

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

Ralph & Nash Deli Corp,

Appellant,

v.

Case Number: C0195972

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 Ralph & Nash Deli Corp. (hereinafter “Appellant”) from participation as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP) was properly imposed by FNS’s 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 Ralph & Nash Deli Corp.

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 from SNAP based on an analysis of EBT transaction data from June 2016 through November 2016. This involved the following transaction patterns which are common trafficking indicators:

- There were an unusual number of transactions ending in a same cents value.
- There were multiple transactions made from individual benefit accounts in unusually short timeframes.
- Excessively large purchase transactions were made from recipient accounts.

CASE CHRONOLOGY

The agency's record shows that FNS initially authorized Ralph & Nash Deli Corp. for SNAP participation as a small grocery store on September 12, 2013. In a letter dated January 9, 2017, the Retailer Operations Division charged the Appellant with trafficking, as defined in Section 271.2 of the SNAP regulations, based on a series of irregular SNAP transaction patterns that occurred between the months of June 2016 and November 2016. 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 a letter dated January 14, 2017, the Appellant, through counsel, responded to the trafficking charges, vehemently denying that trafficking was occurring at the store. The Appellant provided an eight-page written response to the charges which outlined its contentions. Key points in the Appellant's response included the following:

- There is no evidence of the firm's intent to violate the regulations. Without evidence of intent, there is no other basis to disqualify the firm from SNAP. The patterns referred to in the charge letter are neither unusual nor inexplicable.
- The Appellant would not jeopardize its livelihood by engaging in illegal activity.
- There has been no prior action taken by FNS to warn the firm about the possibility that violations are occurring.
- Since becoming authorized to accept SNAP benefits, the Appellant has continuously trained and tested its employees concerning SNAP regulations and requirements, and the firm has maintained an exemplary record of compliance.
- Because there is no evidence of intent to violate the regulations, FNS should instead subject the firm to a civil money penalty because a disqualification would cause hardship to participating households.
- The transactions listed in the charge letter are not trafficking, but simply a reflection of the firm's normal business practices and customer shopping habits.
- The agency's use of EBT records as the sole basis for the charges is inadequate. It is not based on fact and the conclusions reached are unfounded and without merit.
- The agency's inconclusive and arbitrary decision to consider permanent disqualification will deprive the Appellant of its business and cause it to suffer irreparable injury and damage. Further, to base a decision on such an accusation is to deprive the vendor of due process.
- Other than the listing of transactions, there are no definitive factual allegations of why these transactions are indicative of trafficking.

Other contentions in the Appellant's January 14, 2017 response letter are similar or identical to the arguments presented in the Appellant's request for administrative review. These contentions will be detailed below in the section entitled, "Appellant's Contentions."

In addition to its response to the trafficking allegations, Appellant's counsel demanded a large number of documents from FNS in a request made in accordance with the Freedom of Information Act (FOIA). Upon receipt of this FOIA request, the Retailer Operations Division withheld its determination in the case pending completion of the FOIA process.

On May 16, 2017, the agency completed its FOIA response and delivered it to Appellant's counsel. In a letter dated August 8, 2017, Appellant's counsel submitted an appeal of the agency's FOIA response. On August 28, 2020, FNS completed its written response to the Appellant's FOIA appeal and sent it to Appellant's counsel.

On August 31, 2020, Appellant's counsel received a letter from the Retailer Operations Division indicating that with the FOIA process now complete, the Appellant had 10 calendar days to submit any additional contentions or evidence in response to the January 9, 2017 charge letter. The record indicates that the Appellant did not respond to the August 31 letter and offered no additional contentions.

After evaluating the Appellant's sole response to the charges 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 September 23, 2020. 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 found that a CMP was not appropriate 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 October 1, 2020, the Appellant, through counsel, appealed the Retailer Operations Division's determination by requesting an administrative review. The request was granted.

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....

