

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

Richdale Convenience Store,

Appellant,

v.

Case Number: C0220150

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 Richdale Convenience Store (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 Richdale Convenience Store.

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 May 2019 through July 2019. This involved the following four transaction patterns which are common trafficking indicators:

- There were a large number of transactions ending in a same cents value.
- There were multiple transactions made from the accounts of individual SNAP households within a set time period.

- The bulk of SNAP households' remaining benefits were depleted within short timeframes.
- The firm conducted EBT transactions that were large based on observed store characteristics and recorded food stock.

CASE CHRONOLOGY

The agency's record shows that FNS initially authorized Richdale Convenience Store for SNAP participation as a convenience store on April 27, 2017. In a letter dated September 19, 2019, the Retailer Operations Division charged the Appellant with trafficking, as defined in Section 271.2 of the SNAP regulations, based on a series of irregular SNAP transaction patterns that occurred between the months of May 2019 and July 2019. 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).

Agency records show that in response to the charge letter, the Appellant, through counsel, had several conversations with the Retailer Operations Division, both verbal and via e-mail, and also submitted three formal, written responses. The formal responses are summarized as follows:

Reply dated September 30, 2019: Appellant believes the charges of trafficking are incorrect and unfounded and are inadequately supported by hearsay documents and records and are based on speculation. There is not any firsthand observation of a single unlawful transaction. There is not even secondary evidence in the form of a report of what items were purchased on a given occasion, or any record of an analysis by a human being. Rather, the government piles suspicion and supposition on top of speculation to draw inferences. The charging evidence falls well short of what is required to find the Appellant liable for trafficking offenses.

According to the Appellant, the standard and judicially-accepted means of providing proof to support a trafficking charge, or any evidence to be admitted in court, is through witnesses who have conducted controlled buys with undercover agents and/or have firsthand knowledge of the offenses. In this case, there is no such evidence and there is no one who can testify to having observed any illegal activity.

The Appellant claims that it has a perfect history with SNAP and that no prior warnings or violations have been issued to the firm. There is also no evidence of the firm's intent to violate the regulations. The charges, therefore, are contrary to the regulations found in 7 CFR § 278.6(d).

Charge letter attachments:

- Regarding same-cents transactions, this is readily explained. Items sold in the store that are priced in whole dollar amounts or items that are priced with uneven amounts when joined together with other uneven amounts can easily result in even-dollar sale amounts. Because there are hundreds or even thousands of sales per week, it would not be difficult to have a lot of even-dollar sales. The government has the luxury of culling out a few

selected sales over a three-month period and suggesting that those sales represent a greater percentage of sales than they actually do. The government required a three-month period of sales to pull out a few that it speculates were illegal, based on some unknown and undisclosed calculation, theorem or equation predicting probabilities in retail food store sales. The government's proof is grossly deficient in this regard.

There is nothing in the rules or regulations that prohibits the transactions which are reflected in this attachment to this charge letter.

- Regarding multiple transactions within a set time period, this is readily explained. Occasionally, buyers engage in two transactions, one after the other. This may be for ease with an EBT card, such as a household who live together or share payments for food that is eaten by all of them. It is believed that there are hundreds of low-income households all around the store. Many of these residents have EBT cards. Often a family or household group will buy a lot of items so as to stock up for cold weather or a time when they will not be able to or have time to shop. Sometimes a purchaser may forget to buy an item and then return shortly afterwards to purchase it. Or they may purchase certain items, and then return later for more items.

In this case, many of the transactions listed are separated
5 U.S.C. § 552 (b)(6) & (b)(7)(C)s. The government is going outside the bounds of reasonableness by alleging that such transactions involve "unusually short time frames."

The store handles hundreds of sales each day and has no way of tracking these sorts of allegedly incriminating "patterns." The government has the luxury of culling out a few selected sales by looking in hindsight at selected data that is not apparent to the store clerks and owners. It is thus incorrect and inaccurate to suggest those sales represent patterns or a large percentage of sales. The government required a three-month period of sales to pull out of few that it speculates were illegal, based on some unknown and undisclosed calculation or analysis and based on unknown and unexplained facts concerning likelihoods or probabilities. The government's proof is grossly deficient and should be summarily rejected.

