to conduct multiple transactions in a short period of time. However, it is unusual that the subsequent transaction dollar amount is for a substantial amount in all of these transaction sets and that they nearly equal or exceed the dollar amount of the first transaction in 23 of the 27 sets.

5 U.S.C. § 552 (b)(6) & (b)(7)(C). These multiple transactions indicate that the amounts were contrived in an attempt to avoid suspiciously high dollar value transactions that would be indicative of trafficking by breaking them into multiple, smaller amounts. The preponderance of transactions ending in .00, .20, or .30 cents is further evidence of this as it is statistically improbable that these amounts would occur randomly. FNS transaction data shows that this same pattern of multiple transactions in unusually short time frames is not evident at other nearby like type grocery stores further supporting that trafficking was occurring at the Appellant firm during the period under review.

FNS Retailer Operations Division staff conducted an analysis of the shopping patterns for households listed in the charge letter attachments. This analysis 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, including a variety of super stores and supermarkets. These households frequently shopped at these much large stores on or about the same day as shopping at the Appellant firm where they were conducting larger dollar value transactions. Appellant's contentions fail to offer any explanation or rationale as to why households who are shopping and spending large dollar amounts at many larger and better stocked stores would conduct multiple purchases totaling to high dollar values at a minimally stocked store. Common sense dictates that it is improbable that households would choose to spend large dollar amounts at the Appellant firm if their purchases consisted solely of eligible food items that could be purchased at any of the super stores and/or supermarkets they were already regularly shopping at and therefore more likely than not that these households were trafficking SNAP benefits at the Appellant firm.

5 U.S.C. § 552 (b)(6) & (b)(7)(C). No other households had this unusual pattern at the Appellant firm and this household did not exhibit this same pattern at any other stores it shopped at. Manually keyed transactions are those in which the magnetic strip on the back of the EBT card is not being read by the store's POS terminal by swiping the EBT card and the clerk must manually key enter the lengthy EBT card number into the POS terminal which requires more time than when an EBT card is able to be swiped. When the magnetic strip on an EBT card fails, it can no longer be swiped and replacement EBT cards contain different identification numbers. This household used the same EBT card throughout the period under review. On-site investigations into trafficking at retailers have found it is not uncommon for retailers to have the SNAP

recipient's PIN and EBT card number in order to facilitate trafficking SNAP benefits in exchange for cash without the need for the recipient to be physically present. The retailer manually key enters the EBT card number as the recipient has the actual EBT card and then enters the PIN. A review of other EBT transactions on the dates of the manual transactions show that Appellant's POS device was functioning properly as there swiped transactions immediately before and after the manually keyed transactions. A pattern of manually keyed and swiped transactions using the same EBT card is indicative of trafficking. The Retailer Operations Division's shopping pattern analysis also noted the incidence of multiple transactions for nearly the same dollar amount by this household and several others.

There may be legitimate reasons why a SNAP household might return to a store during a short period of time, but the examples in this Attachment indicate a series of SNAP purchases that total to large dollar amounts. 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

High Dollar Value Transactions

This Attachment lists 309 individual EBT transactions 5 U.S.C. § 552 (b)(6) & (b)(7)(C). 5 U.S.C. § 552 (b)(6) & (b)(7)(C). The substantial number of high dollar value transactions is uncharacteristic for a small grocery store offering a minimal stock of staple foods and calls into question the legitimacy of these transactions. The SNAP transactions listed in this Attachment are all substantially higher than the average SNAP transaction amount of \$9.38 for this store type in Bronx County. The 309 excessively large SNAP EBT transactions at Appellant's firm for the review months represent more than 49.5 percent of all SNAP redemptions at Appellant's firm during the period under review. This is unusual and indicative of trafficking.

The evidence under review shows that SNAP households shopping at the Appellant firm are also shopping at many full-line supermarkets and super stores, located nearby as well as at a distance that offer a greater quantity and variety of SNAP eligible foods items for better prices than customers can find at the Appellant firm. The large dollar transactions remain questionable when considering the proximity of these other 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 firm, where the eligible food stock is limited, 5 U.S.C. § 552 (b)(6) & (b)(7)(C) of their purchases at larger stores.