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 has wrongfully concluded that the firm has engaged in trafficking activities. This erroneous conclusion was made solely on an analysis of records, with no additional investigation.
- Appellant owner vehemently denies that he or anyone involved with or employed by the business has engaged in such activities.
- FNS must consider Section 278.6(d) of the SNAP regulations before making a disqualification determination. Because there are no specific violations committed by personnel of the firm and because there has been no prior action by FNS to warn the firm about the possibility that violations are occurring, the only remaining basis for disqualification is other evidence that shows the firm's intent to violate the regulations. However, there is no evidence that shows the firm's intent to violate the regulations.
- The store is open 24 hours a day, seven days a week. Because of its location, a substantial portion of its sales is due to its SNAP participation. EBT transactions in exchange for eligible items constitute approximately 80 percent of the firm's sales, and provide the income necessary to keep the business profitable. The firm would not jeopardize this source of business and its livelihood by engaging in illegal activity.
- The store is staffed by up to four full-time employees. It is a large-sized grocery store/deli.
- The Appellant has continuously trained and tested its employees concerning SNAP regulations from the time the store was authorized. During this time, the firm maintained an exemplary record. This unblemished record is evidence of the Appellant's continued compliance with the law and with its training and supervision of its employees.
- The store is well-stocked with eligible staple foods at all times. The vast majority of people who shop at the store are regular customers.

- With no evidence of intent to violate the regulations and because there is no other basis to disqualify the firm from SNAP, FNS should instead subject the firm to a civil money penalty in lieu of disqualification because, in accordance with § 278.6(a), a disqualification would cause hardship to participating households. Appellant requests an immediate hearing to make this determination.
- The firm is a purveyor of halal foods to the religious and ethnic community in the area. There are no other similar providers, and as such, disqualification would result in hardship to the community.
- The firm provides necessary food items to the community, which is comprised of many apartment complexes and houses with large families within a two-block radius of the store. The nearest supermarket is several blocks away. The store is located in a busy neighborhood, with schools, churches, community centers, and homeless shelters in the immediate area.
- There is a great need for families in the area to have access to basic food items like infant formula, milk, eggs, baby food, cereal, bread, juice, etc.
- The transactions listed in the charge letter are legitimate transactions that occur in the normal course of business.
- Regular customers often make telephone calls to the store to place large grocery orders and then personally pick up the orders and then purchase additional items. They cannot do this at a supermarket.
- The store also makes deliveries when customers do not have vehicles or are not physically able to transport their purchases. Households also buy items on their way home from picking up their children from school, and to and from churches and child care centers. Multiple transactions in short timeframes such as these are not unlawful.
- The firm's business model is designed to accommodate the needs of regular and repetitive customers.
- Attachment 1 (transactions with a same-cents value):
 - These are all legitimate transactions and none were ever in exchange for cash.
 - Many of these transactions resulted from the pricing of items in whole numbers, with no tax added. Other times, the same cents value resulted from the price being rounded off a bill for a regular customer solely for their benefit in keeping track of the amounts left on their EBT cards.
 - In some instances, the Appellant might have run out of pennies and rounded off the purchase.
 - The vendor has a right to make such business judgments under the law without being accused and suspected of wrongful behavior.
- Attachment 2 (multiple transactions from the same household account in unusually short time frames):
 - These are all legitimate transactions and none were ever in exchange for cash.
 - Many of these transactions are from individuals who live in close proximity and are going out to pick up items they need for convenience, or who are picking up their children, or are low-income seniors who live nearby and visit the store frequently.
 - The store sells sandwiches and deli meats for breakfast, lunch, and dinner. All of this requires customers to make more than one trip per day to the store.