There is nothing in the rules or regulations that prohibits the transactions which are reflected in this attachment to this charge letter.

- Regarding the allegation that the bulk of some households' benefits were depleted in short timeframes, this is readily explained. Occasionally, frequent or large purchases are made at the store at certain times of the month, often by family purchasers. Families often make larger purchases, and the store has the inventory that families can use to stock up for several weeks.

There is nothing in the rules or regulations that prohibits the transactions which are reflected in this attachment to this charge letter.

- Regarding large transactions, large purchases are often made by family purchasers. The store is located in a low-income area with hundreds of families, many of whom have EBT cards and make larger purchases, and do so as their EBT cards are replenished. Often, these EBT cards have hundreds of dollars on them, and the store has a wide variety of highly sought after food items that families can use to stock up for several weeks. They often make large purchases in order to avoid having to return repeatedly to the store.

There is nothing in the rules or regulations that prohibits the transactions which are reflected in this attachment to this charge letter.

Remaining contentions from the Appellant's September 30 response include the following:

- USDA's charge letter is overly simplistic and does not describe how or why the government reached the conclusions it did. By all appearances, the entire report as well as the charge letter were compiled by a computer program. This is a machine-made prosecution based on automated likelihoods and groundless speculations.
- The Appellant is deprived of due process by an unreasonable delay of almost five months from the earliest alleged violations cited, thereby preventing the Appellant from having any ability to investigate and evaluate the transactions while it was still possible to find such evidence. Store clerks and managers cannot possibly remember the transactions.
- The investigative reports do not appear to have been signed under the penalty of perjury, or by anyone, for that matter. There is no way to respond to a report which has no reported author, no reference to the source of the data. This also violates the Appellant's due process rights.
- USDA should have issued a warning letter before charging the firm with trafficking in accordance with 7 CFR § 278.6(e)(7), because the government's proof is extremely limited and is based solely on circumstantial evidence.
- The unsupported trafficking charges violate the principles of fair play and due process, and also runs afoul of the spirit of the regulations. Regulations require that FNS consider Section 278.6(d) before making a penalty determination.
- The firm will suffer irreparable harm if forced to give up the SNAP program.
- Even if the trafficking charge is upheld, the Appellant should be given a civil money penalty in lieu of permanent disqualification. The firm has an effective compliance policy and personnel training program to prevent program violations, and this policy and program were in effect prior to the alleged violations. Additionally, ownership was not aware of, did not approve of, did not benefit from, and was not in any way involved in illegal conduct.
- One of the firm's store clerks may have offered food to some loyal customers on credit so that they would not go hungry during a period of time when they were waiting for their EBT card to be replenished by SNAP. This offer of credit is a cultural characteristic of Indian Americans who are brought up to always offer food to those who are hungry. If some of the transactions can be viewed as having been based on this credit account activity, then the Appellant should qualify as an "innocent owner" and should be given the option to pay a CMP in order to preserve the firm's SNAP authorization.

In response to the Appellant's claim that it allowed credit accounts at the store, the Retailer Operations Division sent the firm a letter dated October 1, 2019. In this letter, the Appellant was asked to provide additional documentation to support its claim of credit accounts. The letter stated that the documentation must identify specific accounts along with corresponding dates and amounts. It should be noted that the practice of allowing SNAP households to purchase food items on credit is prohibited by regulation. If a firm is found to have committed credit account violations instead of trafficking, the firm would be subject to a one-year disqualification from SNAP in accordance with regulations at 7 CFR § 278.2(f).

Supplemental reply, dated October 15, 2019: In response to the agency's credit account letter, the Appellant submitted an additional explanation along with copies of 36 pages from a small spiral-bound notebook which appears to be a type of credit account ledger. The Appellant also submitted roughly 250 loose, itemized cash register receipts from the review period. The Appellant stated that it "was able to track and obtain the slip for each sale listed on the EBT/SNAP printouts attached" to the charge letter.

With regard to the credit ledger, the Appellant stated that it had done its best to determine specific accounts, dates, and amounts, but claimed that the firm's cash register system does not communicate with the EBT point-of-sale terminal, so it is next to impossible to determine the specific EBT account or customer for each sale. The Appellant acknowledged that the ledgers sometimes do not list full names or dates of sales.

