

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

Tienda Iniguez,

Appellant,

v.

Case Number: C0208018

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 determination by the Retailer Operations Division to impose a permanent disqualification against Tienda Iniguez (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 25, 2018.

AUTHORITY

According to 7 U.S.C. § 2023 and the 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

By letter dated May 7, 2018, the Retailer Operations Division charged Appellant with trafficking based on a series of irregular SNAP transaction patterns that occurred in October 2017 through March 2018. 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 requested an extension of time to respond in a phone call made on May 8, 2018, and responded to the charges in a letter dated May 25, 2018. This letter did not request a CMP nor was any evidence submitted to be considered in support of a CMP. The Retailer Operations Division notified Appellant by letter dated July 25, 2018, that the firm was permanently disqualified from participation as a SNAP retailer in accordance with 7 CFR § 278.6(c) and 278.6(e)(1) for trafficking violations. This letter also stated that Appellant was not eligible for the CMP because insufficient evidence was submitted to demonstrate that it had established and implemented an effective compliance policy and program to prevent SNAP violations.

By letter dated July 27, 2018, Appellant appealed the Retailer Operations Division's assessment and requested administrative review. The appeal was granted. Subsequent correspondence was received.

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 SNAP benefits.

7 CFR § 278.6(a) states: "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."

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." Trafficking is defined in part as, "The buying, selling, stealing, or otherwise effecting an exchange of SNAP benefits for cash or consideration other than eligible food". Trafficking includes "Intentionally purchasing products originally purchased with SNAP benefits in exchange for cash or consideration other than eligible food".

7 CFR §278.6(i) states: "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: “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 a civil money penalty in lieu of a permanent disqualification for trafficking and submit documentation and evidence of its eligibility within the specified 10 days, 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 October 2017 through March 2018. 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

The following 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:

- The firm is a family business started 15 years ago by the owner and his father. The owner is the fourth generation in the grocery business and is a very ethical person who would not do anything illegal. They believe in customer service and the family business has become the neighborhood store. The owner is the fourth generation in the business and he and his parents run the store on a daily basis. There are two butchers who only work at the meat counter so there are no other cashiers;
- Sonoma has a very large Hispanic demographic that concentrates on big Hispanic events and holidays, quinceanera parties, birthday parties, weddings. The store offers a discount for large orders for events. All of the major holidays occur during the October – March period so the store went from higher than normal sales due to the wildfires to high sales due to the holidays. Customers buy large orders of meat, chicken, oysters, lobsters, and turkeys for the holidays;
- On October 8, 2018, the area around the store was hit by multiple wildfires that resulted in power losses for most of Sonoma by the next day. The immediate area around the store was the only area with power and the store was the only grocery store open in

Sonoma. The owners stayed open from 6:00 AM-11:00 PM to help the residents for three weeks and there were high transactions as people stocked up on meat, produce, dairy, eggs, and water. There were many evacuations, but EBT families could not afford hotels so they had to stay and continue shopping at the store to feed their families. During the wildfires (October 8-November 4, 2017), all of the other neighborhood stores had either lost power or evacuated;

- Sonoma County has experienced a very large rental housing cost increase partly due to the wildfires. Because of this, the majority of low income Hispanics rely on SNAP for food. Up to now, we were one of the only stores in the County accepting SNAP and WIC. Other small Hispanic stores do not carry this service. We also do not sell alcohol;
- During November 2017-March 2018, the store became well known and attracted more customers since it was a full grocery that accepted EBT and WIC. The owners decided to order more meat due to this and to the upcoming holidays. During these months the store ordered goat, filets, prime rib, shrimp, sweet bread, liver, etc. to be able to accommodate the busy time of year. The store is also known for its organic produce brought in twice weekly from San Francisco and there was a very big increase in produce sales during this time. Often a spouse will come in for things and their spouse will swing by later in order to purchase more food thus accounting for the multiple transactions on the same day;
- Additional square footage has been added for produce fridges, another meat fridge, and a walk-in for more meat/poultry. The store's merchandise is very unique and it is a full grocery store. It is the only Hispanic grocery carrying goat, sheep, lamb, ribs, pork loin, oysters, salmon, shrimp, chicken, and liver. Tickets are higher because of this variety. EBT families love that these varieties are carried and since they have large families, this results in high transactions. They are not trafficking; and,
- The store has only one older cash register that does not print receipts so the owners check items themselves and only use EBT for qualified foods. The firm is old fashioned due to the owners' parents running the register the majority of the time. The biggest failure of the successful business is the lack of a proper point of sale system to keep track of daily transactions. This keeps us from providing detailed receipts showing each item sold. In place of receipts, the attached sales reports from each vendor for the review period show that the store does buy and sell at volume. We have also purchased a new POS system.