The difference in the average SNAP transaction dollar amount and the total SNAP transaction dollar volume for Bronx County small grocery stores during the review months and at the Appellant firm is significant. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). A comparison by the Retailer Operations Division of Appellant's SNAP redemptions to that of nearby small grocery stores that had redemptions for the review period shows similar differences.

Additionally, none of these nearby stores exhibit the same suspicious transaction patterns listed in the charge letter for the Appellant firm even though all are located in proximity to Appellant's location and would therefore be expected to share the same SNAP customer base and shopping patterns. This is a further indication that the SNAP transactions in this Attachment and the others

do not represent legitimate food purchases. The Retailer Operations Division considered all of these to be indicators of unusual and suspicious activity.

This store also had irregular SNAP transaction data as compared to like type small grocery stores in Bronx County. A comparison of Appellant's SNAP redemption data with that of Bronx County small grocery stores using ten dollar increments shows that Appellant's transaction count and dollar volumes are significantly below the average of like type stores in the lowest ranges 5 U.S.C. § 552 (b)(6) & (b)(7)(C) where typically the majority of small grocery store transactions occur. Appellant's transaction count and dollar volume exceeds that of Bronx County small grocery stores in the remaining ranges 5 U.S.C. § 552 (b)(6) & (b)(7)(C) at which point transactions stop. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). While there are normally few transactions in these higher ranges, the data shows that most stores of this type do still have a small number of them further supporting that the Appellant firm 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 when trafficking SNAP benefits. These large dollar value transactions are considered to be irregular and suspicious based on the Appellant store's food inventory. The Retailer Operations Division determined there was no credible reason for the Appellant firm to have transactions at these dollar levels given the minimal stock of staple foods and the lack of any specialty, bulk, or ethnic foods that might sell for large dollar amounts and therefore also considered this to be a strong indication of trafficking. None of Appellant's contentions explain these unusual and suspicious differences.

Appellant contends that given the selection of merchandise and the options provided, it is easy for a family to spend the amounts listed in the report. The neighborhood is populated by large families with many children and babies. Formula is one of the most popular and necessary products and can cost \$12.99 per can. Cold cuts are \$7.99 for a small salami and for cheese by the pound and ham starts at \$8.99 per pound. Rice is \$14.99 for a 20 pound bag and \$8.99 for a 10 pound bag, cooking oils are \$9.99-\$12.99, and milk is \$4.49. Even just three or four of these basic items can reach the amounts of some of the transactions that are allegedly too high in value. Appellant submitted 22 pages of store photographs and 65 pages of inventory purchase receipts in support of these contentions. Appellant did not offer any explanation as to how credit accounts would account for the large dollar value transactions in this Attachment.

While households residing in areas with extremely limited grocery store options may conduct high dollar value transactions at small grocery stores out of necessity, this is not the case when households have better alternatives. FNS records show there are four supermarkets, one super store, three large grocery stores, and 13 medium grocery stores located within one mile of Appellant's location that offer greater quantities and varieties of staple food items at lower prices than would be found at a minimally stocked small grocery store that offers no fresh or frozen unprocessed meats or seafood, has a limited selection of fresh fruits and vegetables, no frozen fruits and vegetables, and no frozen staple foods. The super store, two medium grocery stores, and three small grocery stores are located within 0.25 miles or 440 yards of Appellant's location with the closest medium grocery store being only one block away thereby refuting Appellant's claim that the firm is one of the few local stores in a heavily populated area. The Appellant firm is two blocks away from Webster Avenue that has scheduled fixed route bus service that would

facilitate shopping at other stores. The firm is also approximately seven blocks from the Metro 174-175 Street Station on the Grand Concourse that also has scheduled fixed route bus service.