Second supplemental reply, dated October 29, 2019: In response to the Appellant's supplemental reply, the Retailer Operations Division contacted Appellant's counsel by e-mail on October 25, 2019, and asked additional questions related to the firm's credit practices as well as questions about the cash register receipts. For example, many of the itemized receipts listed the code, "Non Scan-11111." The Retailer Operations wondered what this meant. In response, the Appellant stated that this code represented new items, such as dairy, cereal, rice boxes, juice, Coffee-Mate, frozen hot dogs, frozen entrees, chicken breast patties, etc. According to the Appellant, there were so many new food items received by the store – usually based on customer personal requests – that there was not enough time to enter the items into the scanning system. As such, they were rung up as "Non Scan-11111." The Appellant stated that such items were price-tagged the moment they were brought into the store, so that is how they were entered into the cash register system. To support its October 29 reply, the Appellant submitted 12 photographs of non-scan items.

After evaluating each of the Appellant's responses 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 November 4, 2019. This letter informed the Appellant that it would be permanently disqualified from SNAP upon receipt of the letter in accordance with 7 CFR § 278.6(c) and § 278.6(e)(1). The letter also stated that the Retailer Operations Division considered the Appellant's eligibility for a trafficking CMP according to the terms of Section 278.6(i) of the SNAP regulations, but found that a CMP was not appropriate in this case because the Appellant failed to submit sufficient evidence to demonstrate that the firm had established and implemented an effective compliance policy and program to prevent SNAP violations.

In a letter postmarked November 15, 2019, the Appellant 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.... [Emphasis added.]

7 CFR § 278.6(e)(1)(i) states:

FNS shall disqualify a firm permanently if personnel of the firm have trafficked as defined in § 271.2.

7 CFR § 271.2 states, in part:

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

7 CFR § 271.2 states, in part:

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

7 CFR § 278.6(b)(1) states, in part:

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

7 CFR § 278.6(c) states, in part:

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

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

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

7 CFR § 278.6(b)(2)(iii) states:

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

7 CFR § 278.6(i) states, in part:

FNS may impose a civil money penalty in lieu of a permanent disqualification for trafficking ... if the firm timely submits to FNS substantial evidence which demonstrates that the firm had established and implemented an effective compliance policy and program to prevent violations of the Program... In determining the minimum standards of eligibility of a firm for a civil money penalty in lieu of permanent disqualification for trafficking, the firm shall, at a minimum, establish by substantial evidence its fulfillment of each of the following criteria:

Criterion 1. The firm shall have developed an effective compliance policy as specified in § 278.6(i)(1); and

Criterion 2. The firm shall establish that both its compliance policy and program were in operation at the location where the violation(s) occurred prior to the occurrence of the violations cited in the charge letter sent to the firm; and

Criterion 3. The firm had developed and instituted an effective personnel training program as specified in § 278.6(i)(2); and

Criterion 4. Firm ownership was not aware of, did not approve, did not benefit from, or was not in any way involved in the conduct or approval of trafficking violations...

APPELLANT'S CONTENTIONS

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

- Appellant believes that the agency's disqualification determination is inadequate as it is conclusory and boilerplate and does not include any explanation or proper consideration of the Appellant's responses and evidence. Appellant believes this is due to inherent bias or other infirmity by the FNS employee considering the matter.
- The determination that the firm was engaged in trafficking is incorrect as a matter of fact and is inadequately supported. Even if a store employee committed improper acts without anyone's knowledge, the Appellant owner was not aware of any such improprieties and should be relieved of any consequence under an innocent owner defense.
- No prior warnings or notices of violations have been issued to the firm by FNS and there was no intent by the firm to commit any trafficking violations. [See 7 CFR § 278.6(d).]
- Even if the trafficking charge is upheld on administrative review, the Appellant seeks a civil money penalty in lieu of permanent disqualification. This CMP request should not have been denied by the Retailer Operations Division. The Appellant had an effective compliance policy and personnel training program geared to prevent SNAP violations, and this policy was in place prior to the alleged violations. Further, the firm's ownership was not aware of, did not approve of, did not benefit from, and was not in any way involved in any illegal conduct.
- USDA's conclusory arguments relating to the trafficking charges are circumstantial and speculative without any direct or compelling evidence, and are meritless.
- Regarding the four charge letter attachments, the Appellant repeats its contentions as presented in its September 30 reply to the charge letter (see pp. 2-4, above).
- The Appellant also repeats its contention related to the firm's credit account activities. These are attributed to one store clerk and the Appellant claims that the offer of credit is a cultural characteristic of Indian Americans who are brought up to always offer food to those who are hungry.
- Appellant also repeats its contentions from its two supplemental replies to the charge letter. These replies were dated October 15, 2019, and October 29, 2019 (see p. 5, above).
- It should be clear from a careful review of the Appellant's explanations and evidence that there was no trafficking and the charges should have been dismissed. Instead, the November 4, 2019, determination letter shows an inadequate review and conclusory, boilerplate decision made without proper analysis and which disregards the substantial proof submitted by the Appellant.
- The Appellant's remaining contentions are identical to the remaining contentions found in its September 30 reply to the charge letter, including a claim that the firm should be given a CMP in lieu of permanent disqualification (see p. 4, above).
- For the foregoing reasons, Appellant believes that the Retailer Operations Division's trafficking charges should be dismissed; failing that, the denied request for a CMP should be reversed, and a CMP should be granted.