- It is patently ridiculous that the Appellant would risk permanent disqualification from SNAP for the sum of the transactions found in Attachment 2 and where it is unknown by FNS what portion, if any, of that amount was exchanged for cash.
- This shopping behavior is the result of a business decision made by the Appellant to allow customers to purchase items in the store throughout the day. The Appellant is permitted under the law to make such decisions and is not violating any rule or regulation under SNAP.
- Attachment 3 (excessively large transactions):
 - Many of these transactions are the result of spending the remaining balance in a customer's SNAP account. But none are indicative of trafficking activities
 - The transactions resulted from well-established customers placing large orders over the phone and paying for the food when they arrived at the store.
 - If FNS averaged out the amount of the firm's transactions, **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**, which is not unusual under these circumstances.
 - In the summer months, when the temperature is high, many customers only go outside when they need to and they buy in bulk to avoid having to make multiple trips in the uncomfortably warm weather. A customer's shopping habits should not be interpreted in a negative manner with an inference that trafficking has occurred. As a result of the weather, storage of cans of food is a common practice.
 - Baby food items are expensive, with cans of Enfamil selling at \$20.00 per small container; \$24.99 per midsize container, and \$34.99 per large container. These are common items sold in this store.
 - A customer's shopping habits should not be interpreted in a negative manner, implying that trafficking has occurred. Many of these transactions resulted from customers who had budgeted their benefits, and some had placed telephone orders at a particular time in the month when they know they can use the balance of their benefits. At some point in time, the card would have to be exhausted, so it makes sense that the cardholder would use it at their neighborhood store.
 - It is patently ridiculous that after years of participation in SNAP that this vendor would risk permanent disqualification for the mere sum found in Attachment 3. It is unknown by FNS what portion of that amount might have been exchanged for cash, if any.
- Nothing in the attachments reveals conclusively or even by a fair preponderance of the credible evidence that the Appellant exchanged SNAP benefits for cash. The Agency has not provided a basis for disqualification under 7 CFR § 278.6(d).
- It is ludicrous for FNS to refuse to allow an owner to sell large containers of Enfamil and other expensive items without risking allegations of trafficking, especially where the agency has failed to provide guidelines as to the amounts cardholders are permitted to purchase at one time.
- FNS's use of EBT records in sole support of what it claims to be serious unlawful activity is inadequate. It is not based on fact, and the conclusions reached are unfounded and without merit.
- A permanent disqualification based on this inadequate proof will deprive the Appellant of its business and cause irreparable injury and damage. The decision made by FNS is inconclusive and arbitrary. The EBT transactions should require a more careful review

before making such a major decision based totally upon computer-generated reports which only create an unfounded inference and presumption of wrongdoing.

- Nothing was provided to the Appellant except a sampling of transactions that allegedly constitute unlawful activity. No specifics were set forth concerning the other transactions that occurred in the store. As such, the Appellant is not afforded the opportunity to fully answer and challenge the charge lodged against it. The charge letter is nothing more than an unsubstantiated general accusation. It has no merit; and to base a decision upon such an accusation is to deprive the Appellant of due process.
- There is no definitive factual allegation as to why the transactions listed are indicative of trafficking in the type of firm operated by the Appellant.
- It appears that the disqualification decision is based upon a predetermined standard of EBT activity for the type of firm owned by the Appellant. If this is the case, then a statistical sampling or survey has been used to erroneously determine that the normal transactions in the store significantly exceed the normal practice for the Appellant's type of firm.
- FNS has failed to specifically describe the type of firm operated by the Appellant and it has failed to investigate and reveal which of the precise transactions constitute trafficking activities. It would be expected and required in so serious a matter as this that FNS would investigate and evaluate the specific activities by the Appellant, which has an unblemished record in SNAP, before issuing a permanent disqualification.
- All transactions listed in the attachments are a legitimate result of the Appellant's business model, which has a right to make business judgments under the law without being accused and suspected of wrongful behavior. It is unconscionable that FNS can cause an owner to be permanently disqualified merely based on a data driven analysis without any other proof of wrongdoing. Such a faulty and erroneous determination based solely on FNS's computer analysis is unacceptable and the charge of trafficking should be withdrawn.
- FNS has failed to establish intent, which is an essential element of the basis for its decision to permanently disqualify the Appellant from SNAP. A statistical analysis based on EBT transactions cannot be a basis for FNS to determine that the Appellant's intent was to violate the regulations.
- FNS should be investigating the individual cardholders to determine whether they are misusing and abusing their participation in SNAP. It is not the responsibility of the Appellant to deny an EBT cardholder any services or to police violations or misuse by the cardholders.
- The disqualification action relates to alleged incidents that occurred years ago. The statute of limitations precludes the bringing of such charges after a long period of time, as it prejudices the owner by no longer having access to receipts, surveillance videos or records due to the gap in time before the charges were brought.
- The inadequacies, inaccuracies, and insufficiencies identified by the Appellant in its contentions affect the reliability, veracity, and sufficiency of the data-driven determination and the meager and questionable trafficking charge. This charge cannot be sustained as a matter of fairness and justice. Where the Appellant owner's livelihood relies substantially upon the store, the firm should not be disqualified for any period.
- Appellant requests that the decision to permanently disqualify the firm be vacated and a hardship civil money penalty be assessed instead.

