

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

SB Liquor,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0215119

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 SB Liquor (hereinafter “Appellant”) from participation as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP) was properly imposed by the Retailer Operations Division.

ISSUE

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

AUTHORITY

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

SUMMARY OF CHARGES

The Appellant was charged with trafficking and subsequently permanently disqualified based on an analysis of EBT transaction data from August 2018 through January 2019. This involved the following transaction patterns which are common trafficking indicators:

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

CASE CHRONOLOGY

The agency's record shows that FNS initially authorized SB Liquor for SNAP participation as a convenience store on January 24, 2017. In a letter dated March 11, 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 August 2018 and January 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).

In correspondence between March 18, 2019, and March 25, 2019, the Appellant, through counsel, responded to the charges. In its response, the Appellant appeared to acknowledge that violations occurred and blamed them on a clerk whose employment has now been terminated. The Appellant requested that in lieu of disqualification the firm be assessed a CMP. In support of this request, the Appellant submitted several documents, including a copy of the firm's SNAP compliance policy effective January 1, 2016, and a copy of the firm's "Employee EBT Training Guide" signed by the violating employee in 2017, 2018, and 2019. The Appellant also submitted signed declarations from three of the firm's owners. The declarations described the firm's training activities, particularly in relation to the violating employee, and explained that the owners were not aware of, were not involved in, did not approve, and did not benefit from any of the suspected trafficking violations. The Appellant also submitted signed Training Guides from three other employees, but this additional evidence was submitted after the 10-day deadline noted above.

After reviewing 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 March 29, 2019. This letter informed the Appellant that it would be permanently disqualified from SNAP upon receipt of the letter in accordance with 7 CFR § 278.6(c) and § 278.6(e)(1). The letter also stated that the Retailer Operations Division considered the Appellant's eligibility for a trafficking CMP according to the terms of Section 278.6(i) of the SNAP regulations, but that a CMP was not appropriate in this case because the Appellant failed to submit sufficient evidence to demonstrate that the firm had established and implemented an effective compliance policy and program to prevent SNAP violations.

In a letter postmarked April 6, 2019, the Appellant, now through new counsel, appealed the Retailer Operations Division's determination by requesting an administrative review. The request was granted.

It should be noted that on May 15, 2019, Appellant's new counsel submitted a request for case file information in a request made under the Freedom of Information Act (FOIA). The agency's response to this FOIA request was delivered to Appellant's counsel on June 14, 2019. On July 5, 2019, Appellant's counsel submitted a 21-page brief outlining its contentions in this matter, along with a large volume of supporting documentation.

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, submitted a long list of contentions in its request for administrative review. These are summarized below, in relevant part:

- Appellant seeks reversal of the March 29, 2019, decision to disqualify the firm from SNAP participation.
- SB Liquor has been authorized as a retailer in SNAP since January 2017, and stocks a variety of staple foods, including canned and packaged goods, bread, pasta, eggs, dairy items, fresh produce, and frozen foods.
- Directly across the street from the store are low-income housing complexes, and there are multiple mobile home parks nearby, most of which house residents who receive government assistance and who walk to the store for their groceries.
- The store is, to the Appellant's knowledge, the only retail store in the surrounding area that provides the community with such an expansive and diverse selection of grocery products. Accordingly, the Appellant store carries a substantial inventory that reflects this greater reliance.
- Many residents lack personal transportation and the Appellant offers free rides to the elderly from the store to their homes.
- The store offers five shopping baskets and two shopping carts for the shoppers' convenience, which permits customers to gather a substantial amount of food and transport it from the shelves to the register without difficulty.
- Appellant offers demographic information about California Congressional District 31 based on data compiled by FNS in a report entitled "Profile of SNAP Households," published in January 2018. This data shows that 16.8 percent of District 31's households live below the poverty level, and 18 percent of residents receive SNAP benefits.
- Appellant also offers national SNAP benefit redemption data and data related to shopping trends and behaviors. The data comes from three reports and one article:
 - "Benefits Redemption Patterns in the Supplemental Nutrition Assistance Program: Final Report" (Food and Nutrition Service, February 2011)
 - "Foods Typically Purchased by SNAP Households" (Food and Nutrition Service, November 2016)
 - "U.S. Grocery Shopping Trends, 2016" (Food Marketing Institute and The Hartman Group, Inc., 2016)
 - "Know Your Core, Protect Your Core" (*Convenience Store News* for the Single Store Owner, April 2016)

These reports (copies of which were provided by the Appellant, except for the 2011 report) demonstrate, among other things, that customers nationwide are increasingly shopping at convenience stores, small grocery stores, and ethnic food stores, and using such stores as their primary grocers.