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 firm. 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 firm 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 August 3, 2017, shows that the Appellant firm offers a minimal quantity and variety of SNAP eligible staple food items, many accessory foods, and many ineligible items. Much of the inventory for sale consists of inexpensive snacks, candy, beverages, and single serving foods as well as many ineligible items. Since the Appellant firm offers no fresh unprocessed meat/seafood, no frozen unprocessed meat/seafood, a very limited quantity and variety of processed meats and seafood (a limited selection of deli meats, canned meat/poultry/fish, sausages, and jerky), no bacon, no hotdogs, no packaged lunch meats, no frozen entrees, no frozen dinners, a moderate supply of eggs, a limited selection of fresh fruits and vegetables, no frozen fruits and vegetables, no packaged nuts, a limited stock of canned soups, a moderate quantity and variety of canned and packaged staple food items, baking mixes, pancake mixes, five loaves of bread, rolls, no tortillas, no tamales, no corn meal, rice, uncooked pasta/noodles, cold cereal, hot cereal, baby cereal, fresh milk, canned milk, no sour cream, a limited selection of deli cheese, no packaged cheese, no butter, margarine, a limited selection of yogurt, a limited selection of baby food, one can of powdered infant formula, and very few expensive eligible food items, these patterns are deemed to be suspicious. The fact that tobacco, tobacco accessories, gasoline, hot ready-to-eat foods, hot drinks, ATM, household products, paper products, pet products, health and beauty items, clothing, charcoal, Styrofoam coolers, cell phones/phone accessories, and candles are not eligible for purchase with SNAP benefits also provides no justification for the large transaction amounts.

Increasing food prices make it even more unlikely that SNAP recipients, with very limited food benefits, would want to spend a considerable part of their benefits in a 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 built-in scanners and conveyor belts to facilitate processing purchases quickly. Additionally, Appellant furnished no itemized cash register and EBT receipts for the period under review to document the legitimacy of these excessively large transactions. The Appellant firm has a small checkout area and no shopping carts thereby making it difficult to facilitate the great quantities of eligible food items required to make up these large dollar transactions. Therefore, it is improbable that the food items purchased in these high dollar amounts could be carried to the register without the use of carts and more likely that the amounts were contrived.

A detailed analysis of the 65 pages of receipts submitted for inventory purchases was conducted by the Retailer Operations Division and the dollar amount of eligible food purchases compared to SNAP redemptions at the firm. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). SNAP redemptions for the review period 5 U.S.C. § 552 (b)(6) & (b)(7)(C) so the receipts provided account for approximately one-third of SNAP redemptions at the Appellant firm. It is also noted that, during the FNS store visit, the firm stated that eligible food stock is also used in the preparation of hot foods which are not eligible for purchase using SNAP benefits. Accordingly, the actual potential eligible food sales figure would be lower. Since the receipts do not support the SNAP redemptions for the review period, they also do not explain the suspicious high dollar value transactions in this Attachment. Appellant's photographs do not provide any valid basis for dismissing the charges or for mitigating the penalty imposed as they were taken after the review period.

It is further noted that SNAP redemptions at the Appellant firm fluctuated unusually following receipt of the charge letter on February 7, 2018. The average SNAP transaction dollar amount decreased 28.24 percent from January 2018 to March 2018 while the volume of SNAP redemptions at the Appellant firm decreased 10.96 percent during the same months. The number of SNAP transactions had a significant increase of more than 24 percent from January 2018 to March 2018 possibly indicating that the Appellant firm was dividing larger transactions into even smaller transactions in an attempt to avoid suspicion following receipt of the charge letter. A pronounced fluctuation in SNAP transactions 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.

Credit Contentions

Appellant contends the firm allows credit accounts, a violation of SNAP regulations at Section 278.2(f), because the owner was not aware of this prohibition when the transactions occurred.

While store ownership may or may not have personally conducted the violative transactions, SNAP rules and regulations state that regardless of whom store ownership may utilize to handle store business or their degree of involvement in store operations, the owner is accountable for the proper training of staff and the monitoring and handling of all SNAP benefit transactions. When the owner signed the certification page of the online SNAP retailer application to begin operating as a SNAP retailer, he confirmed he understood and agreed to abide by program rules and regulatory provisions. He agreed to accept responsibility for SNAP including those committed by any of the firm's employees, paid or unpaid, new, full-time or part-time. This certification page specifically cites violations such as accepting SNAP benefits as payment on credit accounts or loans. The certification is clear that store ownership understood by signing the document that violations of program rules can result in administrative actions such as fines, sanctions, withdrawal, or disqualification from the SNAP. Despite agreeing to abide by SNAP rules and

regulations, ownership now admits that the firm allowed credit accounts, a clear violation of SNAP regulations and rules. Additionally, the SNAP Retailer Training Guide and the training video, provided to all retailers upon initial authorization, are also available on the same web site used by the owner to submit the online SNAP retailer application. Both the guide and video cite credit accounts as violating SNAP regulations. Had store ownership read the SNAP training materials provided by FNS or trained his employees using these materials, it is inconceivable that he could not have been aware that credit accounts violated of SNAP regulations.