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

ANALYSIS AND FINDINGS

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

Contractor Store Visit

The case file indicates that in reaching a disqualification determination, the Retailer Operations Division considered not only the Appellant firm's EBT transactions, but also information obtained from an August 15, 2019, 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:

- Richdale Convenience Store is a convenience store, roughly 1,200 square feet in size, operating in the city of Salem, Essex County, Massachusetts.
- At the time of the contractor's visit, the firm did not have any shopping carts, but appeared to have approximately three hand-held baskets for customer use. This is not unusual for stores of this size. Customers shopping in convenience stores generally purchase only as much food as they can carry in their arms.
- The store visit photographs show one cash register and agency records reflect the use of one EBT point-of-sale terminal for SNAP purchases. It appears that the firm uses an optical scanner to ring up items on the cash register.
- The store's staple food stock is sufficient for program eligibility and is typical of a convenience store. As with most convenience stores, the store has a heavy presence of snack foods, carbonated and uncarbonated drinks, and nonfood items such as tobacco products, lottery tickets, cleaning supplies, and other miscellaneous household merchandise.
- The checkout area is not suitable for conducting large or rapid transactions as there is little space on the counter to place more than a few items at a time and little room for customers to maneuver with large amounts of groceries.
- There is no indication from the store visit report that the firm has a special pricing structure, such as even-dollar prices for all merchandise. The posted prices of most items appear to end with a cents-value of 9, such as \$1.29, \$2.69, \$3.99, etc. The contractor's report also states that the firm does not round transaction totals up or down at checkout.
- There is no indication from the report that the firm has special food packages for sale or that items are sold in bulk. According to the report, the most expensive food items available for purchase include a 16-ounce package of pistachios for \$10.99; a 29.5-ounce

package of frozen fried chicken for \$10.99; a 4-ounce container of Kava coffee for \$7.99; and a 3.25-ounce package of beef jerky for \$7.39. Most 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 convenience store, where households normally purchase a limited number of items to supplement their overall dietary needs. There was no indication that SNAP households would be inclined to regularly visit Richdale Convenience Store to purchase large quantities of groceries, especially considering the absence of shopping carts and the availability of much larger grocery stores in the area, including three medium-sized grocery stores and two supermarkets less than half a mile away. 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 a large number of transactions ending in a same cents value. This attachment lists 43 transactions ending in .00, 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in SNAP redemptions. 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

After examining the patterns of even-dollar transactions in this case, it is the determination of this review that the trafficking charge related to Attachment 1 be dismissed. 5 U.S.C. § 552 (b)(7)(E). Accordingly, the trafficking charge related to Attachment 1 is dismissed.

Charge Letter Attachment 2: Multiple transactions were made from the accounts of individual SNAP households within a set time period. This attachment lists 21 sets of transactions (55 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 convenience store without shopping carts 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

Such repetitive transactions and dollar amounts at a store like Richdale Convenience Store are highly irregular and are often an indication of trafficking. As such, these transactions warrant further explanation.