- SNAP households often make frequent trips to the store to purchase a forgotten grocery item or to purchase items that they saw during their first trip to the store but originally opted not to purchase. In other instances, multiple members of the same household will shop together and then make their purchases separately (using the same account and card) in quick succession. Households may also go on a spending spree wherein they make

purchase after purchase without leaving the store or by returning after a brief absence, thereby reducing their benefits in short order.

- The store has sufficient variety and quantity of inventory to meet the needs of several households all at once without having to replenish inventory.
- The agency's onsite inspection did a moderate job of depicting the store in this case. The inspection found that the store was sufficiently provisioned to satisfy the purchase amounts listed in the charge letter.
- The only documentation that the Appellant has received in this case is the charge letter. As such, it is impossible for the Appellant to guess what the Retailer Operations Division specifically took issue with.
- It is likely that confirmation bias exists, as it does in many cases handled by FNS. In a definition derived from www.sciencedaily.com, confirmation bias is "a tendency to search for or interpret information in a way that confirms one's preconceptions, leading to statistical errors. [It] is a type of cognitive bias and represents an error of inductive inference toward confirmation of the hypothesis under study." In this case, ambiguous or contradictory evidence has been disregarded or interpreted in such a way that unreasonably favors the Department's hypothesis that trafficking is occurring at the store.
- The danger of confirmation bias is obvious: FNS starts with the theory that trafficking exists because that's allegedly what the ALERT patterns were designed to detect. If the store is flagged often enough, then the automatic hypothesis put forth by FNS is that trafficking is occurring. However, when relevant factors are disregarded or devalued (such as prior negative undercover investigations and other information submitted by the Appellant in its initial response to the charge letter) the statistical analysis becomes inherently flawed.
- When making an evidentiary evaluation, the administrative review officer should look at the evidence offered and make a determination regarding which of the two possibilities is more likely: that the store trafficked in SNAP benefits, or that the agency's ALERT system has incorrectly flagged transactions as the result of a difference in business operations, as the Appellant always maintained.
- The review officer is also permitted to consider new evidence, and subsequently render a new decision on whether the additional evidence changes the balance of the evidence in the matter.
- Appellant believes it is important to consider the limitations of the ALERT system, as its over-utilization by FNS has created an internal belief that the system is infallibly accurate. To support its position that ALERT data is unreliable, Appellant's counsel summarized portions of two depositions he took of an FNS employee in October 2016 and November 2017.
- Appellant further questions whether appropriate comparison stores have been selected to provide a baseline set of data against which to compare the Appellant's transactions.
- Appellant cites two court decisions to support its position that ALERT data is unreliable for purposes of disqualification.
- Appellant also cites two administrative review decisions: *Howard's Quik Mart* and *Gloesis Group*, both of which noted that "the determination of permanent disqualification must be supported to such a degree as to conclude that trafficking is the only plausible explanation."

- The core of the question that FNS should be evaluating is two-fold: (1) could the transactions have logistically occurred in a legitimate manner; and (2) is it likely that the transactions occurred in a legitimate manner? With respect to #2, both of the patterns set forth in the charge letter are the result of customer shopping patterns and habits as well as the inventory maintained at the store. It is not common for a retailer to ask why you return to the store twice in a day or why you spent so much money at his store rather than someone else's store. The retailer would never be privy to that information. Accordingly, the retailer's response is necessarily limited – just as FNS's assumptions are. With respect to #1, the store's operations, inventory, and clientele account for the transactions.
- As part of its request for review, the Appellant submits inventory invoices for the months of August 2018 through January 2019. These invoices show that the store had more than enough inventory to support the SNAP transactions conducted during the review period. Considering the firm's 22 percent estimated markup for retail sales, and an estimated 20 percent of the firm's sales volume accounted for by cash or credit card transactions, the firm had sufficient inventory to account for the total SNAP redemptions. Because the store had more than enough inventory to account for SNAP transactions during the review period, it is clear that the store more likely than not conducted innocent transactions rather than trafficking.
- Regarding Attachment 1 (multiple transactions from the same household within a set time period):
 - It is not unusual that SNAP participants spend their benefits within seven days after receiving their monthly allotment. Multiple purchases **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** after receiving SNAP benefits are also not unusual.
 - Appellant contends that co-shopping, where both adult members of an average household are about 50 percent responsible for picking up groceries, is on the rise in the United States. This is manifest at the Appellant firm in a couple of ways: 1) different household members will shop separately using the same account; and 2) different household members will travel to the store together and then separate their purchases. The first option is statistically preferred by customers.
 - What was once a single shopping trip in the 1990s (when FNS's ALERT system was originally built) is now two or three trips conducted by separate members of the household for different purposes.
 - It is expected that households will spend their money quickly after receiving their benefits and Attachment 1 reflects this behavior.
 - There are only two households flagged in Attachment 1 – the household ending in **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** and the household ending in **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. Of those conducted by household **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**, most took place between the 1st and 10th of the month. All of the transactions conducted by household **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** took place between the 1st and the 10th.
 - Appellant cites another court case, *Onukwugha v. U.S.*, to show that multiple transactions **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** not inherently suspicious.
 - In light of the reasonable explanations provided by the Appellant, it is unlikely that the suspicious transaction patterns were the result of trafficking.

