

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

R & D Union Inc,

Appellant,

v.

Case Number: C0201580

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 decision by the Retailer Operations Division to impose a permanent disqualification against the R & D Union Inc (hereinafter Appellant) from participating as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP).

ISSUE

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with Title 7 of the Code of Federal Regulations (CFR) § 278.6(a), (c) and (e)(1)(i), when it imposed a permanent disqualification against Appellant on August 14, 2017.

AUTHORITY

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

CASE CHRONOLOGY

In a letter dated August 3, 2017, the Retailer Operations Division charged the Appellant with trafficking, as defined in Section 271.2 of the SNAP regulations, based on a series of irregular SNAP transaction patterns that occurred during the

months of January 2017 through June 2017. The letter noted that the penalty for trafficking is permanent disqualification as provided by 7 CFR § 278.6(e)(1). The letter also noted that the Appellant could request a trafficking civil money penalty (CMP) in lieu of a permanent disqualification within ten days of receipt under the conditions specified in 7 CFR § 278.6(i).

Appellant responded to the charges in a letter dated August 9, 2017, and submitted via fax, but the response neither requested nor contained no any evidence to be considered in support of the CMP. The response did admit to the violations and stated that because ownership could not afford the CMP, they were opting for disqualification from SNAP. The Retailer Operations Division notified Appellant in a letter dated August 14, 2017, that the firm was permanently disqualified from participation as an authorized retailer in SNAP in accordance with Section 278.6(c) and 278.6(e)(1) for trafficking violations. This determination letter also stated that Appellant's eligibility for a trafficking CMP according to the terms of Section 278.6(i) of the SNAP regulations was considered. However, the letter stated “. . . you are not eligible for the CMP because you failed to submit sufficient evidence to demonstrate that your firm had established and implemented an effective compliance policy and program to prevent violations of the Supplemental Nutrition Assistance Program.”

By letter dated August 16, 2017, Appellant appealed the Retailer Operations Division's assessment and requested an administrative review of this action. The appeal was granted. Subsequent correspondence dated September 14, 2017, was received from Appellant.

STANDARD OF REVIEW

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

CONTROLLING LAW

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

7 U. S. Code § 2021(a)(2) states, “Regulations promulgated under this chapter shall provide criteria for the finding of a violation of, the suspension or disqualification of and the assessment of a civil penalty against a retail food store or wholesale food concern on the basis of evidence that may include facts established through on-site investigations, inconsistent redemption data, or evidence obtained through a transaction report under an electronic benefit transfer system.”

In addition, 7 CFR § 278.6(a) states, in part, “FNS may disqualify any authorized retail food store

. . . if the firm fails to comply with the Food and Nutrition Act of 2008, as amended, or this part. Such disqualification shall result from a finding of a violation on the basis of evidence that may include facts established through on-site investigations, inconsistent redemption data, evidence obtained through a transaction report under an *electronic benefit transfer system* . . .” (Emphasis added.)

7 CFR § 278.6(e)(1)(i) reads, in part, “FNS shall . . . [d]isqualify a firm permanently if . . . personnel of the firm have trafficked as defined in § 271.2. ”

Trafficking is defined, in part, in 7 CFR § 271.2, as, “The buying, selling, stealing, or otherwise effecting an exchange of SNAP benefits . . . for cash or consideration other than eligible food, either directly, indirectly, in complicity or collusion with others, or acting alone . . .” Trafficking is further defined, in 7 CFR

§ 271.2, to include “(5) Intentionally purchasing products originally purchased with SNAP benefits in exchange for cash or consideration other than eligible food.”

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

7 CFR §278.6(b)(2)(ii) states, inter alia: “Firms that request consideration of a civil money penalty in lieu of a permanent disqualification for trafficking shall have the opportunity to submit to FNS information and evidence . . . that establishes the firm’s eligibility for a civil money penalty in lieu of a permanent disqualification in accordance with the criteria included in

§278.6(i). This information and evidence shall be submitted within 10 days, as specified in

§278.6(b)(1).” Part 278.6(b)(2)(ii) further states that if a firm fails to request consideration for a civil money penalty in lieu of a permanent disqualification for trafficking and submit documentation and evidence of its eligibility within the 10 days specified in Part 278.6(b)(1), the firm shall not be eligible for such a penalty.