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

A key 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 a November 14, 2016, 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:

- Ralph & Nash Deli Corp. is a small grocery store, roughly 800 square feet in size, operating in the city of New York, New York.
- The store visit photographs show one cash register and agency records reflect the use of one EBT point-of-sale terminal for SNAP purchases.
- At the time of the store visit, the firm did not have any handheld shopping baskets or shopping carts for customer use.
- The store's staple food stock appears to be typical of small grocery stores in the area. The store also sells a variety of accessory foods, including snack foods, candy, condiments, and carbonated and uncarbonated drinks. The store also sells nonfood merchandise, such as tobacco products, alcoholic beverages, paper goods, cleaning supplies, and other miscellaneous household merchandise.
- The checkout area is typical of a small grocery store, with a small space to place a few items. The checkout area is not conducive to conducting large or rapid transactions, as there is little room to place more than a few items at one time and insufficient space to maneuver with a large volume of groceries or other merchandise.
- As with most retail stores, the prices of most items appear to end with a cents-value of 9, such as .29, .49, or .99. The report indicates that a few items also end in .75, such as a half-gallon of milk for \$2.75, or a single bag of Famous Amos cookies or Cheez-It crackers for 75 cents. The report also shows that some deli items, particularly sandwiches and breakfast foods, are priced in even dollar amounts or in 50-cent increments. For example, a salami hero sandwich sells for \$5.00, while a bacon, egg and cheese roll sells for \$2.50.

- Cold cuts are sold by the pound, and most prices end in .99, such as \$7.99 for a pound of cheddar cheese or \$9.99 for a pound of pastrami.
- There is no evidence that the firm has special food packages for sale or that items are sold in bulk. There is also no evidence that the store carries expensive food items, such as cans of infant formula, or that the firm's inventory caters to specific religious or ethnic groups. Based on the evidence from the report, the majority of items in the store appeared to sell for \$5.00 or less.

The available inventory of SNAP-eligible food at the time of the store visit showed stock that would be typical of a small grocery store, where households normally purchase a limited number of items to supplement their overall dietary needs. There was little indication that SNAP households would be inclined to regularly visit Ralph & Nash Deli Corp. to purchase large quantities of groceries, especially considering the constricted checkout area, the absence of shopping carts and baskets, and the availability of much larger stores in the area, including both a supermarket and a superstore located less than a quarter of a mile from the store. 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 similar-sized competitors.

SNAP Transaction Analysis

Charge Letter Attachment 1: There were an unusual number of transactions ending in a same cents value. This attachment lists 516 transactions ending in .00, **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. When such transactions are not supported by a specific pricing structure at the store, they are a strong indicator of trafficking in SNAP benefits. As noted earlier, the contractor's report shows that most prices end with a cents-value of 9. As such, the likelihood that so many transactions, which would logically consist of random items from the store's shelves, would so frequently and legitimately end in .00, .50, or .99 is very low.

The Appellant argues that many of the transactions in Attachment 1 are the result of items being priced in whole numbers. Additionally, the Appellant argues that some of these transactions are the result of transaction totals being rounded off for regular customers so that they can keep track of the amounts left on their EBT cards. Finally the Appellant argues that in some instances, the store might have run out of pennies, and thus rounded off the purchase. Whatever the reason, the Appellant argues that it has a right to make such business judgments under the law without being accused and suspected of wrongful behavior.

This review finds that there is little rationale for the Appellant's arguments. As noted earlier, the store visit report does not support the claim that prices of items are listed in whole dollars. While a small number of items were priced in such a manner, these few items are very unlikely to account for more than 500 SNAP transactions ending in .00 over a six month period, particularly if one reasonably assumes that most customers purchase other items at the same time, most of which are priced with a cents value ending in 9.