- The transactions in Attachment 1 were conducted by only two households and are easily explained by the customer forgetting an item in his/her prior transaction, co-shopping, or the customer making a purchase, returning home, and then returning to the store to make a second purchase.
- If the transactions in Attachment 1 were to occur at a 5 U.S.C. § 552 (b)(6) & (b)(7)(C), the 5 U.S.C. § 552 (b)(6) & (b)(7)(C) would not be charged with trafficking. FNS would argue that the 5 U.S.C. § 552 (b)(6) & (b)(7)(C) is bigger and better stocked, so the participant would be likely to return because the store can serve more of their needs. However, SB Liquor serves significant quantities of all of the foods listed on FNS's report that addresses the types of foods typically purchased by SNAP households. 5 U.S.C. § 552 (b)(6) & (b)(7)(C) does not serve a materially larger variety or quantity of the eligible food items than the Appellants do, so if these transactions are not suspicious at 5 U.S.C. § 552 (b)(6) & (b)(7)(C), they should not be viewed as suspicious at the Appellant store either.
- Regarding Attachment 2 (large transactions):
 - It is entirely unclear how FNS has come to the conclusion that transactions up to 5 U.S.C. § 552 (b)(6) & (b)(7)(C) have been categorized as suspiciously large.
 - The invoices submitted by the Appellant show that there is far more inventory on the shelves than the largest of the transactions in this attachment. Considering the varieties and quantities of food available, FNS cannot make a straight-faced argument that the transactions are impossible for want of items to sell.
 - The question with respect to Attachment 2 becomes an issue of whether or not the transactions could be supported by the store's substantial traditional inventory – both in quantity and price – which it clearly can.
 - The transactions are normal reflections of a SNAP participant's shopping habits.
 - Large transactions are not suspicious as it is expected that SNAP participants would spend their money shortly after receiving their benefits.
 - Aside from substantial inventory, a reasonable and plausible explanation for these transactions is that the households likely have more participants residing in them, thus requiring a larger amount of groceries each month. This Attachment lists only three households. Of the 85 transactions listed, 72 were conducted by household 5 U.S.C. § 552 (b)(6) & (b)(7)(C), 12 conducted by household 5 U.S.C. § 552 (b)(6) & (b)(7)(C), and one conducted by household 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Because FNS has redacted all of the identifying information in the charge letter, the Appellant is unable to confirm the actual number of residents in these households.
 - The innocence of these transactions are supported by affidavits of the firm's clientele. Nine of the firm's customers attested to making large purchases at the store, 5 U.S.C. § 552 (b)(6) & (b)(7)(C).
 - The transactions in Attachment 2 are not trafficking. They are supported by substantial inventory and are reasonably explained by co-shopping, reliance on the store as a primary grocer for some minutiae of local participants, or a general aberration or statistical outlier to the average whole. That FNS segregated these transactions from the remainder is of little consequence as most other stores in the area are likely to have the same number or greater of similar transactions.

