

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

Stephanie's Market,

Appellant,

v.

Case Number: C0199978

Retailer Operations Division,

Respondent.

FINAL AGENCY DECISION

The U.S. Department of Agriculture, Food and Nutrition Service (FNS), finds that there is sufficient evidence to support the decision by the Retailer Operations Division to impose a permanent disqualification against Stephanie's Market (hereinafter Appellant) from participating as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP).

ISSUE

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with Title 7 of the Code of Federal Regulations (CFR) § 278.6(a), (c) and (e)(1)(i), when it imposed a permanent disqualification against Appellant on July 28, 2017.

AUTHORITY

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

CASE CHRONOLOGY

In a letter dated July 3, 2017, the Retailer Operations Division charged the Appellant with trafficking, as defined in Section 271.2 of the SNAP regulations, based on a series of irregular SNAP transaction patterns that occurred during the months of November 2016 through April 2017. The letter noted that the penalty for trafficking is permanent disqualification as provided by 7 CFR § 278.6(e)(1). The letter also noted that the Appellant could request a trafficking civil

money penalty (CMP) in lieu of a permanent disqualification within ten days of receipt under the conditions specified in 7 CFR § 278.6(i).

Appellant, through counsel, requested an extension for both the trafficking CMP deadline and to respond to the charges in a letter dated July 11, 2017, but which was sent via fax on July 17, 2017. The Retailer Operations Division contacted the Appellant counsel by telephone and in a letter dated July 17, 2017, explaining that SNAP regulations do not permit an extension of time to request a trafficking CMP and granting an extension of time until July 24, 2017, to respond to the charges. Appellant responded to the charges in a letter dated July 24, 2017, and sent via email; however, this response neither requested nor contained any evidence to be considered in support of the CMP. The Retailer Operations Division notified Appellant in a letter dated July 28, 2017, that the firm was permanently disqualified from participation as an authorized retailer in SNAP in accordance with Section 278.6(c) and 278.6(e)(1) for trafficking violations. This determination letter also stated that Appellant's eligibility for a trafficking CMP according to the terms of Section 278.6(i) of the SNAP regulations was considered. However, the letter stated “. . . you are not eligible for the CMP because you failed to submit sufficient evidence to demonstrate that your firm had established and implemented an effective compliance policy and program to prevent violations of the Supplemental Nutrition Assistance Program.”

By letter dated August 8, 2017, Appellant, through counsel, appealed the Retailer Operations Division's assessment and requested an administrative review of this action. This request also admitted that the Appellant business had been offering credit accounts, a violation of SNAP regulations. The appeal was granted. Subsequent correspondence dated September 12, 2017, was received from Appellant.

STANDARD OF REVIEW

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

CONTROLLING LAW

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

7 U. S. Code § 2021(a)(2) states, “Regulations promulgated under this chapter shall provide criteria for the finding of a violation of, the suspension or disqualification of and the assessment of a civil penalty against a retail food store or wholesale food concern on the basis of evidence

that may include facts established through on-site investigations, inconsistent redemption data, or evidence obtained through a transaction report under an electronic benefit transfer system.”

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

7 CFR § 278.6(e)(1)(i) reads, in part, “FNS shall . . . [d]isqualify a firm permanently if . . . personnel of the firm have trafficked as defined in § 271.2.” Trafficking is defined, in part, in 7 CFR § 271.2, as, “The buying, selling, stealing, or otherwise effecting an exchange of SNAP benefits . . . for cash or consideration other than eligible food, either directly, indirectly, in complicity or collusion with others, or acting alone” Trafficking is further defined, in 7 CFR § 271.2, to include “(5) Intentionally purchasing products originally purchased with SNAP benefits in exchange for cash or consideration other than eligible food.”

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

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

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

SUMMARY OF THE CHARGES

The issue in this review is whether, through a preponderance of evidence, it is more likely true than not true that the questionable transactions were the result of trafficking. The charges on review were based on an analysis of SNAP EBT transaction data during the six month period of November 2016 through April 2017. This involved two patterns of EBT transaction characteristics indicative of trafficking:

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

APPELLANT'S CONTENTIONS

In the responses to the letter of charges, in the request for administrative review, and in the subsequent correspondence, Appellant has stated as its position in the matter the following:

- Counsel claims to have been notified via phone on July 17, 2017, that the trafficking sanction had been upheld and the Appellant has no ability to elect a CMP, resulting in permanent disqualification. This directly contradicts the notice in the FNS letter dated July 23, 2017, that sets the amount at \$27,900.00. Even this amount is further in contradiction to 278.6 (g-i) that provides for a remediation and compliance process. The Appellant has never been contacted regarding any kind of compliance policy or remedial steps to correct any problems with recordkeeping. It seems apparent that the USDA regional office does not care to and does not intend to follow the regulations set forth in the FSP or even to afford the barest notion of due process. Additionally, contrary to the provisions of 278.6(d), FNS has provided no evidence of prior action taken by FNS to warn the Appellant or any other evidence that show's Appellant's intent to violate regulations;
- Appellant has been charged with violation of Section 271.2 based on evidence that clearly does not in any shape or form fall within the purview of the definition of trafficking. The allegations consist of (1) multiple transactions made from individual benefit accounts in unusually short timeframes; and (2) excessively large purchase transactions made from recipient accounts. Neither of the allegations meet the 271.2 definition of trafficking which is "the buying or selling of coupons, ATP cards, or other benefit instruments for cash or other consideration other than eligible food; or the exchange of firearms, ammunition, explosives, or controlled substances, as defined in section 802 of Title 21, USC, for coupons". The administrative action against Appellant should be reversed as there is no evidence that Appellant bought or sold coupons for cash or any consideration other than eligible food and the evidence does not establish any particular transaction reflecting the buying or selling of coupons for cash or any consideration other than eligible food. Rather, the determination made in this case is based on a mere assumption or at best, an inference from the sheer numbers gathered through the investigation. This evidence does not suggest a violation of Section 271.2 any more than it does a violation of Section 278.2(f). Appellant would hold USDA to the strictest proof differentiating between the two violations with the given evidence and has repeatedly and vehemently denied any of the aforementioned alleged violation of Section 271.2;
- The evidence is more indicative of a violation of Section 278.2(f). Copies of all receipts for November 2016 to April 2017 are submitted that demonstrate explicable documented business transactions for eligible items. Also submitted are copies of pages from a notebook that was used in the regular course of business during the aforementioned timeframe. These demonstrate a recording of credit accounts that were made for repeat customers of the Market. The majority of these customers are low income families that reside close to the business and rely on it for most of their household needs. This evidence negates any

allegation of violations of Section 271.2 that would arise from the evidence gathered by USDA of multiple transactions within short timeframes and excessively large purchase transactions;

- It is evident that had the legislation intended for these two charges to be the same, then it would have been very clearly reflected. Rather the legislation separated these two acts into different violations with very different punishments. One faces automatic and permanent disqualification whereas the other provides for not only a warning, but two temporary disqualification periods. It is ludicrous that USDA has taken on the role of the legislature by reconstructing the very clear lines they have set forth through a democratic process. This trafficking charge has the most severe consequences and the most limited protections. In comparison to other violations, a charge of trafficking requires minimal notice, has automatic and permanent disqualification, does not permit a stay of suspension pending review, and is effectively the exception to every rule made to protect businesses. Given that the purpose of SNAP is to “promote the general welfare and to safeguard the health and well-being of the Nation’s population” it is inconceivable that the USDA would elect to deprive a neighborhood of low-income families that rely on this one store for most of their household needs where the evidence does not solely, or even primarily, suggest a violation of Section 271.2. It also seems draconian to permanently disqualify the Appellant on the basis of no evidence whatsoever, when there is ample evidence that she provides qualified families with eligible items on a daily basis;
- Attachment 1 is a copy of all receipts from the Appellant business between the dates November 1, 2016-April 30, 2017. The owner vigorously disputes any allegations that these transactions are “unusual, irregular, and inexplicable”. As the receipts demonstrate, they are explicable as documented business transactions for eligible items. These are repeat customers living close to the Appellant business and who are low income therefore relying on one store for most of their household needs. It is not uncommon for individuals and families on SNAP to either stagger their purchases or purchase large quantities depending on their SNAP disbursements and their own budgets; and,
- By preponderance of the evidence taken as a whole, including evidence of documentation reflecting the accounting practices at the Appellant business, you will find that the presented evidence is not sufficient to support the conclusion that a violation of Section 271.2 occurred. Consequently, the administrative action should be reversed.

Appellant submitted 299 pages containing copies of all receipts for the period under review and credit notebook pages in support of these contentions.

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

ANALYSIS AND FINDINGS

The Retailer Operations Division presented a case that Appellant trafficked SNAP benefits. Each Attachment furnished with the letter of charges represents the questionable and unusual patterns of SNAP transactions indicative of trafficking which were conducted at the Appellant

business during the review period. As patterns of unusual transactions appear across multiple Attachments, the case of trafficking becomes more convincing.