Appellant submitted newspaper articles on the wildfires, a listing of providers and items ordered from them, a monthly sales total for each month in the review period, and computer printouts from many vendors showing payments and credits in support of these contentions.

ANALYSIS AND FINDINGS

Government analyses of stores caught in trafficking violations during on-site investigations have found that transactions involving trafficking consistently display particular characteristics or patterns. These patterns include, in part, those cited in the letter of charges. Nevertheless, transactions having such characteristics are sometimes valid and sufficient evidence that support that they were the result of legitimate purchases of eligible food items is provided. This is why

opportunities are afforded to charged retailers to explain the questionable transactions cited and to provide evidence that they are legitimate.

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

Store Background and FNS Store Visit

FNS initially authorized the firm on January 28, 2015. FNS records indicate that under the current owner's father, the firm was disqualified for six months effective April 17, 2014, for selling ineligible items in exchange for SNAP benefits. The father stated that only family members work at the firm and were responsible for the violative transactions. The case file indicates that in reaching a disqualification determination, the Retailer Operations Division considered information obtained during a March 27, 2018, 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 firm's suspicious SNAP transactions. The store visit documented the following store size, description, and characteristics:

- The firm was a relatively small medium grocery store offering a moderate quantity and variety of staple foods. The store had a small butcher area and offered some fresh meats, poultry, and seafood and also had a variety of baked goods. The store carried no other unique items or offered any distinctive services.
- The store stocked many traditional American brands as well as Hispanic products.
- The store visit report and photos showed four small shopping carts and four hand baskets for customer use limiting the amounts of food that could be moved to the checkout.
- No food packages, bundles, case sales, bulk items, or other sales were evident that would explain the unusual transactions and no cased items were available for purchase.
- The store visit report specifically notes that the firm was not a specialty store and that there were no meat bundles or fruit and vegetable boxes for sale.
- The sole checkout area was approximately 1.5 feet deep and 3.0 feet wide with displays, the register, and PIN pads taking up space on both sides leaving limited space for customers to place their purchases. The checkout area had one cash register, no optical scanner, and a POS terminal as confirmed by the store owner.
- The store had a moderate stock of staple foods that also included single serving and pre-packaged items with a significant portion of inventory in soda, candy, snacks, and other drinks as well as many ineligible items.
- The store had a small commercial kitchen containing a cooktop grill/range, two ovens, a commercial slicer, commercial exhaust hood, microwave oven, prep tables, and a coffee percolator. There was no menu board, but interior signage advertised hot tamales.

- The store had fresh unprocessed meat (beef, poultry, pork) and seafood (shrimp, fish), no frozen unprocessed meat or seafood, a limited quantity and variety of processed meats (bacon, packaged lunch meat, hot dogs, sausages), no processed seafood except canned fish, no jerky, no deli meats, no frozen entrees, no frozen dinners, eggs, a moderate selection of fresh fruit and vegetables, no frozen fruits or vegetables, a limited selection of packaged nuts, no 100 percent vegetable juices, a limited selection of canned soups, a moderate quantity and variety of canned and packaged staple food items, no deli cheeses, a sizeable quantity and variety of packaged cheeses, yogurt, sour cream, butter, no margarine, a moderate stock of baby cereals and baby foods, no baby juices, a moderate stock of infant formula, only eight loaves of bread, two packages of rolls, no pitas, a good selection of tortillas and tostadas, corn meal, a limited selection of hot and cold cereals, single serving noodle soups, a very limited stock of dry pasta, no dry noodles, mac&cheese, no tea, cocoa, coffee, and a limited number of expensive staple food items.
- There were no unique meats or seafood such as goat, lamb, sheep, lobsters, or oysters.
- Ineligible items included: hot food, hot drinks, household products, paper products, health and beauty items, and charcoal while accessory foods included: candy, spices, condiments, snacks, baked goods, baking mixes, cooking oil, sugar, single serving ice cream, coffee, cocoa, and un/carbonated drinks.
- Signage was primarily in Spanish and there were no SNAP posters (anti-fraud, eligible items, reporting trafficking, etc.) visible in the store.
- The firm's hours of operation were 8 AM-10 PM daily as confirmed by the store owner. The store owner also stated that the firm did not take phone or online grocery orders; did not deliver groceries; and did not round prices up/down.
- Most food items were priced with all visible prices ending in .x9 cents. Comments on the FNS store visit report specifically stated that most of the 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 food items costing more than \$5.00 for sale in the store as being a 12.5 ounce container of infant formula priced at \$21.99, an 8.0 ounce container of infant formula priced at \$22.99, a 10.5 ounce container of coffee priced at \$11.99, and shrimp priced at \$8.99/pound. This listing of the most expensive items was provided by the store owner during the store visit.
 - The firm was a WIC vendor. Most SNAP households with infants or small children are WIC participants and therefore would be purchasing these products using WIC vouchers, not SNAP EBT.