As to the argument that a transaction is rounded at the point of sale, this review can find no logic for this practice. A customer's remaining balance is listed at the bottom of every EBT transaction

receipt where the customer can plainly see it. Furthermore, hundreds of other transactions at the store during the review period did not end in even-dollar amounts or .50 amounts. If the firm was concerned about helping regular customers keep track of their EBT balances, they would round up or down on virtually all transactions at the store, or simply price their inventory in such a manner.

With regard to the argument that the firm might have run out of pennies, such a contention is nonsensical as all SNAP transactions are electronic, and no cash change is needed.

It should be noted that the Appellant did not provide any supporting evidence in either its response to the charge letter or in its request for administrative review. 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 trafficking charges.

Without a reasonable explanation or compelling evidence to demonstrate that the transactions in Attachment 1 were legitimate purchases of eligible food, it is reasonable for this review to conclude that the transaction patterns listed in Attachment 1 were likely due to trafficking violations.

Charge Letter Attachment 2: Multiple transactions were made from individual benefit accounts in unusually short timeframes. This attachment lists 20 sets of transactions (52 transactions in all) 5 U.S.C. § 552 (b)(6) & (b)(7)(C). 5 U.S.C. § 552 (b)(7)(E).

For example, 5 U.S.C. § 552 (b)(6) & (b)(7)(C), an extraordinary amount for a small grocery store like Ralph & Nash Deli Corp., which has no shopping carts or shopping baskets, does not sell items in bulk, and which sells primarily inexpensive food items. Attachment 2 is filled with similar examples. Considering the amount of food it would take to add up to these transaction totals, and considering the store's characteristics, it is unlikely that all of the transactions in Attachment 2 were legitimate purchases of eligible food.

The Appellant has made a number of contentions related to Attachment 2, including the argument that many of these transactions are from individuals who live in close proximity and pick up items they need for convenience on a frequent basis. The Appellant further argues that the store sells sandwiches and deli meats for breakfast, lunch, and dinner, which requires customers to make more than one trip per day to the store. The Appellant claims that it is ridiculous to think that it would risk permanent disqualification from SNAP for the sum of the transactions found in Attachment 2, and argues that the firm is permitted to make business decisions which would allow customers to shop at the store throughout the day.

Unfortunately, the Appellant has not offered a single piece of evidence to support its claims. Anecdotal explanations without supporting documentation do little to convince this review that the transactions in Attachment 2 were legitimate purchases. It should be made clear that SNAP regulations do not provide limitations on the number of transactions that can be made by SNAP households or how large the individual transactions can be. However, the transactions noted in the charge letter are questionable not because they exceed any limits for use, but rather because they display patterns of use that are inconsistent with the store's documented physical characteristics. It should be further noted that the transactions identified in the charge letter are not marginally abnormal, but decidedly so, especially in comparison with other nearby SNAP-

authorized stores with similar characteristics. This review does not contend that the EBT transactions detailed in the charge letter are overtly suspicious when they occur on an occasional or intermittent basis. But when such transactions form repetitive and 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.

Because the Appellant has offered little explanation beyond conjecture and has submitted no evidence to support its claims, it is reasonable for this review to conclude that trafficking was a likely cause of the transaction patterns listed in Attachment 2.

Charge Letter Attachment 3: Excessively large purchase transactions were made from recipient accounts. This attachment lists 109 SNAP transactions

to 5 U.S.C. § 552 (b)(6) & (b)(7)(C). These large transactions are not consistent with other small grocery stores in the state of New York. The Retailer Operations Division has determined that during the review period, the average SNAP transaction amount for a small grocery store in New York was \$10.92. The average transaction in Attachment 3 is more than five times larger than the average purchase amount for this store type.

Given that the Appellant firm has a moderate inventory of staple foods and other SNAP-eligible items, 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 3. However, as noted earlier, there is no evidence that the firm would be likely to have SNAP redemption patterns that differ significantly from nearby, similar-sized competitors, especially considering the absence of shopping carts and baskets and the availability of much larger stores in the immediate vicinity. The substantial number of high-dollar transactions in a six-month period calls into question the legitimacy of these transactions.