- It is impossible for the Appellant to deduce what actual data was used by FNS in the formulation of the trafficking allegations, including an alleged analysis of comparison stores. This is because the Case Analysis Document provided to the Appellant under FOIA is so heavily redacted that it provides no statistical data or useful information. Thus, with nothing set forth by FNS to the contrary, the only reasonable conclusion is that the store’s transactions were in line with transactions at comparison stores.
- The sum total of the Department’s information is based upon transaction patterns and the subsequent analysis of the data by an analyst who has never physically visited the store and who may or may not understand how a retail food business is run, resulting in a decision based upon a mountain of assumptions.
- By FNS’s own testimony, ALERT cannot identify fraud. It is designed to identify “suspicious behavior” at most, but the basis for the system is unknown.
- Appellant recognizes the Department’s right to utilize redemption data in the disqualification of stores, but the statute does not authorize FNS to rely upon a system that inaccurately accounts for what is “consistent” or “inconsistent.”
- Appellant cites two more administrative review decisions, *TG Mini Mart Inc.*, and *Lima Mini Mart Inc.*, to claim that the presence of documentation, such as cash register receipts, accounting records, tax records, SNAP recipient statements, or inventory purchase invoices, would have changed the outcome of the review officers’ analyses. In this instance, the Appellant submitted both inventory receipts and recipient affidavits. These documents are more than sufficient to substantiate the Appellant’s claim that the inventory satisfied the SNAP transactions in the charge letter, making it more likely than not that food was being sold in the store. Furthermore, these documents are precisely what FNS has stated it looks for from retailers to demonstrate their innocence. As such, the Appellant has shown by a preponderance of the evidence that the transactions cited in the charge letter are more likely than not innocent transactions rather than trafficking.

In support of its contentions, the Appellant submitted the following documentation:

- 385 pages of inventory invoices from a variety of vendors;
- Nine customer affidavits from apparent SNAP recipients stating, among other things, that they frequently shop at SB Liquor as one of their primary grocery markets, **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. The customers claim that all purchases are for food items and that they have never received cash back.

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 a December 18, 2018, store visit which was conducted by an FNS contractor to observe the nature and scope of the firm's operation, stock, and facilities. This store visit information was used to ascertain if there were justifiable explanations for the firm's irregular SNAP transaction patterns. The store visit report and photographs documented the following store size, description, and characteristics:

- SB Liquor is a convenience store, roughly 2,500 square feet in size, operating in the city of San Bernardino, San Bernardino County, California.
- At the time of the contractor's visit, the firm had no shopping carts, but did have a small number of handheld shopping baskets. This somewhat contradicts the Appellant's claim of two shopping carts and five shopping baskets. There is no evidence in either the contractor's photographs or in its written report that the store had any shopping carts. As for shopping baskets, the photographs show that there are indeed five handheld baskets, but at the time of the inspection, four of the baskets were located on top of a cooler, at about the height of the top of a standard doorway. As reaching these baskets could be difficult for some people, it is questionable if the baskets were actually intended to be used by customers.
- The store visit photographs show two cash registers and agency records reflect the use of two EBT point-of-sale terminals for SNAP purchases.
- The store's staple food stock is sufficient for program eligibility in each of the four staple food categories, although the overall breadth of staple food inventory is minimal.
- The report indicates that the store sells SNAP-eligible, non-staple accessory food items, such as carbonated and uncarbonated drinks, snacks, candy, and condiments. The store also sells ineligible, nonfood items, including alcoholic beverages, tobacco products, lottery tickets, automotive products, cleaning supplies, and other miscellaneous household merchandise.
- The checkout area sits behind a glass or Plexiglass barrier. Cashiers and customers interact through an opening in the glass, perhaps 18 inches by 18 inches in size. The countertop area is not suitable for conducting large or rapid transactions as there is little space to place more than a few small items at a time.
- There is no indication from the store visit report that the firm has a special pricing structure, although most items appear to end with a cents-value of 9. The report also states that the firm does not round transaction totals up or down at checkout.
- There is no indication from the report that the firm has special food packages for sale or that items are sold in bulk. According to the report, the most expensive food items available for purchase include a 10-ounce package of jerky for \$19.99; a 12-pack of soda for \$6.99; an 11.2-ounce box of cereal for \$5.99; and a 16-ounce package of margarine for \$5.99.

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 SB Liquor to purchase large quantities of

groceries, especially considering the absence of shopping carts and the availability of larger grocery stores in the immediate area, including a full-line supermarket just down the street less than two-tenths of 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 its competitors.

SNAP Transaction Analysis

Charge Letter Attachment 1: Multiple transactions were made from the accounts of individual SNAP households within a set time period. This attachment lists 24 sets of transactions (103 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 with limited staple food inventory. 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

5 U.S.C. § 552 (b)(6) & (b)(7)(C). None of the above transactions were even-dollar transactions, but somehow each set had an even-dollar total.

That such repetitive transaction sets occurred at a small convenience store like SB Liquor is highly unusual. The likelihood that three random transactions would routinely total exactly 5 U.S.C. § 552 (b)(6) & (b)(7)(C) is extraordinarily remote. The transactions in Attachment 1 have a strong appearance of a cashier attempting to disguise trafficking by breaking down exchanges of cash into smaller transactions that look legitimate.