Multiple transactions in unusually short time frames

This Attachment documents 96 individual transactions in 44 sets of two or more transactions conducted by 27 different households in a short period of time.

5 U.S.C. § 552 (b)(6) & (b)(7)(C). The dollar amounts of subsequent transactions in each set are substantial and nearly equal or exceed the dollar amount of the initial transaction in 28 of the 44 sets. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Eight sets are comprised of three individual transactions while the remaining 36 sets are comprised of two individual 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 within a short period of time is a method which violating stores use to avoid single high dollar transactions that cannot be supported by store inventory and structure. These sets of transactions appear to be in amounts which are indicative of trafficking.

Appellant contends that many times a spouse will buy things and their spouse will swing by later in order to purchase more food thus accounting for the multiple transactions on the same day. SNAP households have no limit on the number of times they may use their benefits or the dollar value of eligible food they may purchase. The SNAP transactions listed in this Attachment are questionable not because they exceed any limits for use, but rather because they display characteristics of use inconsistent with the nature and extent of a medium grocery store's stock and facilities and are thus indicative of trafficking. 5 U.S.C. § 552 (b)(6) & (b)(7)(C)t. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Appellant provided no explanation as to why households would conduct up to three sizeable transactions at the Appellant firm within a short period of time.

It is certainly not unusual for a small number of SNAP households to conduct multiple transactions in a short period of time. However, it is unusual that subsequent transaction dollar amounts are substantial in these transaction sets and that all of the sets in this Attachment total more 5 U.S.C. § 552 (b)(6) & (b)(7)(C) when the comparable average medium grocery store SNAP transaction amount in Sonoma County during the review period was \$19.58. These multiple transactions indicate that the amounts were contrived in an attempt to avoid suspiciously high transactions that would be indicative of trafficking by breaking them into multiple, smaller amounts. FNS transaction data shows that this same pattern of multiple transactions in unusually short time frames is not evident at other nearby like type grocery stores further supporting that trafficking was occurring at the Appellant firm during the period under review.

The Retailer Operation Division's shopping pattern analysis for households in this Attachment shows they have ready access to transportation as evidenced by their shopping at a variety of larger food stores located nearby and at a distance from Appellant's location, including a variety of super stores and supermarkets. Specifically, all of the households analyzed shopped at a super store and/or a supermarket 5 U.S.C. § 552 (b)(6) & (b)(7)(C) of transactions at the Appellant firm. Appellant fails to offer any explanation or rationale as to why households who are shopping and spending large dollar amounts at many larger and better stocked stores would conduct multiple purchases totaling to high dollar values at a moderately stocked store. Common sense dictates that it is improbable that households would choose to spend large dollar amounts at the Appellant firm if their purchases 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 therefore more likely than not that these households were trafficking SNAP benefits at the Appellant firm.