Store Background and FNS Store Visit

The FNS authorized the Appellant business on August 25, 2011, and the business is classified as a convenience store. The file indicates that in reaching a disqualification determination, Retailer Operations Division considered information obtained during a May 1, 2017, store visit conducted by a FNS contractor to observe the nature and scope of the firm's operation, stock, and facilities. This information was then used to ascertain if there were justifiable explanations for the EBT transactions at Appellant's store that formed patterns indicative of trafficking. The store review summary documented the following store size, description, and characteristics:

- The business was a small, crowded convenience store offering a limited quantity and variety of staple foods and carrying no unique items or offering any distinctive services.
- The business stocked a typical variety of ethnic Hispanic foods.
- The contractor stated the store size was 2,000 square feet with no additional storage based on information provided by the store owner during the store visit.
- There were no shopping carts and only one handheld basket for customer use seen during the visit making it difficult for customers to carry large amounts of food to the checkout. The one basket was located in the middle of the store away from the entrance in an aisle filled with non-food items indicating that it is not used very often by customers.
- The checkout counter was approximately one foot by one foot and was totally covered in displays leaving little or no space for customers to place their purchases. There was a large chest freezer containing single serving ice cream located directly in front of the checkout area that customers must reach over to pass their purchases to the cashier. The extremely small size of the checkout area would make it problematic to process large orders.
- The checkout area had one cash register, one POS terminal, and no scanner.
- No food packages, bundles, case sales, bulk products, or other sales were evident that would explain the unusual transactions and no SNAP eligible cased items were available for sale.
- The store had a limited stock of staple foods that consisted of many pre-packaged and single serving items with the majority of inventory in accessory foods (primarily soda, candy, and other drinks), snacks, and a wide variety of ineligible items.
- Dairy items included: canned milk, single serving milk drinks, fresh milk, packaged cheese, margarine (3), yogurt, infant formula (1), sour cream (2), and single serving ice cream.
- Meat, poultry, or fish items included: jerky, canned meat/poultry/fish, packaged lunch meats (2), eggs (3 dz.), pork sausages (2), and turkey hot dogs (5).
- There were no fresh or frozen fruits or vegetables.
- The business had no fresh unprocessed meats or seafood, no frozen unprocessed meats or seafood, a very limited quantity and variety of processed meats and seafood (canned meat/poultry/fish, only five packs of turkey hot dogs, only two packs of packaged lunch meats, only two pork sausages, and jerky), no deli meats or deli cheeses, only three dozen

eggs, no frozen entrees, no frozen dinners, limited quantities of yogurt and sour cream, minimal packaged cheese, three packages of margarine, no fresh fruits or vegetables, no frozen fruits or vegetables, a very limited quantity and variety of canned and packaged staple food items, no coffee, only one container of infant formula, no infant cereals, very minimal quantities of baby foods, no baby juices, no baking mixes, no rice, no hot cereals, only three cold cereals, minimal quantities of dry pasta or noodles, no spices, and no expensive eligible food items.

- Ineligible items included: tobacco, household products, paper products, pet products, health and beauty items, hats, clothing, perfume, jewelry, toys, party supplies, bedding, stuffed animals, and money transfers while accessory foods included: un/carbonated drinks, candy, condiments, cocoa, and tea.
- Signage was in English and Spanish.
- Many food items were priced with the majority of prices ending in .x9 cents. Comments on the FNS store visit report by the contract reviewer specifically stated that most of the store's food prices ended in .x9 cents. A price ending in .x9 cents is the most common pricing structure for stores of this type.
- The FNS store visit report listed the four most expensive SNAP eligible items for sale in the store and these ranged in price 5 U.S.C. § 552 (b)(6) & (b)(7)(C)0 based on responses provided by the store owner during the store visit.
- The store was not a WIC vendor.
- Store hours were 7:00 AM-7:00 PM Monday-Friday, 8:30 AM-7:00 PM Saturday, and closed on Sundays as confirmed by the store owner during the store visit.
- The quantity and variety of the store's staple food inventory was much less than that seen during the previous FNS store visit on June 28, 2016.

Multiple transactions in unusually short time frames

This Attachment documents 17 individual transactions in eight sets of two or more transactions conducted by five different households in a short period of time.

5 U.S.C. § 552 (b)(6) & (b)(7)(C). There is one set comprised of three transactions while the remaining seven sets are comprised of two transactions. It is not a usual shopping pattern to see so many purchases, in a short period of time, by the same recipients as documented in this Attachment. Multiple transactions conducted by the same household account within a short period of time is a method which violating stores use to avoid single high dollar transactions that cannot be supported by a retailer's inventory and structure. These sets of transactions appear to be in amounts which are indicative of trafficking.

Appellant provided no documentation or explanation to support the legitimacy of the listed transactions in this Attachment other than that all of the suspicious transactions at the Appellant business during the period under review are associated with store ownership offering credit accounts to repeat customers of the business.