The owner's admission to extending credit is documented in the case file under review and is not contested. Accepting SNAP benefits for payment on credit is a violation of Section 278.2(f) and warrants a one year disqualification period as specified by Section 278.6(e)(4). It is the agency's position that credit violations constitute owner or management involvement and that a one year disqualification is the base sanction. To refute charges of trafficking, the retailer must provide adequate proof that credit accounts existed at the time the suspicious transactions occurred so that a comparison can be made with transactions outlined in the charge letter. A level of detail regarding the legitimacy of credit accounts is necessary since retailers have long admitted to credit in an attempt to garner a lesser penalty after committing more egregious violative acts. Credit transactions must be accounted for with substantive evidence such as the dates credit was extended, to whom, for what amount, and for what items. If such exculpatory evidence is not advanced, the appropriate penalty is permanent disqualification.

In support of the admission to accepting SNAP benefits for payment on credit accounts, a program violation, Appellant submitted five pages purportedly copied from a credit log book and five photocopies of New York State SNAP EBT cards for individuals receiving credit.

A review of the credit log book pages shows they do not provide a detailed or itemized breakdown of food items were purchased, their unit cost, dates of purchases, how many credit purchases were made during the month, or the dates and dollar amounts of credit purchases or payments. They also do not contain the full name, address, SNAP EBT card number, or SNAP household case number of the SNAP recipient allegedly conducting the credit purchases. A review of the EBT cards by the Retailer Operations Division shows that only one transaction matched a transaction listed in the charge letter and that one of the households cited did not conduct any transactions at the Appellant firm during the review period. An analysis of the SNAP shopping patterns for the households associated with the remaining four EBT cards letters did not show evidence consistent with credit accounts. Accordingly, the documents offered by Appellant do not provide substantial evidence that the store permitted credit accounts during the review period. Since Appellant was able to account for only one of the charge letter transactions as being due to credit, the original determination made by the Retailer Operations Division was evaluated to determine if trafficking occurred. The transactions showed clear and repetitive patterns of unusual, irregular, and inexplicable SNAP activity indicative of trafficking as previously discussed.

Other Contentions

In an appeal of an adverse action, the Appellant bears the burden of proving by a preponderance of evidence that the administrative action should be reversed. That means the 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. 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.

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

The issue under review involves a charge of trafficking SNAP benefits based on EBT transaction data. EBT transaction data is covered in SNAP regulations at 7 CFR § 278.6(a) and is addressed below. Trafficking is always considered to be the most serious violation even if it is a first offense therefore a temporary suspension or lesser penalty would not be applicable. SNAP regulations at 278.6(e)(1) clearly state that, "FNS shall disqualify a firm permanently if personnel of the firm have trafficked as defined in § 271.2." SNAP regulations at 7 CFR § 271.2, define trafficking as, "The buying, selling, stealing, or otherwise effecting an exchange of SNAP benefits for cash or consideration other than eligible food". SNAP regulations at 7 CFR § 278.6(a) clearly state that "FNS may disqualify any authorized retail food store if the firm fails to comply with the Food and Nutrition Act of 2008, as amended, or this part. Such disqualification shall result from a finding of a violation on the basis of evidence that may include facts established through on-site investigations, inconsistent redemption data, evidence obtained through a transaction report under an electronic benefit transfer system". In the present case, the data presented in the Attachments is solely based on the SNAP EBT transactions conducted at the Appellant firm during the review period. 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 review period. All of the transactions were then reviewed and analyzed by the Retailer Operations Division staff before the decision was made to issue a charge letter. This investigative process included a detailed examination of information obtained from various sources, including, but not limited to the inventory report and photographs from the FNS store visit, a transaction comparison and analysis of like type and larger stores, and analysis of shopping patterns for recipient households conducting transactions at the Appellant firm during the review period. This analysis also included a review of the business to ensure its store classification was correct and the data comparisons with like type firms valid. Additionally, there are nearby like type stores whose transaction data does not form these suspicious patterns and are therefore not at risk of disqualification for trafficking. There is also no regulatory requirement that trafficking disqualifications be based solely on on-site undercover operations.