SNAP transactions involving legitimate food purchases require many steps: 1) the customer waiting for the previous customer to pick-up their purchases and leave the checkout; 2) the customer making multiple trips bringing items to the checkout counter for large purchases since

the firm has only four small shopping carts; 3) the cashier separating eligible from ineligible items; 4) the cashier handling individual items to determine the price, which in this case involves manual keying of amounts since there is no scanner; 5) the cashier weighing individual items if sold by weight; 6) the cashier entering prices into a register or adding machine, once for eligible foods and once for ineligible items, which is typical for larger purchases; 7) the cashier handling manufacturers cents-off coupons, if applicable; 8) the cashier bagging the items; 9) the cashier informing the customer of the totals (one for eligible foods and one for non-eligible items, if applicable, which for large purchases includes most transactions); 10) the cashier pressing the “SNAP transaction key” on the POS device/card reader; 11) the customer swiping their EBT card; 12) the customer entering their required PIN; 13) the cashier entry of the purchase amount; 14) the cashier confirming the customer has a sufficient benefit balance; 15) the transaction being processed by the system and receiving approval; 16) the cashier printing the EBT and cash register receipts; 17) the cashier accepting an alternate form of payment for nonfoods and possibly handling cash change; and 18) the customer removing products from the checkout so the next customer in line can begin the next transaction. All or most of these steps are inherent in legitimate large SNAP purchases. One can readily surmise that while such transactions may be completed in succession, performing these processes on large transactions is not done rapidly. The amount of time required is generally proportional to the dollar amount of the transaction; typically, the larger the dollar amount the longer the time period between transactions.

The Appellant firm processed transactions well in excess 5 U.S.C. § 552 (b)(6) & (b)(7)(C), markedly faster than supermarkets typically process purchases, yet the Appellant firm does not have an optical scanner or any of the logistical tools such as conveyor belts, rotating bagging platforms, or order separators that are routinely used in rapid throughput operations. It is therefore improbable that large dollar value transactions for the purchase of legitimate food items which would consist of a substantial number of lower priced items based on Appellant’s stock could be processed in the times listed in this Attachment given the facilities at the firm. The large transaction dollar amounts and the short interval between transactions in this Attachment demonstrate the improbability of these being legitimate eligible food purchases and suggest trafficking as the most likely explanation.

5 U.S.C. § 552 (b)(6) & (b)(7)(C). During the review period this household regularly shopped at two super stores, two supermarkets, and one other medium grocery store. Appellant offers no explanation as to why a household that regularly shops at larger stores would conduct multiple transactions at a moderately stocked medium grocery store that would have less selection and higher prices. There is no legitimate reason why this household would spend so much of its SNAP allotment at the Appellant firm when it clearly had access to and regularly shopped at supermarkets and super stores located nearby and at a distance. The more plausible explanation is that this household was trafficking. Other households analyzed exhibited similar shopping patterns indicative of trafficking.

There may be legitimate reasons why a SNAP household 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 to obscure trafficking by dividing a large dollar

value transaction into a series of smaller dollar value transactions and are a method which violating stores use to avoid high dollar transactions that cannot be supported.

High Dollar Value Transactions

This Attachment lists 242 individual EBT transactions 5 U.S.C. § 552 (b)(6) & (b)(7)(C). The substantial number of high dollar transactions is uncharacteristic for a grocery store offering a moderate stock of staple foods and calls into question the legitimacy of these transactions. 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

The evidence under review shows that SNAP households shopping at the Appellant firm are also shopping at many full-line supermarkets and super stores, located nearby as well as at a distance from Appellant's location that offer a greater quantity and variety of SNAP eligible foods items for better prices than customers can find at the Appellant firm. The high dollar value transactions remain questionable when considering the proximity of these other stores that would be better shopping options for consumers. Based on their 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 firm, where the eligible food stock is limited, 5 U.S.C. § 552 (b)(6) & (b)(7)(C) of their purchases at larger food stores.

FNS records show there were five comparably sized or larger SNAP retailers that included a supermarket and four medium grocery stores located within a one mile radius of the Appellant firm during the review period as well as two super stores and a supermarket located within 1.78 miles. The super stores and supermarkets would offer greater quantities and varieties of staple food items at lower prices than could be found at a moderately stocked medium grocery store. One of the nearby medium grocery stores is located within two blocks of Appellant's location.