SUMMARY OF THE CHARGES

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

1. There were an unusual number of transactions ending in a same cents value.
2. Multiple transactions were made from individual benefit accounts in unusually short time frames.
3. The majority or all of individual recipient benefits were exhausted in unusually short periods of time.
4. Excessively large purchase transactions were made from recipient accounts.

APPELLANT'S CONTENTIONS

In the response to the letter of charges, Appellant has stated as its position in the matter the following:

- Ownership apologizes for the violations. The cashier was doing things he should not have done. When asked, the cashier said that EBT card holders were frequently carrying their cards in their hands and were losing them. When they lost their cards the cashier would note their purchases in a diary to help them and when the cards were found he would charge the total amount to them. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Of course, this does not explain all the transactions, but ownership agrees that he should not have done this;
- The store is a very small business and does not have any formal training policy, but the cashier was trained properly and should not have done these wrong things. There was no fraud involved and only food items permitted by SNAP laws were sold. The cashier did this to help these cardholders and no other fraud or bad intentions; and,
- In the August 9, 2017, response, ownership stated that they are in no position to pay 5 U.S.C. § 552 (b)(6) & (b)(7)(C) and so were opting for disqualification from SNAP. Once again the owners apologize for the violations and the hassle. Also, the store has stopped accepting EBT sales effective this date;

In the request for administrative review and in the subsequent correspondence, Appellant stated the following:

- Ownership is very sorry for the violations at their business. The cashier did things he should not have done without telling the owners and the owners know this is no excuse and as business owners take full responsibility for the violations;

- If the owners' request is approved, there will not be a single violation in the future. Ownership will personally supervise all EBT transactions, review all EBT sales on a weekly basis, train the cashier every week on EBT rules, and will do more self-policing;
- Ownership is submitting signed statements from 29 EBT customers confirming that without EBT it will be very hard for them to walk a mile to go to other stores and risk violence walking at night. Also enclosed is a letter from the Myers Neighborhood Association requesting the EBT license be approved for the same reasons – convenience to the community. Tucson is a very hot place and it is no fun to walk a mile on 110 degree days;
- With the above facts in review, ownership requests to be allowed to apply for a SNAP permit after six months; and,
- Based on the above, the owners request the EBT license be approved for the “convenience of the community” and take full responsibility that there will be no future violations.

Appellant submitted three petition pages containing customer signatures and a letter from the Myers Neighborhood Association in support of these contentions. Appellant submitted no evidence or other rationales in support of these contentions.

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

ANALYSIS AND FINDINGS

The Retailer Operations Division presented a case that Appellant trafficked SNAP benefits. Each Attachment furnished with the letter of charges represents the questionable and unusual patterns of SNAP transactions indicative of trafficking which were conducted at Appellant's store during the review period. As patterns of unusual transactions appear across multiple Attachments, the case of trafficking becomes more convincing.

Store Background and FNS Store Visit

The FNS initially authorized the Appellant's store on October 19, 2005, and most recently reauthorized the business on March 22, 2016; the business is classified as a convenience store. The file indicates that in reaching a disqualification determination, the Retailer Operations Division considered information obtained during a June 30, 2017, store visit conducted by a FNS contractor to observe the nature and scope of the firm's operation, stock, and facilities. This information was then used to ascertain if there were justifiable explanations for the EBT transactions

at Appellant's store that formed patterns indicative of trafficking. The store review summary documented the following store size, description, and characteristics:

- The business was a small store offering an extremely limited quantity and variety of staple foods and carrying no unique items or offering any distinctive services.
- The contractor stated the store size was 1,800 square feet with no additional storage based on information provided by the store owner during the store visit.