The Appellant, through counsel, has provided several contentions related to Attachment 1, including a claim that frequent transactions from the same household are not unusual, and a claim that the transactions may be the result of co-shopping, where one household member shops at the store and then later in the day other household members shop at the same store using the same EBT card.

Unfortunately, none of the Appellant's claims are credible in light of the highly repetitive transaction totals described earlier. Claims of co-shopping are little more than conjecture, and claims that the subsequent transactions in each set are a result of a customer returning to the store to purchase a forgotten item or two is not believable.

It should be noted that the Appellant has claimed that Attachment 1 involved just two households: 5 U.S.C. § 552 (b)(6) & (b)(7)(C). However, this is not the case. Household SNAP accounts in California often end in 5 U.S.C. § 552 (b)(6) & (b)(7)(C). As such, Attachment 1 actually involved nine separate households.

The Appellant has also argued that if these transactions were to occur at a 5 U.S.C. § 552 (b)(6) & (b)(7)(C) store, the 5 U.S.C. § 552 (b)(6) & (b)(7)(C) would not be charged with trafficking. According to the Appellant, FNS would argue that the 5 U.S.C. § 552 (b)(6) & (b)(7)(C) is bigger and better-stocked, so the SNAP participant would be likely to return because the store can serve more of their needs. However, the Appellant contends that 5 U.S.C. § 552 (b)(6) & (b)(7)(C) does not serve a materially larger variety or quantity of

eligible food items than SB Liquor; so if these transactions are not suspicious at 5 U.S.C. § 552 (b)(6) & (b)(7)(C), they should not be viewed as suspicious at the Appellant store either.

It should be noted that at no point in this review has the Appellant firm been mistaken for a 5 U.S.C. § 552 (b)(6) & (b)(7)(C) store. While SB Liquor may carry a few of the same foods as a superstore, it does not carry a materially similar variety or quantity of eligible foods. The Appellant has also offered no evidence to support its assertion that 5 U.S.C. § 552 (b)(6) & (b)(7)(C) would not be charged with trafficking if unusual and inexplicable transactions were discovered there.

It is notable to this review that in its initial response to the charge letter, the Appellant, through its original counsel, essentially acknowledged that violations occurred. One of the firm's owners, in his signed declaration stated the following:

I investigated the flagged charges and found them to be suspicious. I immediately terminated [the store clerk's] employment for failing to follow SB Liquor's Compliance Policy.

Based on the evidence in the case record, this review finds it more likely true than not true that trafficking violations were the reason for the unusual transaction patterns found in Attachment 1. The contentions submitted by the Appellant appear to be canned or boilerplate and are not persuasive as they do not square with the transaction patterns listed.

Charge Letter Attachment 2: The store conducted EBT transactions that were large based on observed store characteristics and recorded food stock. This attachment lists 85 SNAP transactions from 18 different households 5 U.S.C. § 552 (b)(6) & (b)(7)(C). These large transactions are not consistent with a convenience store in the state of California. The Retailer Operations Division has determined that during the review period, the average SNAP transaction amount for a convenience store in California was \$7.24. In San Bernardino County, the average was even lower, at \$7.04 per transaction. The average transaction in Attachment 2 is almost five times larger than the average purchase amount for this store type.

Given that the Appellant firm does have a small inventory of staple foods, it is likely that there would be an occasional instance where the transaction amount is high. As such, there may be some legitimate SNAP transactions sprinkled among the transactions listed in Attachment 2. 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. The substantial number of high-dollar transactions in a six-month period calls into question the legitimacy of these transactions.

Attachment 2 lists 16 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). On the surface, this amount may not seem particularly large, but considering that SB Liquor is a stereotypical convenience store focused largely on low-priced snack foods, 5 U.S.C. § 552 (b)(6) & (b)(7)(C), especially in comparison with similar stores in the area. A closer review of the transactions also reveals some peculiarities.

For example, 5 U.S.C. § 552 (b)(6) & (b)(7)(C). After reviewing the contractor's store visit report, this review can find no reason for such repetitive totals.

The bulk of the Appellant's arguments relating to Attachment 2 centers on its submission of several hundred inventory invoices. The Appellant claims that the firm has more than sufficient inventory to account for the SNAP transactions during the review period, which verifies that the transactions in the charge letter were valid. The Appellant also cites two recently sustained administrative review decisions to support its claim that the presence of inventory documentation is sufficient to warrant a reversal of the disqualification determination.