The Appellant has argued that the transactions in Attachment 2 are readily explained. For instance, the Appellant contends that it is not unusual for SNAP customers to conduct two transactions, one after the other, such as households who live together or share payments for food that is eaten by all of them. The Appellant contends that a family or household group will buy many items in order to stock up for various purposes. The Appellant further contends that customers may forget to buy an item and then return shortly afterwards to purchase it; or they may purchase certain items, and then return later for more items.

These anecdotal and speculative arguments regarding customer shopping behavior represent very common purchasing characteristics among SNAP households or any other households. For instance, it is not unusual for households to purchase an item and then later discover that they

forgot something; so they return to the store to make an additional purchase. Accordingly, it can hardly be expected that a firm would have zero repetitive SNAP transactions over the course of three months. However, the large number of such transactions combined with the size of the transactions constitute patterns that are highly irregular in comparison to nearby stores of similar size with similar inventory. It stands to reason that SNAP households in the same area would shop in similar manners at similar stores. But that is not the case, as the Appellant store had many more unusual and suspicious transactions than its nearby counterparts.

It is noted that the Appellant has also argued that the firm allowed some customers to purchase food items on credit. It also submitted a large number of itemized cash register receipts in an effort to prove that the transactions were legitimate. These will be addressed in greater detail later in this document. Suffice it to say that these additional contentions do not persuade this review to conclude that the transactions listed in Attachment 2 solely involved the purchase of eligible food items. Accordingly, it is the finding of this review that the transaction patterns in this attachment were likely the result of trafficking.

Charge Letter Attachment 3: In a series of transactions, the bulk of SNAP households' remaining benefits were depleted within short time frames. This attachment lists 13 sets of SNAP transactions 5 U.S.C. § 552 (b)(6) & (b)(7)(C). 5 U.S.C. § 552 (b)(7)(E). It makes little sense that a household would spend almost the entirety of its SNAP allotment in a single transaction or in a series of rapid transactions at this store.

The Appellant has argued that frequent or large purchases are occasionally made at certain times of the month, often by families who make larger purchases. The Appellant contends that the store has sufficient inventory that families can purchase to stock up for several weeks.

While these arguments may be true, they do not explain why these households would choose Richdale Convenience Store to exhaust or nearly exhaust their entire SNAP balance in such short timeframes when there are much larger stores with greater inventory and variety just a short distance away. These nearby grocery stores or supermarkets also have shopping carts to help carry large amounts of merchandise. For example, 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Considering that the store does not sell large food packages, such as bundles of fresh meat or seafood, and considering that the vast majority of food items appear to sell for \$5.00 or less, and considering how many items it would typically take to add up to 5 U.S.C. § 552 (b)(6) & (b)(7)(C), and considering that the store does not have any shopping carts to transport such volume, it seems very unlikely that this would have been a valid purchase of eligible food. Unfortunately, the Appellant has offered no evidence related to this transaction, so there is no way to know if it was legitimate or not.

It is the determination of this review that the transaction patterns listed in Attachment 3 likely represent trafficking violations committed by the Appellant.

Charge Letter Attachment 4: The store conducted EBT transactions that were large based on observed store characteristics and recorded food stock. This attachment lists 118 SNAP transactions 5 U.S.C. § 552 (b)(6) & (b)(7)(C). These large transactions are not consistent with a convenience store in the state of Massachusetts. The Retailer Operations Division has

determined that during the review period, the average SNAP transaction amount for a convenience store in Massachusetts was \$7.47. In Essex County, the average was a bit higher, at \$7.72 per transaction, but the average transaction in Attachment 4 is more than 10 times larger than the average purchase amount for this store type.

Given that the Appellant firm has a moderate inventory of staple foods as well as other SNAP-eligible items, including snacks and drinks, it is probable 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 well be some legitimate SNAP transactions sprinkled among the transactions listed in Attachment 4. 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 lack of shopping carts and the availability of much larger stores in the area. The substantial number of high-dollar transactions in a three-month period calls into question the legitimacy of these transactions.

Attachment 4 lists 13 transactions 5 U.S.C. § 552 (b)(6) & (b)(7)(C) 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 food items it would typically take to add up 5 U.S.C. § 552 (b)(6) & (b)(7)(C), and considering that Richdale Convenience Store has no shopping carts to help transport large amounts of merchandise, this review finds it difficult to believe that every large transaction in Attachment 4 was a legitimate purchase of eligible food.