Attachment 3 lists 13 transactions 5 U.S.C. § 552 (b)(6) & (b)(7)(C) or more during the review period, including a high of 5 U.S.C. § 552 (b)(6) & (b)(7)(C). 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Considering how many low-priced food items it would typically take to add up 5 U.S.C. § 552 (b)(6) & (b)(7)(C), and considering that the firm does not have any shopping carts or baskets, and given the fact that there are much larger grocery stores in the area with substantially greater inventory and variety, this review finds it unlikely that every transaction in Attachment 3 was a legitimate purchase of eligible food.

This attachment also cites a large number of repetitive transaction. For example, 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Similar patterns are repeated throughout Attachment 3. Considering that the firm does not sell eligible food items at prices as large as 5 U.S.C. § 552 (b)(6) & (b)(7)(C), and considering that it is rare for a variety of randomly selected, non-taxed food items with prices ending in a cents-value of 9 to add up to transaction totals ending in 99 cents, this review finds that the transaction patterns in Attachment 3 are far too repetitive to be truly random. Such patterns are a strong indicator of trafficking.

The Appellant has argued that many of the transactions are the result of customers spending the remaining balance in their SNAP account. The Appellant also argues that the transactions are

from well-established customers who place large orders over the phone and then pay for their food when they arrived at the store. The Appellant additionally claims that when there is hot or inclement weather, many customers venture outside only when necessary and then buy in bulk to avoid having to make multiple trips to the store. Further, the Appellant argues that baby food items are expensive, with cans of Enfamil selling for between \$20.00 and \$34.99 per container. According to the Appellant, these are common items sold at the store. Finally, the Appellant contends that a customer's shopping habits should not be interpreted in a negative manner or inferred that trafficking has occurred. At some point in time, the EBT card would have to be exhausted, so it makes sense that the cardholder would use it at their neighborhood store.

Unfortunately, the Appellant has not offered any evidence to support its contentions or to prove that the transactions listed in Attachment 3 were legitimate purchases of eligible food. For example, as to the Appellant's claim about telephone orders, there is no evidence from the store inspection report that this service is even offered. If there was such a service, the Appellant has submitted nothing to indicate how common such orders really are. With regard to the claim about Enfamil infant formula, this review could not find a single container of Enfamil in the contractor's store visit photographs, and the Appellant has submitted no data to prove that such items are frequently sold. Without any evidence that the store even stocks Enfamil, this review cannot accept this argument as legitimate. Additionally, most SNAP households with infants are simultaneously eligible for WIC benefits, and infant formula is part of the WIC food package. Thus it would be expected that such households would use WIC vouchers rather than SNAP benefits to purchase expensive infant formula.

Finally, there is no evidence to support the Appellant's assertion that customers shop less frequently during warmer weather than at other times.

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 contentions, submitted without any supporting evidence, does not meet this standard.

Trafficking Case based on EBT Data

One of the chief arguments by the Appellant relates to USDA's use of a computerized fraud detection system. The Appellant contends that USDA's conclusion of trafficking was made solely on an analysis of EBT transaction records, with no additional investigation. It claims that such use of EBT records is inadequate to reach a conclusion that violations have occurred. Further, the Appellant argues that a permanent disqualification based on inadequate proof will deprive the Appellant of its business and cause irreparable injury and damage. The Appellant believes that such a decision made by FNS is both inconclusive and arbitrary.

The Appellant additionally complains that the charge letter lacks specificity and that a general accusation of trafficking based on a sampling of transactions is unsubstantiated and deprives the Appellant of due process. From the Appellant's perspective, the disqualification decision is

likely based upon a predetermined standard of EBT activity for the type of firm owned by the Appellant.

Finally, the Appellant states that FNS has failed to specifically identify which of the transactions listed in the charge letter constitute trafficking activities. The Appellant argues that FNS should be required to investigate and evaluate the specific activities by the Appellant as well as the EBT cardholders before issuing a permanent disqualification.

With regard to these contentions, this review concedes that a conclusion of trafficking cannot be drawn from EBT data alone, nor would it be possible to do so in a case based primarily on inconsistent redemption data. It is acknowledged that USDA 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 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.