It must be noted that SNAP households have no limits on the number of times they may use their SNAP cards or how much eligible food they may purchase. Although it is not uncommon for customers to have more than one transaction per day, the SNAP transactions listed in this

Attachment are questionable and therefore suspicious because they are large transactions being conducted by a specific household in a short period of time at a convenience store with a limited quantity and variety of staple foods and display characteristics of use inconsistent with the nature and extent of the store's stock and facilities. The household transactions in this Attachment do not contain the characteristics associated with a recipient making payments on a credit account since an analysis of the eight transaction sets shows that the households conducting three of the sets still had SNAP benefits remaining in their accounts at the end of the previous month and that three households did not exhaust the benefits in their accounts until the very end of the preceding month. Therefore, in six of the eight transaction sets contained in this Attachment there would have been no need for the household to use credit during the preceding month thereby refuting Appellant's contentions that these suspicious transactions are the result of the Appellant allowing credit accounts.

These transaction sets also do not contain the characteristics associated with a household purchasing a forgotten item right after checking-out or returning to the store later to purchase a forgotten item of two as the subsequent transaction is for a substantial amount in all of these transaction sets and they nearly equal or exceed the dollar amount of the initial transaction i5 U.S.C. § 552 (b)(6) & (b)(7)(C). 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

The FNS store visit offers no legitimate explanation for why SNAP customers would routinely shop at the business multiple times during a short period of time as it shows the business offers a limited stock of staple foods consisting of many pre-packaged and single serving items with the majority of inventory in snacks, accessory foods, and a variety of ineligible items. There were no fresh or frozen meats/seafood, no fresh or frozen fruits or vegetables, no frozen dinners or entrees, and a very limited quantity and variety of canned and packaged staple food items making the Appellant business unlikely to be the grocery store of choice for SNAP recipients. The business also offers no great variety of products, price advantage, profusion of large packages, or significant bulk items for sale leaving no explanation for the large dollar transactions amounts. The store visit inventory report and photographs show no expensive eligible foods in stock that would account for these large amounts as well as showing the store has very limited checkout counter space and no shopping carts in which to transport the large number of low priced items required to make-up these large transaction amounts. Without these, it is unlikely such large dollar value transactions could be for actual food purchases and more likely they involve trafficking.

An analysis of the shopping patterns for the households listed in this Attachment shows that these households have ready access to transportation as evidenced by their shopping at a variety of other larger food stores located nearby and at a considerable distance from Appellant's location. These five households each conducted SNAP transactions at between eight to 14 super stores and supermarkets during the review period showing that they are not dependent on the Appellant business for the majority of their grocery purchases as alleged by Appellant. This analysis further shows that four of the five households conducted 13 or fewer transactions at the Appellant business during the six month period under review with two households conducting only five and seven transactions indicating that 80 percent of the households in this Attachment are not regularly shopping at the Appellant business and would therefore not be using store

credit. It is also unlikely that store ownership would extend credit to customers who are not regularly shopping at her business.

FNS records further show there are two super stores and three supermarkets located within one mile of Appellant's location that would offer greater quantities and varieties of food items at lower prices than would be found at a minimally stocked convenience store. Given the proximity of these larger stores, there is no reason for the attraction to the Appellant business and the volume of violative transactions, especially the large dollar transactions. Appellant has failed to provide any viable explanations for the irregular shopping patterns exhibited by the households in this Attachment as contentions of credit have been unsubstantiated. Also, no explanation or rationale has been offered by Appellant as to why households that are regularly shopping at larger stores offering a greater variety and quantity of SNAP eligible food stock at lower prices and who apparently have no transportation limitations would be conducting multiple, high dollar value transactions at a convenience store that offers a limited selection of staple food items and has no shopping carts that would be needed for the large transactions in this Attachment. Common sense dictates that it is improbable that SNAP households, with limited cash resources, would choose to shop at the Appellant business when their SNAP eligible food needs could be met at any of the larger ethnic or non-ethnic stores they are already regularly shopping at and therefore it is more likely than not that these households were trafficking SNAP benefits at the Appellant business and that the multiple transactions were attempts to obscure trafficking by dividing a large dollar value transaction into a series of smaller dollar value transactions. This is a method used by stores to avoid high dollar transactions that cannot be supported.

There may be legitimate reasons why a SNAP recipient might return to a store during a short period of time, but the examples in this Attachment indicate a series of SNAP purchases that total to large dollar amounts. Multiple transactions over a short period of time, especially those of high dollar values, are indicative of attempts by store employees to obscure trafficking by fabricating transactions and are a method which stores use to avoid high dollar transactions that cannot be supported.