Attachment 4 also has an unusual number of very large even-dollar transactions. For example, the three largest transactions during the review period – 5 U.S.C. § 552 (b)(6) & (b)(7)(C), all from the same household – all ended in whole dollar amounts. There was also an unusual number of repetitive even-dollar transactions, 5 U.S.C. § 552 (b)(6) & (b)(7)(C). At the time of the contractor's inspection, the store did not appear to have a pricing structure in which most items ended in .00, .25, .50, .75, or other structure that would routinely result in even-dollar transactions. By all indications, most items ended with a cents value of 9, such as .69, or .99. As such, the likelihood that non-taxed transactions containing large numbers of randomly-selected items would so frequently and legitimately end in .00 is very low. As such, it is difficult for this review to comprehend how these transaction patterns were legitimate purchases of eligible food.

The Appellant has argued that large transactions are easily explained. The Appellant contends that large purchases are often made by families and claims that the store is located in a low-income area with hundreds of families, many of whom make large purchases when their EBT cards are replenished. According to the Appellant, these EBT cards have hundreds of dollars on them, and the store has a wide variety of highly sought after food items that families can buy to stock up for several weeks.

Unfortunately, this review finds the Appellant's anecdotal explanation to be insufficient to justify the unusual transaction patterns found in Attachment 4. It is true that some EBT cards have hundreds of dollars' worth of SNAP benefits on them, but there is no compelling evidence to suggest that Richdale Convenience Store would be a business where a customer might spend hundreds of dollars.

5 U.S.C. § 552 (b)(6) & (b)(7)(C).

This review does not doubt that Richdale Convenience Store sells eligible food items and conducts some legitimate SNAP business. But when unusually large transactions form patterns that are substantially different from comparable stores in the area, further evidence from the Appellant is warranted to verify that there is not something more, such as trafficking or other program violations, taking place. In this case, the Appellant's evidence does not adequately explain what occurred between the customer and store personnel at the point of sale. Accordingly, it is the finding of this review that trafficking was a likely cause of the unusual transaction patterns found in Attachment 4.

The transactions identified in Attachments 2, 3, and 4 of the charge letter are highly irregular and substantially different from comparable stores in the area. 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 and evidence do not meet this standard. Accordingly, it is the finding of this review that the Appellant firm was likely engaged in trafficking violations during the review period.

Credit Accounts

The Appellant has claimed that one of the store's clerks may have offered food items on credit to some loyal customers so that they would not go hungry while they were waiting for their EBT cards to be replenished. According to the Appellant, this offer of credit is a cultural characteristic of Indian Americans who are brought up to always offer food to those who are hungry. To support this claim, the Appellant submitted copies of 36 pages from a small spiral-bound notebook which appears to be a type of credit account ledger. The Appellant stated that it had done its best to determine specific accounts, dates, and amounts of the credit transactions, but claimed that the firm's cash register system does not communicate with the EBT point-of-sale terminal, so it is next to impossible to determine the specific EBT account or customer for each sale. The Appellant also acknowledged that the ledger sometimes does not list full names or dates of sales.

Finally, the Appellant provided a detailed explanation of how the credit transactions worked, including the use of one ledger where the individual items and prices were written down and a second ledger where total amounts were recorded. According to the Appellant, the first ledger with the listing of individual items was discarded once the EBT card was used to pay off the amount owed.

Unfortunately, the documentation and explanation provided by the Appellant is insufficient for this review to eliminate trafficking as a key reason for the unusual transaction patterns identified in the charge letter. Based on the existence of credit ledgers, it is likely that credit account activity was taking place at the Appellant firm to some degree. But the Appellant's evidence is not nearly comprehensive enough to eliminate trafficking from the equation. From this review's perspective, the Appellant's credit ledgers, which list dollar amounts, a few names (mostly first names), and occasional dates, are largely indecipherable. None of the dollar amounts, including those that seem

to be payments, correspond with any of the transactions listed in the charge letter attachments. There is also no evidence of what items were obtained on credit. Did the Appellant limit this credit activity to SNAP-eligible food items only? It is impossible to tell.