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

The evidence under review shows SNAP activity indicative of trafficking. Neither the Food and Nutrition Act of 2008, as amended, nor the regulations issued pursuant thereto cite any minimum dollar amount of cash or SNAP benefits, or number of occurrences, for such exchanges to be defined as trafficking. Nor do they cite any degrees of seriousness pertaining to trafficking of SNAP benefits. Trafficking is always considered to be the most serious violation, even when the exchange of SNAP benefits for cash is dollar-for-dollar or is conducted by a non-managerial store clerk. This is reflected in the Food and Nutrition Act, which reads, in part, that disqualification “shall be permanent upon the first occasion of a disqualification based on trafficking by a retail food store.” In keeping with this legislative mandate, Section 278.6(e)(1)(i) of the SNAP regulations states that FNS shall disqualify a firm permanently if personnel of the firm have trafficked. There is no agency discretion in the matter of what sanction is to be imposed when trafficking is involved and second chances are not an authorized option under existing regulations.

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 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, ownership’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 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.

SNAP regulations are explicit in what constitutes substantial evidence. Specifically, 7 CFR § 278.6(i)(2) states in relevant part, “As specified in Criterion 3 above, in determining whether a firm has established an effective policy to prevent violations, FNS shall consider **written and dated statements of firm policy** which reflect a commitment to ensure that the firm is operated in a manner consistent with part 278 of current FNS regulations and current FSP policy on the proper acceptance and handling of food coupons.” This section goes on to state, “As required by Criterion 2, such policy statements shall be considered only if documentation is supplied which establishes that the policy statements were provided to the violating employee(s) prior to the commission of the violation.” This section further states, “A firm which seeks a civil money penalty in lieu of permanent disqualification **shall document** its training activity by submitting to FNS its **dated training curricula and records of dates training sessions were conducted...**” (Emphasis added).

Appellant did not submit a copy of the firm’s SNAP compliance policy or training program. The only documentation submitted was a signature sheet for a mandatory SNAP meeting conducted on December 8, 2017, by the store owner that listed only one store employee in attendance. Appellant’s February 15, 2018, reply to the charges states that this was the firm’s first refresher course, but offers no explanation as to why a refresher would occur only four months after SNAP retailer authorization or why the sole attendee was hired approximately 32 days prior to the training. Both SNAP regulations at § 278.6(i)(2) and the “SNAP Training Expectations Notice” included in the training materials sent to Appellant upon SNAP authorization clearly state that documented SNAP training for all store owners and new employees must occur within 30 days of the date of the policy implementation or within 30 days of the start of employment. No documentation was provided showing the completion of SNAP training within a 30 day window following SNAP retailer authorization on August 9, 2017, and the training documentation provided by Appellant shows that the store employee completed the training more than 30 days after her date of employment. No documentation was provided showing that the store owner had completed SNAP training and it is also highly unlikely that a firm open 19 hours every day would have only one employee. Additionally, during the FNS store visit on August 3, 2017, a different employee was working at the firm, yet no training documentation was provided for him.

Based on the above discussion, 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 presented a case that Appellant has likely trafficked in SNAP benefits. Their analysis of Appellant's EBT transaction record was the primary basis for its determination to permanently disqualify Appellant. This data provided substantial evidence that the questionable transactions during the review period had characteristics consistent with trafficking violations in SNAP benefits. This is evidenced by: the suspicious patterns in two Attachments of EBT transaction data, the inadequacy of the store's staple food stock as observed during the store visit to support large transactions in short time frames, the lack of adequate evidence for customer spending habits given that there are other SNAP authorized stores located within proximity to Appellant that likely offer a greater selection of eligible food items at competitive prices, and the irregular SNAP transaction data of Appellant as compared to other like type and larger stores in the county and state.

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

RIGHTS AND REMEDIES

Applicable rights to a judicial review of this decision are set forth in 7 U.S.C. § 2023 and 7 CFR § 279.7. If a judicial review is desired, the complaint must be filed in the U.S. District Court for the district in which Appellant's owner resides, is engaged in business, or in any court of record of the State having competent jurisdiction. This complaint, naming the United States as the defendant, must be filed within thirty (30) days of receipt of this decision.

Under the Freedom of Information Act, we are releasing this information in a redacted format as appropriate. FNS will protect, to the extent provided by law, personal information that could constitute an unwarranted invasion of privacy.

ROBERT T. DEEGAN
Administrative Review Officer

August 13, 2018