High Dollar Value Transactions

This Attachment lists 182 individual EBT transactions 5 U.S.C. § 552 (b)(6) & (b)(7)(C). The substantial number of high dollar transactions is atypical for a convenience store and calls into question the legitimacy of these transactions. As has been previously discussed and is evident in this Attachment, many of the transactions end in a same cents value 5 U.S.C. § 552 (b)(6) & (b)(7)(C), including five of the 25 transactions equaling or exceeding 5 U.S.C. § 552 (b)(6) & (b)(7)(C), that are not supported by the store's pricing. Based on the inventory and pricing structure at the Appellant business, it seems implausible that there would be large numbers of high dollar value transactions ending in the same exact amounts and suggests that these amounts may have been contrived. The SNAP transactions listed in this Attachment are all significantly higher than the average SNAP transaction amount of \$6.99 for this store type in Los Angeles County. 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

The evidence under review shows that SNAP households shopping at the Appellant business are also shopping at other nearby stores such as the three supermarket and two super stores located within a one mile radius of the Appellant business as well as at other full-line supermarkets and super stores located at a further distance from Appellant's location that offer a greater quantity and variety of SNAP eligible foods items for better or comparable prices than the customers can find at the Appellant business. The large dollar transactions remain questionable when considering the proximity of these other SNAP authorized stores that would be better shopping options for consumers. Based on these shopping patterns, transportation does not appear to be an issue for these households. Yet, these recipients continue to shop and spend suspicious high dollar amounts at the Appellant business, where the eligible food stock is limited, 5 U.S.C. § 552 (b)(7)(E) of their purchases at larger food stores.

Evidence also shows that the difference in the total SNAP transaction dollar volume and the average SNAP transaction amount for Los Angeles County convenience stores during the review months and at the Appellant business is significant. 5 U.S.C. § 552 (b)(7)(E). This is a further indication that the SNAP transactions in this Attachment and the others do not represent legitimate food purchases. The Retailer Operations Division considered all of these to be indicators of unusual and suspicious activity.

This store also had irregular data as compared to like type convenience stores. A comparison of Appellant's SNAP redemption data with that of Los Angeles County convenience stores using ten dollar increments shows that Appellant's transaction count and dollar volume ranges are significantly lower in the lowest ranges than the average of like type stores 5 U.S.C. § 552 (b)(6) & (b)(7)(C) at which point the Appellant's transaction count and dollar volume begin to significantly exceed that of like type stores in all remaining ranges. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). These high dollar transactions are considered to be irregular and suspicious based on the Appellant store's food inventory. The Retailer Operations Division determined there was no credible reason for the Appellant business to have transactions at those high dollar levels given the limited stock of staple foods and the lack of specialty, bulk, or ethnic foods that might sell for large dollar amounts and therefore considered this to be a strong indication of trafficking. None of Appellant's contentions explain these unusual and suspicious differences.

Regarding the high dollar value transactions, Appellant again provided no documentation or explanation to support the legitimacy of the listed transactions in this Attachment other than that all of the suspicious transactions at the Appellant business during the period under review are associated with store ownership offering credit accounts to repeat customers of the business.

An analysis of the shopping patterns for the 13 households listed in this Attachment with transactions 5 U.S.C. § 552 (b)(6) & (b)(7)(C) at the Appellant business shows that all 13 households have ready access to transportation as evidenced by their regularly shopping at a variety of other stores, including many super stores and supermarkets, located nearby and at a distance from Appellant's location. This directly contradicts Appellant's contention that the SNAP households listed in the Attachments live close to the Appellant business and are low income therefore relying on one store for most of their household needs. Many of these households were exhausting all or much of their monthly SNAP allotment within days of receipt

leaving little or no benefits for food purchases during the remainder of the month until the next allotment; this is not typical of SNAP households. This analysis further showed that 11 households conducted 13 or fewer transactions at the Appellant business during the six month period under review with two of the households conducting only a single transaction indicating 5 U.S.C. § 552 (b)(6) & (b)(7)(C) the households in this sample were not regularly shopping at the Appellant business and therefore unlikely to have a need to utilize credit accounts.

Appellant's contention that credit accounts were for repeat customers of the Market is therefore invalid for those customers conducting the largest dollar value transactions. It is noted that four of the 13 households analyzed only shopped at other retail food stores located more than 1.01 miles from Appellant's location with one household shopping only at five super stores and two supermarkets all located 4.6- 37.57 miles away. Two other households were also noted that only shopped at other stores located more than 0.83 and 0.99 miles away from Appellant's location. This is an indication that 46 percent of the 13 households in this sample likely reside at a distance from Appellant's location and do not live close to the business as claimed by the Appellant. These irregular shopping patterns also bring-up the question of why would these households elect to travel a sizeable distance, often several miles round trip from their regular shopping areas, past numerous larger and better stocked stores to conduct multiple purchases at a minimally stocked convenience store that carries no unique foods or offers any special services. Appellant's contentions fail to offer any explanation or rationale for these unusual and suspicious shopping patterns. Common sense dictates that it is improbable that SNAP households, with limited cash resources, would choose to travel these distances if their purchases at the Appellant business consisted solely of eligible food items that could be purchased at any of the super stores and/or supermarkets they were already regularly shopping at and it is therefore more likely than not that these households were trafficking SNAP benefits at the Appellant business.