5 U.S.C. § 552 (b)(7)(E). The unusually high number of SNAP transactions is an indication the firm may be dividing larger transactions into multiple smaller transactions in an effort to circumvent detection as previously discussed. A comparison of Appellant's SNAP redemptions to that of nearby like type stores having redemptions for the review period shows that none exhibit the same suspicious transaction patterns listed in the charge letter for the Appellant firm even though all are located in proximity to Appellant's location and would therefore be expected to share the same SNAP customer base and shopping patterns. This is further indication that the transactions in this Attachment and the previous do not represent legitimate food purchases. The Retailer Operations Division considered all of these to be indicators of unusual and suspicious activity.

The firm also has irregular SNAP transaction data compared to like type stores in Sonoma County. A comparison of Appellant's redemption data to Sonoma County medium grocery stores using ten dollar increments shows that Appellant's transaction count and dollar volume are significantly higher than the average of like type stores 5 U.S.C. § 552 (b)(7)(E) at which point transactions stop. It is worth noting that Sonoma County medium grocery stores begin averaging less than one transaction 5 U.S.C. § 552 (b)(7)(E). These large dollar transactions are considered to be irregular and suspicious based on the firm's food inventory. The Retailer Operations

Division determined there was no credible reason for the firm to have transactions at these dollar levels given the moderate stock of staple foods and the lack of any specialty, bulk, or ethnic foods that might sell for large dollar amounts and also considered this to be a strong indication of trafficking. None of Appellant's contentions explain these unusual and suspicious differences.

Appellant contends that on October 8, 2017, the area around the store was hit by multiple wildfires resulting in power losses for most of Sonoma by the next day. The immediate area around the store was the only area with power and the store was the only grocery open in Sonoma. The owners stayed open from 6:00 AM-11:00 PM to help the residents for three weeks and there were high transactions as people needed to stock up on meat, produce, dairy, eggs, and water. There were many evacuations, but EBT families could not afford hotels so they had to stay and continue shopping at the store to feed their families. During the wildfires (October 8-November 4, 2017), all of the other neighborhood stores had either lost power or evacuated. Sonoma County experienced a very large rental housing cost increase partly due to the wildfires. Because of this, the majority of low income Hispanics rely on SNAP for food. Up to now, the firm was one of the only stores in the County accepting SNAP and WIC, other small Hispanic stores do not. Additional square footage has been added for produce fridges, another meat fridge, and a walk-in for more meat/poultry. The store's merchandise is very unique and it is a full grocery store. It is the only Hispanic grocery carrying goat, sheep, lamb, ribs, pork loin, oysters, salmon, shrimp, chicken, and liver. Tickets are higher because of this variety. EBT families love these varieties and since they have large families, this results in high transactions that are not trafficking. During November 2017-March 2018, the store became well known and attracted more customers since it is a full grocery that accepts EBT and WIC. The owners decided to order more meat due to this and to the upcoming holidays. During these months the store ordered goat, filets, prime rib, shrimp, sweet bread, liver, etc. to be able to accommodate the busy time of year. The store is also known for its organic produce brought in twice weekly from San Francisco and there was a very big increase in sales of produce during this time frame. Appellant submitted newspaper articles on the wildfires, a listing of providers and items ordered from them, a monthly sales total for each month in the review period, and computer printouts from many vendors showing payments and credits in support of these contentions.

Regarding Appellant's contentions, FNS issues disaster SNAP (D-SNAP) benefits for recipients living in areas severely impacted by disasters, and also replacement SNAP benefits for recipients living in areas that have experienced power outages or structural damage that would have resulted in food spoilage or loss. A review of FNS records show that no D-SNAP or replacement SNAP benefits were issued in Appellant's area or zip code. Contrary to Appellant's contentions, there are two medium grocery stores located nearby that stock comparable quantities and varieties of staple foods including Hispanic foods. One of these stores is located within steps of Appellant's location while the other is located 0.53 miles away. FNS records show the closest store conducted SNAP transactions on all, but two days in October 2017 which was similar to its redemptions for September 2017 thus contradicting Appellant's contention that during the wildfires (October 8-November 4, 2017), all of the other neighborhood stores had either lost power or evacuated. Despite catering to the same Hispanic population, neither of these stores displayed the same irregular and suspicious transactions as the Appellant firm.