In one of the two cases, *TG Mini Mart, Inc.*, the administrative review offer stated, "Without relevant evidence from the Appellant, such as inventory records or itemized cash register receipts, it is reasonable for this review to conclude that the transactions listed in the charge letter were, more likely than not, the result of trafficking..."

The review officer in the second case, *Lima Mini Mart, Inc.*, made a similar statement, indicating that the firm had failed to provide sufficient credible evidence to support its argument that trafficking was not occurring. The review officer identified potential evidence as "itemized cash register tapes... comprehensive pricing information... SNAP recipient statements... federal business tax returns or state tax filings... and business banking statements." The review officer concluded: "Thus, the owners have not provided a preponderance of evidence that the transactions on the Attachments are for eligible foods rather than the result of trafficking."

Appellant's counsel claims that these two statements by two separate review officers imply that the presence of the documents mentioned above would have changed the outcome of the review officers' analyses. In the present case, the Appellant contends that its documentation is more than sufficient to substantiate its claim that the transactions were legitimate purchases of eligible food. The Appellant claims that such documentation is precisely what FNS has stated it looks for from retailers to demonstrate their innocence.

As the author of one of the cited cases, *TG Mini Mart, Inc.*, this reviewer can state with certainty that there was no insinuation that the disqualification in that case would have been reversed had the firm simply submitted inventory records or itemized cash register receipts. The mere existence of evidence does meet the preponderance of evidence standard. The evidence must be sufficiently compelling to convince a person with a reasonable mind that the Appellant's version of events is more likely than not the correct version.

In this case, the Appellant submitted a large number of inventory invoices. Many of the invoices and receipts contained only non-food items, such as alcohol or tobacco products, but most contained eligible food merchandise. Inventory records are unquestionably useful for a firm to demonstrate to FNS that it had sufficient stock to cover the total amount of its SNAP redemptions during a review period. However, invoices alone rarely persuade a reviewer to reverse a disqualification determination as they offer little insight into what transpired at the point of sale.

This review does not doubt that SB Liquor sells eligible food items and conducts legitimate SNAP transactions. There is no evidence that this has ever been questioned. But when unusually large transactions form patterns that are substantially different from similar-sized and similarly-stocked stores 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 has not offered adequate evidence, which might have also included cash register receipts or other accounting records, to better explain what took place between the customer and the clerk at the cash register during the specific transactions listed in the charge letter.

As to the nine customer affidavits, such documentation is largely unconvincing, even when coupled with inventory invoices. Customers engaging in trafficking violations are unlikely to admit to such conduct. Furthermore, affidavits, even if well-intentioned, do not typically represent a household's actual shopping behavior, as households generally do not retain records of transactions and often do a poor job of recalling spending patterns at a particular location.

The transactions identified in 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 evidence does not meet this standard, and thus, does not prove by a preponderance of the evidence that trafficking did not take place during the review period.

Trafficking Case based on EBT Data

A key argument by the Appellant relates to FNS's use of a fraud detection system known as ALERT. The Appellant contends that FNS both over-utilizes this system and believes that the system is "infallibly" accurate. Appellant's counsel argues that FNS's reliance on ALERT leads to confirmation bias and causes the agency to disregard or interpret evidence in such a way that unreasonably favors the agency's theory that trafficking is occurring. The Appellant contends that the sum total of FNS's information is based on transaction patterns and a subsequent analysis of the data by an analyst who has never physically been to the store, who may or may not understand how a retail food business operates, and then reaches a conclusion based on a mountain of assumptions.

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 FNS employs a computerized fraud detection tool to identify EBT transactions that form patterns having characteristics indicative of trafficking. However, this tool does not, by itself, determine or conclude that trafficking has occurred. FNS's Retailer Operations Division must still analyze the transaction data and patterns with other factors, such as observations from a store visit, an analysis of customer shopping behavior, and a comparison with similar stores in the area, and then render a determination as to whether or not the questionable transactions were, more likely than not, the result of trafficking. The legality of this method is identified in 7 CFR § 278.6(a) which states, in part, "FNS may disqualify any authorized retail food store ... if the firm fails to comply with the Food and

Nutrition Act of 2008, as amended, or this part. **Such disqualification shall result from a finding of a violation on the basis of evidence that may include facts established through on-site investigations, inconsistent redemption data, [or] evidence obtained through a transaction report under an electronic benefit transfer system** [Emphasis added.]