Note: A review of the Pima County Assessor's Office records shows the building's square footage as 1,296 SF.

- There were no shopping carts and only three small handheld baskets for customer use seen during the visit making it difficult for customers to carry large amounts of food to the checkout.
- The checkout counter was approximately one foot by 2.5 feet with displays on both sides and a rack containing candy in front of it that customers would have to reach over to place items on the counter. The extremely small size of the checkout area would make it problematic to process large orders.
- The checkout counter had one cash register, one point-of-sale (POS) terminal, and no optical scanner.
- No food packages, bundles, case sales, bulk products, or other sales were evident that would explain the unusual transactions and no SNAP eligible cased items were available for sale.
- The store had an extremely limited stock of staple foods that consisted of many single serving and pre-packaged items with the majority of inventory in accessory foods (primarily soda, candy, and other drinks), snacks, and ineligible items.
- The business was marginally stocked in the meat/poultry/fish category carrying only a small number of canned poultry/fish items, one package of lunch meat, two packages of hot dogs, one package of bacon, and two dozen eggs.
- Dairy items included: fresh milk (4 gal), single serving milk drinks, sour cream (2), butter/margarine, and single serving ice cream.
- Other refrigerated items included: heat & eat sandwiches, cold sandwiches, Hot Pockets, chimichangas, and single serving pizzas. The business had a small microwave oven for heating these foods.
- There were no fresh or frozen fruit and vegetables. The business stocked a very limited quantity and variety of canned vegetables (four cans of beans and four cans of tomato sauce) and no canned fruit.
- The inventory of staple foods at the time of the visit also included: fruit juices, single serving bagged nuts, sugar, bread (3), tortillas (2), snacks, baked goods, cold cereals (10 small boxes), and single serving Ramen

noodle soups.

- The store had no fresh unprocessed meats or seafood, no frozen unprocessed meats or seafood, a very limited variety and quantity of processed meats and seafood (canned fish/poultry, two hot dogs, one packaged lunch meat, one bacon, and jerky), no deli meats or deli cheeses, two dozen eggs, no frozen entrees, no frozen dinners, no yogurt, two sour creams, four gallons of fresh milk, minimal packaged cheese, minimal butter/ margarine, no fresh fruits or vegetables, no frozen fruits or vegetables, minimal single serving nuts, an extremely limited quantity and variety of canned and packaged staple food items (four tomato sauce and four canned beans), no cocoa, no tea, no infant formula, no infant cereals, no baby foods, no baby juices, no baking mixes, no flour, no rice, no corn meal, no hot and only 10 small cold cereals, no dry pasta or noodles, no canned soups and no expensive eligible food items.
- Ineligible items included: tobacco, alcohol, lottery, gasoline, household products, paper products, pet products, auto products, sunglasses, ATM, office supplies, and Western Union services while accessory foods included: candy, condiments, coffee, and carbonated/uncarbonated drinks.
- The store was not a WIC vendor.
- Signage in the store was in English.
- Many food items were priced with all visible prices ending in .x9 cents except for some candy items priced at .50 cents and some drinks priced at two for \$3.50. A price ending in .x9 cents is the most common pricing structure for stores of this type.
- The FNS store visit report listed the most expensive item for sale in the store as being a 10.3 ounce container of Folgers Coffee priced at \$5.99 based on responses provided by the store owner during the store visit.
- Store hours were confirmed by the contracted reviewer with the store owner during the FNS store visit as being open 7:00 am-10:00 pm M-Saturday, and 8:00 am-10:00 pm Sunday.
- The store visit report photographs showed many empty or marginally stocked shelves, racks, and coolers indicative of a slow turnover of product.
- Store inventory was significantly less than during the March 19, 2016, FNS store visit.