This review 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 given a specific list of questionable transactions, the Appellant has chosen to offer no evidence of any kind, such as itemized cash register receipts or inventory records, to prove that the specific transactions listed in the charge letter were legitimate purchases of eligible food.

It is the finding of this review, therefore, that the decision made by the Retailer Operations Division was neither arbitrary nor unsubstantiated. There is also no evidence whatsoever that the firm's due process rights have been violated. As such, the Appellant's contentions in regard to

the agency's use of EBT data provide no basis for dismissing the charges or for mitigating the penalty imposed.

Consideration of 7 CFR § 278.6(d)

SNAP regulations at 7 CFR § 278.6(d) state the following:

(d) Basis for determination. The FNS regional office making a disqualification or penalty determination shall consider:

- (1) The nature and scope of the violations committed by personnel of the firm,
- (2) Any prior action taken by FNS to warn the firm about the possibility that violations are occurring, and
- (3) Any other evidence that shows the firm's intent to violate the regulations.

The Appellant has argued that FNS has not provided a basis for disqualification under the regulation at § 278.6(d), which must be considered by FNS before disqualifying a store. It claims that because there were no specific violations committed by personnel of the firm and because there have not been any prior actions by FNS to warn the firm about the possibility that violations were occurring, the only remaining basis for disqualification is evidence which shows the firm's intent to violate the regulations. In this case, the Appellant claims that there is no evidence showing the firm's intent and nothing in the charge letter which reveals conclusively or even by a "fair preponderance of the credible evidence" that the Appellant exchanged SNAP benefits for cash. Therefore, the Appellant believes that the agency has not provided a basis for disqualification under § 278.6(d).

With regard to these contentions, the record clearly shows that the Retailer Operations Division properly considered the elements of § 278.6(d) as required. The case record indicates that the Retailer Operations Division evaluated the firm's history with SNAP compliance and found that in May 2016 – the month immediately prior to the start of the review period in the present case – an onsite undercover investigation was conducted at the store by a USDA investigator. During the investigation, a store clerk committed a SNAP violation by allowing an ineligible nonfood item to be purchased with SNAP benefits on one occasion. FNS determined that the violation in that case did not warrant a disqualification from SNAP, but a warning letter, dated July 22, 2016, was sent to the store owners. The letter stated, "This is an OFFICIAL WARNING from the U.S. Department of Agriculture that if you are again found to be in violation of the regulations, you may lose your authorization to participate in [SNAP]. You should take every precaution to make sure that you and your employees know and follow the SNAP regulations."

By all indications, the Appellant ignored this warning and subsequently committed trafficking violations, which is among the most serious of SNAP violations. In the present case, a second warning letter was not appropriate because of the gravity of the allegations. The law is clear that when trafficking occurs, permanent disqualification is the required penalty, even on the first occasion, as noted in 7 U.S.C. § 2021(b)(3)(B).

As to the element of "intent," this review acknowledges that a conclusion regarding one's intent is difficult to draw from an analysis of EBT data. However, the preponderance of evidence in

this case leans in the agency's favor. The highly unusual patterns of transactions over an extended period of time, particularly in comparison to similar stores in the area, strongly suggest that intentional violations of SNAP regulations were taking place. Conversely, the Appellant has not offered a single piece of evidence to counter the allegations against it.

It is the finding of this review that the Retailer Operations Division appropriately considered the provisions of 7 CFR § 278.6(d) and that the Appellant's contentions in this regard do not provide a basis for dismissing the charges or for mitigating the penalty imposed.

Hardship to Appellant and SNAP Recipients

The Appellant has stated that in lieu of disqualification FNS should subject the firm to a civil money penalty because a disqualification would cause hardship to participating households. For example, the Appellant contends that the firm is a purveyor of halal foods and claims that there are no other similar providers, and as such, disqualification would result in hardship to the community. The Appellant further claims that the nearest supermarket is several blocks away and argues that Ralph & Nash Deli Corp. provides convenient access to basic food items for many people in a busy neighborhood.

The Appellant further claims that approximately 80 percent of the firm's sales are from EBT transactions and contends that these transactions provide the income necessary to keep the business profitable. The Appellant argues that the firm's owner would not risk permanent disqualification, and therefore his livelihood, for the amounts of money listed in the charge letter. According to the Appellant, permanent disqualification will deprive the owner of his business and cause him to sustain irreparable injury and damage.