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

It should be noted that this reviewer has thoroughly examined the documentation and information provided by the Retailer Operations Division and has found no evidence to suggest that the agency simply manufactured numerical data and declared it to be trafficking. From all indications, the Retailer Operations Division obtained the EBT data, found it to be suspicious in comparison to other area stores of similar size, and then completed a thorough analysis before concluding that trafficking was likely occurring.

It is important to restate here that in an appeal of adverse action, the onus is on the Appellant to prove by a preponderance of the evidence that the administrative action should be reversed. As noted earlier, the Appellant's evidence in this case does not persuade this review to conclude that the transactions listed in the charge letter were legitimate purchases of eligible food.

Prior Administrative Review Decisions

Appellant's counsel cited two administrative review decisions to support its argument that the permanent disqualification action should be reversed. The two cases are *Howard's Quik Mart*, and *Gloesis Group*, both of which noted that a determination of permanent disqualification must be supported to such a degree as to conclude that trafficking is the only plausible explanation.

Regarding these cited cases, it must be noted that the administrative review officer in the present case was the author of the decision made in *Howard's Quik Mart*. It can thus be stated with certainty that the phrase "only plausible explanation," was nothing more than an inadvertent misstating of the standard of evidence required in administrative review cases. The standard in such cases, as noted multiple times in this document and repeated in the *Howard's Quik Mart* and *Gloesis Group* decisions, is a preponderance of the evidence. In other words, a determination of permanent disqualification must be supported to such a degree as to conclude that trafficking is the *most* plausible explanation. In the present case, the Retailer Operations Division has met this standard. As such, the two cited cases and particularly the phrase "only plausible explanation," cannot be considered precedent-setting for this or any other case.

Agency FOIA Response

The Appellant has complained that it cannot deduce what actual data was used by FNS in the formulation of the trafficking allegations because the agency's Case Analysis Document provided to the Appellant under FOIA was so heavily redacted that it provides no statistical data or useful information.

With regard to this contention, it should be noted that this review has no authority relating to agency FOIA responses. As such, no opinions or findings can be rendered. When a FOIA response is given, if the requester is not satisfied with the response or feels that information that should have been released was improperly withheld, it has the option of appealing the FOIA response. This review is not aware of any such appeal made by the Appellant.

Miscellaneous Contentions

In its 21-page brief, the Appellant made a few contentions and statements that are directly contradicted by the evidence in the case and deserve mention in this decision.

First, the Appellant stated that the store is, to its knowledge, the only retail store in the surrounding area that provides the community with such an expansive and diverse selection of grocery products. Such a claim is not believable in any respect. The nearest full-line supermarket is quite literally within eyesight of SB Liquor. The supermarket is across the street and down the road just a block or two and is very likely visible from SB Liquor's parking lot. That the Appellant would believe that it had the best-stocked grocery store in the surrounding area is illogical. While it is reasonable to expect that the residents directly across the street from SB Liquor would regularly visit the store to purchase a small number of convenience items, such as snack foods, it is also reasonable to expect that these same residents, when needing to make bigger grocery purchases, would walk a short distance to a much larger grocery store with substantially greater variety and inventory and likely lower prices. The existence of this nearby supermarket is among the reasons that the transaction patterns in the charge letter are so unusual.

Second, in discussing the agency's ALERT system and the dangers of confirmation bias, Appellant's counsel states the following: "In this instance, ambiguous or contradictory evidence has been disregarded or interpreted in such a way that unreasonably favors the Department's hypothesis that trafficking is occurring at the Appellants' Store.... When relevant factors are disregarded or devalued (like prior negative [undercover] investigations, for example, and the other information submitted by the Appellants during the initial administrative proceedings), the statistical analysis becomes inherently flawed."

With regard to this contention, there was no "contradictory evidence" presented by the Appellant in its original response to the charge letter. As such, there is no evidence that could have been disregarded, misinterpreted, or devalued by the agency. Additionally, the agency's prior undercover investigation in January and February 2018 was a positive investigation, meaning that violations were committed by the firm. While the violations were too limited to warrant a disqualification, the firm was issued an Official Warning Letter, which warned the Appellant that if it was again found to be in violation of the regulations, it may lose its SNAP Authorization.

Further, the record shows that the agency strongly considered the Appellant's initial admission that trafficking violations had likely been committed by one of its clerks. In addition to the transaction patterns themselves, this admission played a role in the Retailer Operations Division determining that permanent disqualification was warranted.