When a retailer claims that credit accounts are a reason for the irregular SNAP transaction patterns, FNS requires a level of detail regarding the legitimacy of the claim. This is because retailers have frequently made false admissions of credit accounts in an attempt to obtain a lesser one-year disqualification penalty instead of permanent disqualification for trafficking. Credit transactions must be accounted for with substantive evidence such as the dates credit was extended, to whom, for what amount, and for what items. Such proof should also correspond with the transactions identified in the letter of charges. The evidence provided by the Appellant falls far short of these expectations.

Cash Register Receipt Evidence

To support its argument that the firm was not engaged in trafficking, the Appellant submitted roughly 250 loose, itemized cash register receipts from the review period, claiming that it “was able to track and obtain the slip for each sale listed on the EBT/SNAP printouts attached” to the charge letter. It also provided an explanation of the itemized entry listed on the receipts as “Non Scan-11111,” and 12 photographs of what it claimed were “non-scan items.”

A majority of the cash register receipts had an unusual merchandise designation listed as “Non Scan-11111.” According to the Appellant, this code represented new items, such as dairy, cereal, rice boxes, juice, Coffee-Mate, frozen hot dogs, frozen entrees, chicken breast patties, etc. The Appellant claimed there were so many new food items received by the store that there was not enough time to enter the items into the scanning system. As such, they were rung up as “Non Scan-11111.” The Appellant stated: “Each item was price tagged the moment it was brought into the store based on cost; each item had a price sticker on it; that is how the items were rung into the system.” This explanation appears to imply that even if the firm did not have time to enter the price of new items into the scanning system, staff members would affix a price tag to the individual items so that the cashier could manually enter them into the register when they were presented for purchase.

This review has a number of concerns with the Appellant’s evidence and explanations:

- The claim that the Appellant was “able to track and obtain the slip” for each sale listed on the charge letter attachments is not true, or at the very least, not all receipts were submitted. A large majority of the receipts provided by the Appellant do not appear on the charge letter attachments at all. Most of the transactions on the receipts were less **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**, which are transactions that the Retailer Operations Division likely deemed as not suspicious. As best as this review could determine, just 62 of the receipts corresponded to transactions listed on the charge letter attachments. For example, Attachment 4 had 118 unique transactions; the Appellant submitted receipts for 54 of them, which is less than half. Only eight of the 38 largest transactions (**5 U.S.C. § 552 (b)(6) & (b)(7)(C)**, which this review finds to be among the most suspicious) had corresponding receipts.

- The 12 photographs of the “non-scan items” are little more than photos of the firm’s total on-the-shelf inventory. No items were specifically identified in the photos as “non-scan.” The photographs are substantially the same as the inventory photos obtained by the store visit contractor on August 15, 2019. As such, this review finds the photographs to have no evidentiary value.
- The “Non Scan-11111” designation is extremely problematic. While it is possible that some items were not entered into the firm’s scanning system, but were instead price-tagged and manually entered into the cash register at the point of sale, it is likely that such items would be fairly inexpensive like the rest of the SNAP-eligible merchandise in the store. As noted earlier, the most expensive items noted by the contractor 5 U.S.C. § 552 (b)(6) & (b)(7)(C). But many of the Appellant’s receipts show very large amounts attributed to “Non Scan-11111” entries. Below are a few examples:

5 U.S.C. § 552 (b)(6) & (b)(7)(C)

In the examples above, the “Non Scan-11111” entries range from 5 U.S.C. § 552 (b)(6) & (b)(7)(C). It is extraordinarily unlikely that the firm sold individual food items that were priced at 5 U.S.C. § 552 (b)(6) & (b)(7)(C), as in these examples. As such, the Appellant’s explanation regarding price-tagging new items is either inaccurate or incomplete. Is it possible that these large amounts were credit account payoffs? Perhaps these entries represented several items added together separately and then entered into the cash register as a single item? Were these entries even food items at all? Unfortunately, the Appellant credit account evidence as well as its other explanations do not help answer these questions. While it is clear that a few eligible food items were purchased with SNAP benefits, the Appellant’s receipts are insufficient to prove that violations were not occurring. As such, this review cannot exclude trafficking as a likely cause of these unusual transactions.