Unusual numbers of transactions ending in a same cents value

This attachment lists 169 transactions ending in a same cents

5 U.S.C. § 552 (b)(6) & (b)(7)(C). 5 U.S.C. § 552 (b)(6) & (b)(7)(C). When such repetitive patterns are unsupported by special pricing structures they are a strong indicator of trafficking in SNAP benefits. The FNS store report and photographs revealed no signs posted to indicate special food packages, bundles, case sales, or other sales/promotions that would explain the unusual number of transactions ending

in these same cents values and no bulk items were available for purchase. The high percentage of same cent transactions combined with the large number of high dollar transactions is irregular and suspicious for this type store.

Appellant contends the same cents sales are because the cashier was doing things he should not have done. When asked, the cashier said that EBT card holders were frequently carrying their cards in their hands and were losing them. When they lost their cards the cashier would note their purchases in a diary to help them and when the cards were found he would charge the total amount to them.

5 U.S.C. § 552 (b)(6) & (b)(7)(C). Appellant submitted three petition pages and a letter from the Myers Neighborhood Association in support of these contentions.

Several of the 31 names on Appellant's petition were illegible and only 20 entries included the household's EBT card numbers. Of the 20 EBT card numbers provided there were six numbers that were invalid and one card number that was a duplicate of another number. The remaining 13 EBT card numbers were crosschecked against transactions at the Appellant business with the results being that four households had only a few transactions at the Appellant business of small dollar amounts that were not listed in the letter of charges and two other households had only a single transaction each at the Appellant during the period under review. The transactions for the remaining seven households were reviewed and found to not exhibit the patterns that would be associated with the households having lost their EBT cards; however, patterns were noted that are indicative of trafficking. Based on this discussion, Appellant did not provide adequate evidence to support the legitimacy of the excessively large transactions in this Attachment.

The inventory report and photographs from the June 30, 2017, FNS store visit show the business offered an extremely limited quantity and variety of SNAP eligible food items with the majority of its inventory in snacks, accessory foods and ineligible items. Additionally, the business carried no expensive eligible food items making it questionable that such a large number of high dollar value SNAP transactions could be for legitimate food purchases. Many food items at the Appellant business were priced with the majority of visible prices ending in .x9 cents which is the most common pricing structure for stores of this type. While there were a small number of candies priced at .50 cents and some drinks priced at two for \$3.50, the limited quantities of these items would not account for the high dollar value transactions listed in this Attachment. No food packages, bulk products, bundles, case sales, or other sales/promotions of eligible items were evident during the store visit that would explain these unusual same cents transactions. The purchase of several items with prices ending in .x9 cents would most likely not result in a total ending in a same dollar amount

5 U.S.C. § 552 (b)(6) & (b)(7)(C). When there are a disproportional amount of transactions ending in a same cent value, it appears that these transaction amounts are contrived and therefore, in the absence of any compelling rationale to the contrary, are indicative of trafficking. Also, the three page store visit questionnaire completed by the contract reviewer includes a section where the four most

expensive items available for sale at the store based on information provided by the store's owner are listed; the single most expensive item was \$5.99.

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

Multiple transactions in unusually short time frames

This Attachment documents 47 individual transactions in 20 sets of two or more transactions conducted by 14 different households in a short period of time.

5 U.S.C. § 552 (b)(6) & (b)(7)(C). It is noted that this dollar amount is the exact monthly allotment for a household consisting of one individual.

5 U.S.C. § 552 (b)(6) & (b)(7)(C). It is not a usual shopping pattern to see so many purchases, in a short period of time, by the same recipients as documented in this Attachment. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). These sets of transactions appear to be in amounts which are indicative of trafficking.

Appellant provided no documentation or explanation to support the legitimacy of the listed transactions in this Attachment.