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

Information obtained during the FNS store visit on May 1, 2017, shows that the Appellant business offers a limited quantity and variety of SNAP eligible staple food items, many accessory foods, and many ineligible items. The store visit occurred on the first day of California's monthly SNAP issuance cycle and the store should have been fully stocked to account for the influx of SNAP shoppers, but had limited quantities of food items making it difficult for multiple families to conduct large transactions. There is no apparent legitimate reason for the high transaction amounts at Appellant's store given the minimal stock of staple foods and the fact that: tobacco, household products, paper products, pet products, health and beauty items, hats, clothing, perfume, jewelry, toys, party supplies, bedding, stuffed animals, and money transfers are not eligible for purchase with SNAP benefits. The business carries no special foods or offers any unique services that are not also available at other nearby grocery

stores making it unlikely that SNAP recipients with available transportation would make this business their grocery store of choice. A transaction in the amount 5 U.S.C. § 552 (b)(6) & (b)(7)(C) may not be unusual, irregular or inexplicable if conducted at a full-line supermarket or superstore; however, this same transaction value seems unusual, irregular, or inexplicable if conducted at a minimally stocked convenience store.

Since the Appellant business carries no fresh unprocessed meats or seafood, no frozen unprocessed meats or seafood, a very limited quantity and variety of processed meats and seafood (canned meat/poultry/fish, only five packs of turkey hot dogs, only two packs of packaged lunch meats, only two pork sausages, and jerky), no deli meats or deli cheeses, only three dozen eggs, no frozen entrees, no frozen dinners, limited quantities of yogurt and sour cream, minimal packaged cheese, three packages of margarine, no fresh fruits or vegetables, no frozen fruits or vegetables, a very limited quantity and variety of canned and packaged staple food items, no coffee, only one container of infant formula, no infant cereals, very minimal quantities of baby foods, no baby juices, no baking mixes, no rice, no hot cereals, only three cold cereals, minimal quantities of dry pasta or noodles, no spices, and offers no expensive eligible food items, these patterns are deemed to be suspicious. Additionally, the quantity and variety of the store's staple food inventory was much less than that seen during the previous FNS store visit on June 28, 2016.

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

Appellant furnished no itemized cash register and EBT receipts for the period under review to document the legitimacy of these excessively large transactions and no evidence was provided of SNAP eligible store stock via receipts of products taken into inventory for the relevant review months. Additionally, Appellant's store does not have shopping carts, has only one hand baskets, and does not have a scanner thereby making it difficult to facilitate the great quantities of eligible food items required to make up these large dollar transactions. Therefore, it is improbable that the food items purchased in these high dollar amounts could be carried to the register without the use of carts and more likely that the amounts were contrived. Based on this discussion, Appellant did not provide adequate evidence to support the legitimacy of the excessively large transactions in this Attachment.

Credit Contentions

Appellant contends the evidence presented is more indicative of a violation of Section 278.2(f). Copies of all receipts for November 2016 to April 2017 are submitted that demonstrate explicable documented business transactions for eligible items. Also submitted are copies of pages from a notebook that was used in the regular course of business during the aforementioned timeframe. These demonstrate a recording of credit accounts that were made for repeat customers of the Market. The majority of these customers are low income families that reside close to the business and rely on it for most of their household needs. This evidence negates any allegation of violations of Section 271.2 that would arise from the evidence gathered by USDA of multiple transactions within short timeframes and excessively large purchase transactions.

Regarding the above contentions, when the store owner signed the certification page of the SNAP retailer application to begin operating as a SNAP retailer, she confirmed she understood and agreed to abide by program rules and regulatory provisions. She agreed to accept responsibility on behalf of the firm for violations of the SNAP including those committed by any of the firm's employees, paid or unpaid, new, full-time or part-time. *This certification page specifically includes violations such as accepting SNAP benefits as payment on credit accounts or loans* (Emphasis added.) The certification is clear that ownership understood by signing the document that violations of program rules can result in administrative actions such as fines, sanctions, withdrawal, or disqualification from the SNAP. Despite agreeing to abide by SNAP rules and regulations, ownership now admits that the business allowed credit accounts, a clear violation of SNAP regulations and rules. Additionally, the SNAP Retailer Training Guide and the SNAP retailer training video, provided to all retailers upon initial authorization and upon reauthorization, both cite credit accounts as violating SNAP regulations.