Trafficking Case based on EBT Data

One of the chief arguments by the Appellant relates to USDA’s use of a fraud detection system known as ALERT. The Appellant contends that the charges of trafficking are unfounded and are inadequately supported by hearsay documents and records. According to the Appellant, there is not any firsthand observation of unlawful transactions or even secondary evidence in the form of a report of what items were purchased or a record of an analysis by a human being. The Appellant further claims that the standard and judicially-accepted means of providing proof to support a trafficking charge, or any evidence to be admitted in court, is through witnesses who have conducted controlled buys with undercover agents and/or have firsthand knowledge of the offenses. According to the Appellant, this machine-made prosecution is based on automated likelihoods and groundless speculations. Finally, the Appellant has repeatedly stated that there is nothing in the rules or regulations that prohibits the types of transactions that are reflected in the charge letter attachments.

With regard to these contentions, this review acknowledges 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 noted 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.

It should be noted that 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 undertook 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. Unfortunately, the Appellant has not met this standard.

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.

As to the argument that regulations do not prohibit the types of transactions listed in the charge letter attachments, it is true that except for the rule that SNAP benefits are to be used only for the purchase of eligible food, the regulations do not govern or mandate how a SNAP household spends its benefit allotment, including how many times a household may use its EBT card at a particular location or how large an individual transaction can be. However, the transactions noted in the charge letter are questionable not because they exceed any limits for use, but because they display patterns of use that are inconsistent with the store's documented physical characteristics and food inventory. 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 of similar size. This review does not contend that frequent or large EBT transactions are overtly suspicious when they occur on an occasional or intermittent basis, but when such transactions form questionable patterns on a consistent basis over a substantial period

of time, such activity is considered highly irregular, and a firm's intent to comply with program regulations is called into question.

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, through counsel, has argued that FNS must consider the regulations at § 278.6(d) before making a penalty determination. The Appellant claims that it has a perfect history with SNAP and that no prior warnings or notices of violations have been issued to the firm. The Appellant also claims that there is no evidence of the firm's intent to violate the regulations.

With regard to these contentions, this review finds that the Retailer Operations Division properly considered the elements of § 278.6(d) as required. The case record indicates that FNS evaluated the firm's history with SNAP compliance (no prior violations were found) and determined that due to the seriousness of the allegations, a warning was not appropriate. USDA is under no obligation to warn retailers when trafficking violations are occurring. The law is clear that when serious violations, such as trafficking, occur, 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 EBT data alone. However, the preponderance of evidence in this case most assuredly leans in the agency's favor. The highly unusual patterns of transactions over an extended period of time strongly suggest that intentional violations of SNAP regulations were taking place, and the Appellant's explanation and evidence have failed to convince this review otherwise.

Consideration of Appellant's Responses

The Appellant contends that the agency's disqualification determination is inadequate as it is conclusory and boilerplate and does not include any explanation or proper consideration of the Appellant's responses and evidence. Appellant believes this is due to inherent bias or other infirmity by the FNS employee considering the matter.

With regard to this contention, there is no evidence that the Retailer Operations Division failed to consider the entire record or any of the Appellant's responses in this matter. The agency has produced a large volume of analytical reports and narratives related to the transactions listed in the charge letter and to the responses and evidence submitted by the Appellant. While the

November 4 determination letter may not have been as descriptive and comprehensive as the Appellant wanted, there is no evidence that the Appellant's responses were ignored in any way.

Hardship to Appellant

The Appellant contends that the firm will suffer irreparable harm if it is forced to give up the SNAP program.

With regard to this contention, Federal statute at 7 U.S.C. § 2021(b)(3)(B) makes it clear that disqualification for trafficking shall be permanent. 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 statute or regulations for a 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.

Civil Money Penalty

The Retailer Operations Division determined that the Appellant 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 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 requested a trafficking CMP when it replied to the charge letter, but there is no evidence that the Appellant submitted any documentation that would indicate that the firm had a compliance policy or training program of any kind. Section 278.6(i) of the SNAP regulations states that a firm "shall, at a minimum, establish by substantial evidence" its fulfillment of each of the four criteria for eligibility of a CMP in lieu of permanent disqualification for trafficking. [Emphasis added.]

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 cannot be granted 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 Richdale Convenience Store from SNAP participation. The data from Attachments 2, 3, and 4 of the charge letter provided sufficient evidence for this review to conclude that the questionable transactions and patterns 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, Richdale Convenience Store, 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.

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

March 25, 2020