The household transactions listed in this Attachment do not contain the characteristics associated with different household members shopping together and conducting separate transactions using the same EBT card as most of the individual transactions 5 U.S.C. § 552 (b)(6) & (b)(7)(C). It would also be improbable that each of the 14 households in this Attachment is in a position to share their SNAP benefits. If there were multiple adults within the same household that met all the requirements for SNAP benefits, then these other adults would have their own SNAP accounts and EBT cards. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). For example, mothers may shop and later return to the store to pick-up a forgotten item. 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

It was also noted that 12 of the 47 individual transactions listed in this Attachment occurred well after the store's closing time of 10:00 PM as reported by the store owner during the June 30, 2017, FNS store visit. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). This pattern was also evident in the other Attachments. It is an indication of potential trafficking when there are numerous transactions occurring outside of the store's reported business hours.

Near Depletions of SNAP Benefit Accounts

This Attachment lists a total of 66 EBT transactions in 32 sets of one or more transactions involving 24 households during which the majority, if not all, of the household's monthly SNAP benefits were depleted in a short period of time.

5 U.S.C. § 552 (b)(6) & (b)(7)(C). Twenty- one of the 32 sets also involved a balance inquiry with two of the sets having two separate balance inquiries. Depleting a household's entire SNAP allotment in one or a few transactions, or within one day, leaving little or no benefits for the rest of the month, is inconsistent with the normal shopping behavior of SNAP benefit households.

SNAP benefits are intended to supplement the food budget for recipient households whose net income is at or below the Federal Poverty Level. A government report on SNAP shopping patterns¹ indicates that after the first day of benefit issuance, on average, 79.1 percent of a household's allotment remains unspent. Even after seven days, 42 percent of benefits still remain unspent. It typically takes two weeks to deplete 78.1 percent of one's benefits. This report further revealed that households most often redeemed their benefits at supermarkets and super stores with only four percent of households never shopping in a supermarket.

Participating households typically made several (5 U.S.C. § 552 (b)(6) & (b)(7)(C)) relatively small purchases (5 U.S.C. § 552 (b)(6) & (b)(7)(C)) with SNAP benefits each month. Making single or multiple transactions of large dollar amounts or cumulatively large dollar amounts, and/or depleting substantial amounts of one's allotment in a period of hours, leaving a marginal amount or no benefits for the rest of the month, is inconsistent with typical shopping behavior of SNAP benefit households. Rather, transactions over a short period of time of large value, or large cumulative value, in which SNAP benefits are exhausted are an indicator of trafficking.

Appellant again provided no documentation or explanation to support the legitimacy of the listed transactions in this Attachment.

The FNS store visit shows this is a small store offering an extremely limited quantity and variety of staple foods items as well as a large variety of the accessory foods and ineligible items typically found in convenience stores. It is unlikely that most SNAP households would choose this store as a destination for making large household food purchases if they had the ability to shop at larger stores. An analysis of the shopping patterns for the households listed in this Attachment shows that these households have ready access to transportation as evidenced by their shopping at a variety of other larger food stores, including many super stores and supermarkets, located nearby and at a considerable distance from Appellant's

¹ Benefit Redemptions in the Supplemental Nutrition Assistance Program", report prepared by Mathematica Policy Research for the Food and Nutrition Service, February 2011.

location. This analysis further shows that 21 of the 24 households conducted 15 or fewer transactions at the Appellant business during the six month period under review with 16 households conducting four or fewer transactions indicating that 87.5 percent of the households in this Attachment are not regularly shopping at the Appellant business. Additionally, seven households are conducting all or the majority of their other shopping at stores located at a distance from Appellant's location indicating that these households likely reside at a distance from the Appellant business and would be traveling out of their way to shop there. Appellant offered no explanation as to why households residing at a distance would use their limited cash resources to travel away from their normal shopping areas to shop at Appellant's poorly stocked convenience store. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). It seems unlikely that multiple single person households with very limited food dollars would be purchasing large quantities of eligible food products that would exhaust the majority or all of their monthly SNAP benefits at a store where they seldom shop. The multiple transactions combined with the high number of balance inquiries and households comprised of one individual make it unlikely that the transactions listed in this Attachment are for eligible food items.