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

In regards to Appellant's admission to accepting SNAP benefits for payment on credit accounts, a program violation, Appellant submitted documentation consisting of copies of all receipts for the period under review and copies of notebook pages purporting to be from a log of credit accounts. The cash register receipts provided are not itemized and contain EBT as well as credit/debit card transactions in addition to summary reports. The receipts only list the total amounts and do not include applicable sales tax amounts so it is impossible to determine if the items purchased were even SNAP eligible food items therefore the receipts submitted by

Appellant provide no probative value. The credit documents submitted by Appellant do not provide a detailed or itemized breakdown of what food items were purchased and many do not contain the dates of the purchases or dates of any payments. Some of the entries that were dated go as far back as December 24, 2015, and are well outside of the period under review. The entries also do not contain any contact information such as the customer's full name, address, telephone number, SNAP household account number, or SNAP EBT card serial number. Even if a business were to extend credit accounts, it seems unlikely that it would allow customers to accrue credit without having any means of contacting these individuals or verifying that they, in fact, were SNAP recipients. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Accordingly, it appears that the documents submitted as evidence of payments made using SNAP benefits on credit accounts were fabricated in an attempt to obtain the lesser charge. These documents do not provide evidence that the store permitted credit accounts during the review period. Since Appellant was unable to account for any of the transactions outlined in the letter of charges, the original determination made by the Retailer Operations Division was evaluated to determine if trafficking occurred. The transactions showed clear and repetitive patterns of unusual, irregular, and inexplicable SNAP activity indicative of trafficking as previously discussed.

A single, handwritten page in Spanish was also submitted with the credit notebook pages. A translation of this document shows it references inventory, bill payments, and also makes a reference to money laundering. No explanation was provided by Appellant for this document and it does not appear to have any relevance to the issue under review.

The issue under review involves a charge of trafficking SNAP benefits based on EBT transaction data. EBT transaction data is covered in SNAP regulations at 7 CFR § 278.6(a) and is addressed below. Trafficking is always considered to be the most serious violation even if it is a first offense therefore a temporary suspension or lesser penalty would not be applicable. SNAP regulations at 278.6(e)(1) clearly state that, "FNS shall . . . [d]isqualify a firm permanently if . . . personnel of the firm have trafficked as defined in § 271.2." SNAP regulations at 7 CFR § 271.2, define trafficking as, "The buying, selling, stealing, or otherwise effecting an exchange of SNAP benefits . . . for cash or consideration other than eligible food, either directly, indirectly, in complicity or collusion with others, or acting alone" SNAP regulations at 7 CFR § 278.6(a) clearly state, in part, that "FNS may disqualify any authorized retail food store . . . if the firm fails to comply with the Food and Nutrition Act of 2008, as amended, or this part. Such disqualification shall result from a finding of a violation on the basis of evidence that may include facts established through on-site investigations, inconsistent redemption data, evidence obtained through a transaction report under an *electronic benefit transfer system*" (Emphasis added). In the present case, the data presented in the Attachments is solely based on the SNAP electronic benefit transfer transactions conducted at the Appellant business during the period under review. This firm was selected as a result of a series of complex algorithms that make numerous data comparisons with other like type firms during the period under review. All of the transactions were then reviewed and analyzed by the Retailer Operations Division staff before the decision was made to issue a charge letter. This investigative process included a detailed examination of information obtained from various sources, including, but not limited to the inventory report and photographs from the FNS store visit on May 1, 2017, a transaction comparison and analysis of like type and larger stores, and analysis of shopping patterns for recipient households conducting transactions at the Appellant business during the review period.

Additionally, there are nearby like type stores whose transaction data does not form these suspicious patterns and are therefore not at risk of disqualification for trafficking. There is also no regulatory requirement that trafficking disqualifications be based solely on on-site undercover operations.

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

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

Other Contentions

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

Contrary to Appellant's contentions, the three criteria from SNAP regulations at Section 278.6(d) listed below are not bases to be met in order for a firm to be disqualified, but are those areas that FNS considers in determining the appropriate level of sanction for firms that have violated SNAP regulations, but have not trafficked. The level of sanction could include temporary or permanent disqualification.

- 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.