With regard to the Appellant's contention that the community will experience hardship if the firm is disqualified, it should first be noted that both a supermarket and superstore are located very near Ralph & Nash Deli Corp. As such, SNAP households in the area should have very little trouble obtaining food with their SNAP benefits. Next, the Appellant's claim that the store is a purveyor of halal foods appears to be false. From the contractor's store visit report and photographs, there is no evidence that the store sells halal foods of any kind, let alone in quantities that would cause hardship to nearby households. Additionally, the claim that there are no other halal stores in the area is also false. There is a medium-sized, SNAP-authorized grocery store with substantial halal inventory located just one-tenth of a mile away, or about a two-minute walk. It is unclear why Appellant's counsel would make such fabricated claims.

It is recognized that some degree of inconvenience to SNAP households is likely whenever a SNAP-authorized store is disqualified and a household is forced to use its benefits elsewhere. Regulations at 7 CFR § 278.6(f) do allow, in some circumstances, for a civil money penalty to be imposed in lieu of disqualification when there is an absence of other SNAP-authorized retailers in the area. However, the regulations are clear that a CMP for hardship to SNAP households may not be imposed in lieu of permanent disqualification for trafficking.

As for the assertion that SNAP benefits are a significant part of the Appellant firm's business and the contention that the firm would suffer financially if the disqualification were to be upheld,

Federal statute at 7 U.S.C. § 2021(b)(3)(B) makes it clear that disqualification for trafficking shall be permanent, even on the first occasion. 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 on the basis of possible economic hardship to either the ownership personally or to the firm resulting from the imposition of such a penalty.

Therefore, the Appellant's contentions that the community will be adversely affected and that the firm may incur economic hardship based on the assessment of a disqualification do not provide a valid basis for dismissing the charges or for modifying the penalty imposed.

Statute of Limitations

The Appellant argues that the allegations described in the January 2017 charge letter occurred "years ago," and claims that the "statute of limitations precludes the bringing of such charges after such a long period of time, as it prejudices the owner by no longer having access to receipts, surveillance videos or records due to the gap in time before the charges were brought."

With regard to the so-called "statute of limitations," it must be made clear that no such statute exists in the Food and Nutrition Act of 2008, as amended, or in SNAP regulations. Nowhere in the law does it state that FNS can no longer bring trafficking charges against a firm due to the passage of time. It should also be noted that the charges were not brought against the firm after several years as the Appellant implies; rather the charges (dated January 9, 2017) were levied less than two months after the end of the review period (June 2016 to November 2016). If the Appellant actually had receipts or surveillance videos to submit, it most certainly could have presented them in January 2017, but elected not to. The determination letter, on the other hand, was delayed until September 23, 2020 because Appellant's counsel sought a FOIA request, followed by a lengthy FOIA appeal. Such requests and appeals have been common practice by Appellant's counsel in dozens of other cases. Since Appellant's counsel offered no evidence or additional contentions after receipt of the agency's two FOIA responses, counsel's use of FOIA appears to be nothing more than a tactic to delay implementation of a period of disqualification rather than a genuine request for information in an effort to formulate a defense against the charges.

This review finds that the only prejudicing of the Appellant owner in this case is that which was brought upon himself through his own attorney. Accordingly, this review finds the Appellant's arguments related to a statute of limitations to be disingenuous and do not provide a valid basis for dismissing the charges or for mitigating the penalty imposed.

Trafficking 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 program to prevent SNAP violations.

In accordance with regulations at 7 CFR § 278.6(b)(2), in order for a trafficking CMP 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 supporting documentation within 10 days of receipt of the charge letter. The case record shows that the Appellant did not specifically request a trafficking CMP (which is not the same as a hardship 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 program of any kind. The anecdotal information provided by the Appellant regarding the firm's training activities are of little value without supporting evidence.

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 Ralph & Nash Deli Corp. 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, Ralph & Nash Deli Corp., under the ownership of 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. The judicial filing timeframe is mandated by the Act, and this office cannot grant an extension.

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

January 20, 2021