Appellant has failed to provide any explanations for the irregular shopping patterns exhibited by the households listed in this Attachment, the majority of who are not regular customers of the Appellant business, or why these households would deplete or exhaust their SNAP benefits in a single day 5 U.S.C. § 552 (b)(6) & (b)(7)(C). While SNAP households do tend to make larger purchases in the days immediately following receipt of their monthly allotment, the behavior by households in this Attachment is contrary to the documented shopping patterns of SNAP households, as previously discussed, who typically make just over nine transactions each month consisting of relatively small dollar amounts. Also, no explanation or rationale has been offered by Appellant as to why households that are regularly shopping at larger stores offering a greater variety and quantity of SNAP eligible food stock at lower prices and who apparently have no transportation limitations would be conducting high dollar value transactions at a convenience store that offers an extremely limited selection of staple food items and has no shopping carts that would be needed for the large transactions in this Attachment. Based on this discussion, trafficking is the only feasible explanation for these irregular shopping patterns.

It should be noted that this Attachment is not targeting excessively large transactions per se. It represents a pattern whereby 24 households within the review months, almost depleted, or did deplete their entire monthly SNAP benefit allotments, in a single or a few transactions, d5 U.S.C. § 552 (b)(6) & (b)(7)(C). As previously noted, this is not typical shopping behavior exhibited among SNAP recipients.

High Dollar Value Transactions

5 U.S.C. § 552 (b)(6) & (b)(7)(C).

The record shows that within a one mile radius of Appellant's store there are 13 SNAP authorized retailers including: one super store, one large grocery store, one medium grocery store, one small grocery store, one meat specialty store, two combination grocery stores, and six convenience stores. There are also three additional super stores located 1.11, 1.66, and 2.0 miles away from Appellant's location. The evidence under review shows that SNAP households shopping at the Appellant business are also shopping at other nearby stores, as well as at full-line supermarkets and super stores, located nearby as well as at a distance from Appellant's location that offer a greater variety and quantity of SNAP eligible foods items for better prices than customers can find at the Appellant business. The large dollar transactions remain questionable when considering the proximity of these other SNAP authorized stores that would be better shopping options for consumers. Based on these shopping patterns, transportation does not appear to be an issue for these households. Yet, these recipients continue to shop and spend suspicious high dollar amounts at the Appellant business, where the eligible food stock is limited, 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

Evidence also shows that the difference in the average SNAP transaction dollar amount, the total SNAP transaction dollar volume, and the SNAP transaction count for Pima County convenience stores during the review months and at the Appellant business is significant. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Additionally, none of these nearby stores exhibit the same suspicious transaction patterns listed in the charge letter for the Appellant business 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.

5 U.S.C. § 552 (b)(6) & (b)(7)(C).

The SNAP transactions noted in this Attachment are not presumed to be trafficking because they exceed a set dollar amount; they are questionable because they are inconsistent for this type of store and the store's stock. An analysis of shopping patterns by the Retailer Operations Division shows that households in this Attachment are regularly shopping at much larger stores, and conducting transactions of large dollar amounts, yet are conducting comparable or higher dollar value transactions at the Appellant business. It would make no sense for a household that regularly shops at larger stores and apparently has no transportation limitations to spend large dollar amounts at the Appellant business since its cost of goods would be higher than that of larger stores such as supermarkets or super stores.

Information obtained during the FNS store visit on June 30, 2017, shows that the Appellant business offers an extremely limited quantity and variety of SNAP

eligible staple food items, many accessory foods, and many ineligible items. There is no apparent legitimate reason for the high transaction amounts at Appellant's store given the poor stock of staple foods and the fact that: tobacco, alcohol, lottery, gasoline, household products, paper products, pet products, auto products, sunglasses, ATM, office supplies, and Western Union services are not eligible for purchase with SNAP benefits. The business carries no special foods or offers any unique services that are not also available at other nearby grocery stores making it unlikely that SNAP recipients with available transportation would make this business their grocery store of choice. 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