While a firm that has previously received warnings of possible violations or that has been sanctioned before could receive a more severe penalty, SNAP regulations do not provide any grounds for dismissing or reducing penalties for those firms that have not received warnings or previously been sanctioned. Additionally, Section 278.6(e)(1) states that firms shall be disqualified permanently if personnel of the firm have trafficked so the criteria cited in Section 278.6(d) is not applicable in this case. It is also noted that the record does show that USDA issued a warning letter to store ownership that was received on June 24, 2013. Warning letters are used in situations where the SNAP violations are of a limited nature that would not warrant a temporary or permanent disqualification. This letter was issued at the conclusion of an undercover investigation of the Appellant business that found store employees exchanging SNAP benefits for ineligible items. The warning letter served to advise the store owner that future violations could result in the loss of SNAP authorization and to "take every precaution to make sure that you and your employees know and follow SNAP regulations". This letter also included SNAP retailer training materials for the owner's review and use in preventing future violations.

A violation of SNAP regulations at Section 278.2(f) by a SNAP retailer allowing SNAP benefits to be accepted as payment for items sold to a household on credit do not result in a warning as alleged by Appellant, but results in a one year disqualification as clearly stated in Section 278.6(e)(4)(ii).

Regarding Appellant's other contentions, firms do not have the ability to "elect" a trafficking CMP. The July 3, 2017, FNS charge letter clearly states that, "If you request a CMP, you must meet each of the four criteria listed and provide the documentation as specified within 10 calendar days of your receipt of this letter. No extension of time can be granted for making a request for a CMP or for providing the required documentation". The letter further states that "If it is determined that you qualify for a CMP, the amount of that penalty will be \$27,900.00". SNAP regulations at Section 278.6(i) provide the criteria for a firm to receive a CMP in lieu of a permanent disqualification for trafficking. This Section lists the four criteria that must be addressed and requires firms to timely submit substantial evidence that demonstrates the firm had established and implemented an effective compliance policy and program to prevent Program violations. The record shows that the telephone call and subsequent letter dated July 17, 2017, from the Retailer Operations Division explained that the 10 day period cited in the USDA charge letter to request and provide documentation in support of a trafficking CMP

cannot be extended. The letter further states that the request for an extension of time until July 24, 2017, to respond to the charges has been approved. Neither the telephone call nor the subsequent letter state that the trafficking sanction has been upheld. The purpose of allowing firms to qualify for a trafficking CMP is not for remedial steps to correct recordkeeping problems as claimed by Appellant, but exist to provide an option for a store owner who has followed SNAP requirements by taking the time and effort to develop and implement an effective compliance policy and an effective personnel training program to qualify for a CMP in lieu of permanent disqualification for trafficking. Lastly, SNAP regulations at Sections 278.6(g) and 278.6(h) have to do with determining the dollar amount of civil money penalties for hardship to SNAP recipients and transfer of ownership and the payment of these penalties. Contrary to Appellant's contentions, neither of these regulatory Sections applies to cases involving the determination of trafficking and so have no bearing on the issue under review.

With regards to Appellant's contention that its rights to due process were violated, section 278.6(b)(1) of the SNAP regulations provides that upon charging a firm with SNAP violations, the letter informing the firm of the charges "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." This section further states that, "Any firm considered for disqualification, shall have full opportunity to submit to FNS information, explanation, or evidence concerning any instances of noncompliance before FNS makes a final administrative determination." A review of the Retailer Operations Division's administrative actions regarding this matter indicates full compliance with all applicable SNAP regulations, policies, and procedures. This disqualification is an administrative action and SNAP regulations provide for an administrative review of the action. The Act, as amended, and regulations provide that any firm aggrieved by an administrative review determination may seek judicial review of the determination in Federal court or a State court of record having competent jurisdiction. In such event, trial de novo proceedings ensure the firm of a full evidentiary hearing on the agency action at issue.

CIVIL MONEY PENALTY

A CMP for hardship to SNAP households may not be imposed in lieu of a permanent disqualification as specified in SNAP regulations at 7 CFR § 278.6(f). Trafficking is a permanent disqualification so Appellant is not eligible for a hardship CMP. Additionally, there are 38 SNAP authorized stores located within a one mile radius of Appellant's business that includes three supermarkets and two super stores. The many nearby stores appear readily accessible to SNAP recipients and offer a variety of staple foods and ethnic foods comparable to, or better than, those offered by Appellant. Appellant does not carry any unique items or foods that cannot be found at other stores. Some degree of inconvenience to SNAP benefit users is inherent in the disqualification from SNAP of any participating food store as the normal shopping pattern of such SNAP benefit holders may be altered.

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

specified timeframe. As such, the Retailer Operations Division determined that Appellant was not eligible for a trafficking CMP in lieu of permanent disqualification.

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

CONCLUSION

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

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

RIGHTS AND REMEDIES

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

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

ROBERT T. DEEGAN
Administrative Review Officer

November 9, 2017