Third, Appellant’s counsel makes two contentions that appear to be false. First, it claims that the Appellant has “always maintained” that the flagged transactions were the result of a difference in business operations. Second, it claims that the Appellants “vehemently deny” engaging in the trafficking of SNAP benefits.

Neither of these claims is true. As noted earlier, when initially presented with the charge letter, the Appellant, through its original counsel, blamed one of its clerks for the trafficking violations. There is no evidence at all that the Appellant believed that the transactions were the result of a difference in business operations. And there is no evidence that the Appellant vehemently denied the trafficking allegations. Rather, the Appellant immediately requested a civil money penalty in lieu of disqualification and claimed to have terminated the employment of the offending clerk.

Civil Money Penalty

It is noted that the Appellant, under its present counsel, did not offer any contentions to counter the Retailer Operations Division’s denial of a civil money penalty in lieu of permanent disqualification. Despite the Appellant’s perceived disinterest in a CMP, this review considered the firm’s eligibility for this alternative penalty. In its original response to the charge letter, the Appellant requested a CMP based on the regulations found in 7 CFR § 278.6(i). This regulation states that a firm may be eligible for a CMP if it demonstrates that it had established and implemented an effective compliance policy and program to prevent violations. In an effort to demonstrate that it met the criteria for a CMP, the Appellant submitted several documents:

- A copy of its compliance policy: “SB Liquor Supplemental Nutrition Assistance Program Compliance Policy,” with an effective date of January 1, 2016.
- Three copies of the firm’s “Employee EBT Training Guide,” dated February 17, 2017, February 17, 2018, and February 17, 2019. Each copy is signed by the employee who was blamed for conducting the suspicious SNAP transactions.
- Written declarations signed by three of the firm’s owners, stating among other things, that the owners were not aware of the suspected trafficking violations, did not approve them, did not benefit from them, and were not involved in them.

All of these documents were submitted within 10 days of receipt of the charge letter, as required by regulations at 7 CFR § 278.6(b)(2). Additional signed EBT Training Guides for other employees of the firm were submitted by the Appellant after the 10-day deadline and thus could not be considered by the Retailer Operations Division.

The primary issue regarding the imposition of a CMP in lieu of permanent disqualification for trafficking is whether or not the Appellant meets each of the four criteria for this alternative penalty. These criteria must be met in order for a firm to demonstrate that it had established and implemented an effective compliance policy and training program to prevent SNAP violations.

In accordance with 7 CFR § 278.6(i), fulfillment of the four criteria must be established by “substantial evidence.” Standards of evidence in this regard are found in 7 CFR § 278.6(i)(1) and (2). Unfortunately, the Appellant’s evidence has some elements that caused the Retailer Operations Division to question its authenticity. For example, the compliance policy has an effective date of January 1, 2016, which is more than 10 months before the firm existed.

According to the Appellant's SNAP application, the store did not open for business under its current ownership until November 15, 2016. That a firm would establish a SNAP compliance policy more than 10 months in advance of its opening, and more than a year before it was authorized to accept SNAP is doubtful and gives an impression that the policy may have been created after receipt of the charge letter in an effort to avoid a disqualification sanction. The Retailer Operations Division concluded that this discrepancy makes it impossible to determine if the firm's compliance policy and program were genuinely in operation prior to the occurrence of violations cited in the charge letter. This review agrees.

This review also has doubts about the signed training documents. Although supposedly signed by the violating employee on February 17 in 2017, 2018, and 2019, the documentation has a distinct appearance of being signed on the same day using the same pen. Thus, this review finds it more likely than not that the documentation did not exist prior to the commission of the violations, but rather was manufactured after receipt of the charge letter for the purpose of attempting to meet CMP requirements.

As noted above, fulfillment of each of the four criteria in 7 CFR § 278.6(i) must be established by "substantial evidence." In this case, the legitimacy of the Appellant's evidence is questionable and fails to convince this review that the firm had established an effective compliance policy and training program prior to the violations listed in the charge letter. Accordingly, this review agrees with the Retailer Operations Division that the Appellant is not eligible for a CMP lieu of permanent disqualification.

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 SB Liquor from SNAP participation. This data provided sufficient evidence for this review to conclude that the questionable transactions and patterns listed in the charge letter were more likely than not the result of trafficking violations committed by the Appellant. Likewise, the Appellant has not proven, by a preponderance of the evidence, that the administrative action should be reversed.

Based on a review of all available information in this case, the decision to impose a permanent disqualification against the Appellant, SB Liquor, 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

July 22, 2019