Since the Appellant business carries no fresh unprocessed meats or seafood, no frozen unprocessed meats or seafood, a very limited quantity and variety of processed meats and seafood (canned fish/poultry, two hot dogs, one packaged lunch meat, one bacon, and jerky), no deli meats or deli cheeses, two dozen eggs, no frozen entrees, no frozen dinners, no yogurt, two sour creams, four gallons of fresh milk, minimal packaged cheese, minimal butter/ margarine, no fresh fruits or vegetables, no frozen fruits or vegetables, minimal single serving nuts, an extremely limited quantity and variety of canned and packaged staple food items (four tomato sauce and four canned beans), no cocoa, no tea, no infant formula, no infant cereals, no baby foods, no baby juices, no baking mixes, no flour, no rice, no corn meal, no hot and only 10 small cold cereals, no dry pasta or noodles, no canned soups, and offers no expensive eligible food items, these patterns are deemed to be suspicious. The store visit report photographs showed many empty or marginally stocked shelves, racks, and coolers indicative of a slow turnover of product. Additionally, store inventory was significantly less than that was seen during the previous FNS store visit on March 19, 2016. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). No explanation was provided by Appellant for this unusual and improbable lack of correlation between inventory availability and SNAP redemptions.

Increasing food prices make it even more unlikely that SNAP recipients, with limited food benefits, would want to spend a considerable part of their benefits in a convenience store that does not address all of their food shopping needs when they are already shopping at larger, fully-stocked stores that would offer a greater variety of foods at lower prices. Many of these stores would also offer store brand products at lower prices, offer weekly specials, and have shopping carts and checkouts with scanners and conveyor belts to facilitate processing purchases quickly. The Appellant business has a very small checkout area, no shopping carts, and no scanner thereby making it difficult to facilitate the great quantities of eligible food items required to make up these large dollar transactions. Additionally, Appellant furnished no itemized cash register and EBT receipts for the period under review to document the legitimacy of these excessively large transactions and no evidence was provided of SNAP eligible store stock via receipts of products taken into inventory for the relevant review months. Accordingly, it is improbable that the food items purchased in these high dollar amounts could be carried to the register without the use of many carts and thus more likely the amounts were contrived.

Based on this discussion, Appellant did not provide adequate evidence to support the legitimacy of the excessively large transactions in this Attachment.

Other Contentions

Appellant states that there was no fraud involved in these transactions and only food items permitted by SNAP laws were sold.

Regarding Appellant's denial of violations, this review encompasses and documents the examination of the primary and relevant information in this case, the purpose of which, as noted above, is to determine whether Appellant demonstrates, by a preponderance of the evidence, that the disqualification should be reversed. In this case, therefore, if Appellant demonstrates by a preponderance of the evidence that it did not engage in trafficking with SNAP benefits, then such transactions will be considered legitimate and the disqualification reversed. If this is not demonstrated, the case is to be sustained. Assertions that the firm has not violated program rules, by themselves and without supporting evidence and rationale, do not constitute valid grounds for dismissal of the current charges of violations or for mitigating their impact. Regardless of whom the ownership of a store may utilize to handle store business or their degree of involvement in store operations, ownership is accountable for the proper training of staff and the monitoring and handling of SNAP benefit transactions. The ownership remains liable for all violative transactions handled by store personnel, whether paid or unpaid, new, full-time or part-time. Additionally, a record of participation in SNAP with no previously documented instance of violations does not constitute valid grounds for dismissal of the current charges of violations or for mitigating the impact of those charges.