5 U.S.C. § 552 (b)(6) & (b)(7)(C). Appellant offers no evidence supporting the large event order discounts or to support housing cost increases and no explanation was offered to support how these increases would have resulted in the suspicious transaction patterns found at the Appellant firm. Lastly, the March 2018 store visit inventory report and numerous photos do not support Appellant's claim of unique meats and seafood such as goat, lamb, sheep, lobsters, or oysters being available for purchase.

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 store stock. A shopping pattern analysis by the Retailer Operations Division shows that households in this Attachment are regularly shopping at much larger stores, and conducting high dollar value transactions, yet are conducting comparable or higher dollar value transactions at the Appellant firm. It makes 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 firm since its cost of goods is higher than that of larger stores such as supermarkets or super stores.

Higher food prices make it even more unlikely that SNAP recipients, with very limited food benefits, would want to spend a considerable part of their benefits in a store that does not address all of their food 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 also offer store brand products at lower prices, weekly specials, and have shopping carts and checkouts with built-in scanners and conveyor belts to facilitate processing purchases quickly. Additionally, Appellant furnished no itemized cash register and EBT receipts for the period under review to document the legitimacy of these excessively large transactions and no evidence was provided of SNAP eligible store stock via receipts of products taken into inventory for the relevant review months. While Appellant did provide numerous printouts showing summary purchase information (purchase totals, dates, amounts paid, and so on), no actual invoices or receipts were provided listing the type and quantity of items purchased thereby making it impossible for FNS to conduct an inventory analysis to compare Appellant's potential sales revenues against SNAP redemptions for the review period. The firm also has a small checkout area and only four small shopping carts 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 many carts and more likely that the amounts were contrived.

It is further noted that SNAP redemptions at the Appellant firm fluctuated unusually following the March 27, 2018, FNS store visit and receipt of the charge letter on May 8, 2018. The volume of SNAP redemptions at the Appellant firm decreased 32.53 percent from March 2018 to June 2018 while the number of SNAP transactions decreased 24.79 percent during this same period and the average SNAP transaction dollar amount decreased 10.28 percent. A pronounced decrease in SNAP redemptions following receipt of the charge letter is a clear indication of trafficking since, if trafficking were not occurring, there would be no abnormal fluctuations in redemption amounts.

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

Other Contentions

In an appeal of an adverse action, the Appellant bears the burden of proving by a preponderance of evidence that the administrative action should be reversed. That means the 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. 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. A record of participation in SNAP with no previously documented instance of violations or 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 or for mitigating the impact of those charges.

The owners and the firm were charged with trafficking based on a computer analysis of the store's transactions for the review period. The charges do not derive from the use of a confidential informant or independent investigator who visited the store and made illegal purchases to support findings of trafficking, but by a computer program used by SNAP Administrators. While traditional undercover operations are still in use by USDA, for many years federal regulations have also authorized the use of evidence consisting of EBT transaction data in investigations of SNAP retail stores to determine if trafficking is occurring and U.S. District Courts have long upheld the validity of EBT transaction data.

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 disqualify 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". SNAP regulations at 7 CFR § 278.6(a) clearly state 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". In the present case, the data presented in the Attachments is solely based on the SNAP EBT transactions conducted at the Appellant firm during the review period. 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 review period. 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 photos from the FNS store visit, a transaction comparison and analysis of like type and larger stores, and analysis of shopping patterns for recipient households conducting transactions at the Appellant firm during the review

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

Based on this empirical data, and in the absence of sufficient evidence for the legitimacy of such transaction patterns, a conclusion can be drawn, through a preponderance of evidence that the “unusual, irregular, and inexplicable” transactions and patterns cited in the charge letter evidence trafficking as the most likely explanation for the questionable transactions listed. 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.

The Food and Nutrition Act of 2008, as amended, and the regulations issued pursuant thereto do not 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 and second chances are not an authorized option under existing regulations.

CIVIL MONEY PENALTY

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

The Retailer Operations Division determined that the Appellant was not eligible for a trafficking CMP in lieu of a disqualification under 7 CFR 278.6(i) because Appellant failed to request a 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.

Based on the above discussion and the evidence under review, 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 presented a case that Appellant has likely trafficked in SNAP benefits. Their 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 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. Based on the discussion above, the determination to impose a permanent disqualification against Appellant is sustained. Furthermore, the Retailer Operations Division properly determined that Appellant was not eligible for a trafficking CMP according to 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

December 13, 2018