The issue under review involves a charge of trafficking SNAP benefits based on EBT transaction data. EBT transaction data is covered in SNAP regulations at 7 CFR § 278.6(a) and is addressed below. Trafficking is always considered to be the most serious violation even if it is a first offense therefore a temporary suspension or lesser penalty would not be applicable. SNAP regulations at 278.6(e)(1) clearly state that, "FNS shall . . . [d]isqualify a firm permanently if . . . personnel of the firm have trafficked as defined in § 271.2." SNAP regulations at 7 CFR § 271.2, define trafficking as, "The buying, selling, stealing, or otherwise effecting an exchange of SNAP benefits . . . for cash or consideration other than eligible food, either directly, indirectly, in complicity or collusion with others, or acting alone" SNAP regulations at 7 CFR § 278.6(a) clearly state, in part, that "FNS may disqualify any authorized retail food store . . . if the firm fails to comply with the Food and Nutrition Act of 2008, as amended, or this part. Such disqualification shall result from a finding of a violation on the basis of evidence that may include facts established through on-site investigations, inconsistent redemption data, evidence obtained through a transaction report under an *electronic benefit transfer system*" (Emphasis added). In the present case, the data

presented in the Attachments is solely based on the SNAP electronic benefit transfer transactions conducted at the Appellant business during the period under review. This firm was selected as a result of a series of complex algorithms that make numerous data comparisons with other like type firms during the period under review. All of the transactions were then reviewed and analyzed by the Retailer Operations Division staff before the decision was made to issue a charge letter. This investigative process included a detailed examination of information obtained from various sources, including, but not limited to the inventory report and photographs from the FNS store

visit on February 25, 2017, a transaction comparison and analysis of like type and larger stores, and analysis of shopping patterns for recipient households conducting transactions at the Appellant business during the review period. This analysis included a review of the business to ensure its store classification was correct and the data comparisons with like type firms valid. Additionally, there are nearby like type stores whose transaction data does not form these suspicious patterns and are therefore not at risk of disqualification for trafficking. There is also no regulatory requirement that trafficking disqualifications be based solely on on-site undercover operations.

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

The evidence under review shows SNAP activity indicative of trafficking. Neither the Food and Nutrition Act of 2008, as amended, nor the regulations issued pursuant thereto cite any minimum dollar amount of cash or SNAP benefits, or number of occurrences, for such exchanges to be defined as trafficking. Nor do they cite any degrees of seriousness pertaining to trafficking of SNAP benefits. Trafficking is always considered to be the most serious violation, even when the exchange of SNAP benefits for cash is dollar-for-dollar or is conducted by a non-managerial store clerk. This is reflected in the Food and Nutrition Act, which reads, in part, that disqualification “shall be permanent upon . . . the first occasion of a disqualification based on . . . trafficking . . . by a retail food store.” In keeping with this legislative mandate, Section 278.6(e)(1)(i) of the SNAP regulations states that FNS shall disqualify a firm permanently if personnel of the firm have trafficked. There is no agency discretion in the matter of what sanction is to be imposed when trafficking is involved.

CIVIL MONEY PENALTY

A CMP for hardship to SNAP households may not be imposed in lieu of a permanent disqualification as specified in SNAP regulations at 7 CFR § 278.6(f). Trafficking is a permanent disqualification so Appellant is not eligible for a hardship CMP.

The Retailer Operations Division determined that the Appellant was not eligible for a trafficking CMP in lieu of a disqualification under 7 CFR 278.6(i) because Appellant failed to request a trafficking CMP or to submit sufficient evidence to demonstrate that the firm had established and implemented an effective compliance policy and program to prevent SNAP violations within the specified timeframe. As such, the Retailer Operations Division determined that Appellant was not eligible for a trafficking CMP in lieu of permanent disqualification.

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

CONCLUSION

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

The retailer has not provided sufficient evidence to rebut the case that Appellant most likely trafficked in SNAP benefits. Therefore, based on a review of all of the evidence in this case, it is more likely true than not true that program violations did, in fact, occur as charged by the Retailer Operations Division. Based on the

discussion above, the determination to impose a permanent disqualification against Appellant is sustained. Furthermore, Retailer Operations properly determined that Appellant was not eligible for a trafficking CMP according to the terms of Section 278.6(i) of the SNAP regulations.

RIGHTS AND REMEDIES

Applicable rights to a judicial review of this decision are set forth in 7 U.S.C. § 2023 and

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

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

ROBERT T. DEEGAN
Administrative Review Officer

October 31, 2017