

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

Union 1 Deli Corp,

Appellant,

v.

Case Number: C0204891

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 Union 1 Deli Corp (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 February 20, 2018.

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

By letter dated January 23, 2018, the Retailer Operations Division charged Appellant with trafficking based on a series of irregular SNAP transaction patterns that occurred in May 2017 through October 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 did not respond to the charge letter and no evidence was submitted to be considered in support of the CMP. The Retailer Operations Division notified Appellant by letter dated February 20, 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. The record further shows Appellant requested withdrawal from participation as a SNAP retailer on December 4, 2017. This occurred three days after FNS conducted a contracted visit of the Appellant business on December 1, 2017.

By letter dated February 27, 2018, Appellant, through counsel, appealed the Retailer Operations Division's assessment and requested administrative review. The appeal was granted. No subsequent correspondence 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 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 May 2017 through October 2017. This involved three patterns of EBT transaction characteristics indicative of trafficking:

1. There were an unusual number of transactions ending in a same cents value.
2. Multiple transactions were made from individual benefit accounts in unusually short time frames.
3. 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 attorney has the charge letter and determination letter. The owner never received the charge letter as it was sent to an address that he did not live or work at. The owner discontinued operation of the business on or about October 23, 2017, when he cancelled his permit and returned the EBT machine. The SNAP permit has the Boston Road address and is where the determination letter was received by the owner;
- Appellant requests that the firm be reinstated into the SNAP program as the USDA wrongfully concluded that the firm engaged in trafficking. This erroneous conclusion was based solely on a faulty analysis of records, with no additional or further investigation. The owner vehemently denies that he or anyone involved with or employed by the firm engaged in such activities;
- Appellant cites section 271.2 of SNAP regulations defining trafficking and section 278.6(d) on the basis for determination. As there are no specific violations by individuals of the firm and no warning by FNS, then the only basis for disqualification is the firm's intent to violate the regulations and there is no evidence that shows the firm's intent to violate the regulations;
- The business is open 6:00 AM-12:00 AM daily and 60 percent of sales are from SNAP. The owner would not jeopardize his source of business and livelihood by engaging in the illegal activity charged. The owner was born in Yemen and speaks/writes little English. During the period in question from May 2017 through October 2017, the owner was in the process of selling his business. The owner states he continuously trained and tested his employees on SNAP rules and regulations. He further instituted a training program by hiring a consultant to further train his employees. The owner has an unblemished record for the past five years as evidence of his continued compliance and his training/supervision of his employees. The store was always well-stocked with staple foods specifically designed to accommodate low income customers selling fruit, vegetables, and other cooking ingredients including rice, beans, and pasta. The store also sold a vast array of sandwiches which were one of the owner's best-selling items. The majority of store patrons are regular customers;
- As there is no other basis for disqualification, FNS should subject the owner to a CMP as disqualification would cause hardship to participating households. The business provides necessary items to the community composed of large families living in apartment complexes within a two block radius. The closest supermarket is a ¼ mile away and closes early in the evening. There is a great need for families to have access to infant and child care products after work and at all hours of the day including formula and baby food. Enfamil was a common item priced at \$20.00, \$24.99, and \$34.99 in the store and was sold in volume. There are no similar providers

in the immediate area and this disqualification would result in a hardship to the community;

- The owner's business model prices his sandwiches, his best-selling items, at .00 and soft drinks at .50 so there is nothing unusual about the transactions in a same cents value. The business model may not match the nationwide computer model used by FNS and cannot be used to permanently disqualify an owner without any other proof of wrongdoing;
- The suspicious multiple transactions were not unusual and were legitimate transactions for the store. Regular customers would often call and place a large grocery order and then purchase additional items in a separate transaction when they pick up their telephone order. They would also make purchases on their way home from picking-up their children at school or to and from church. Some recipients allow others to use their card or they themselves use their card for other families. Most do not own cars, but live in the immediate area and have to make multiple trips to carry heavy shopping bags to their apartments. It is not credible that the owner would risk permanent disqualification by allowing 26 flagged transactions in 12 sets totaling a mere 5 U.S.C. § 552 (b)(6) & (b)(7)(C). It is incumbent on FNS to consult with individual card holders to ascertain whether their usage was in accordance with FNS rules and regulations;
- Many of the large purchases were made immediately after benefits were added by well- established customers placing large advance orders and paying for it when they pick it up or have it delivered. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). During hot weather, customers will also buy in bulk to avoid having to go out numerous times. The residents do not prefer to shop at the larger supermarkets as they are crowded with long lines selling the same items for similar prices. In New York City, the use of a grocery store to fulfill shopping needs is a cultural way of life as the groceries are closer, more convenient, open longer, and competitively priced, if not cheaper, than large supermarkets. Again, the owner would not risk disqualification for the sum of the 135 violative transactions. It is ludicrous for FNS to refuse to allow an owner to sell large containers of Enfamil without risking allegations of trafficking;
- The use of EBT records is inadequate, not based on fact, and the conclusions are unfounded and without merit. The decision to permanently disqualify the owner based on inadequate proof will deprive this owner of his business and cause irreparable injury and damage. The charges are unsubstantiated accusations without merit and deprive the owner of due process. The charges are based on a predetermined standard of EBT activity for this type of firm and FNS has failed to investigate and set forth which of the precise transactions constitute trafficking. FNS also has failed to establish intent which is an essential element of the basis for determining permanent disqualification; and,
- FNS should be investigating the cardholders to determine whether they are misusing SNAP as it is not the responsibility of the owner to deny EBT services. It is further submitted that where an owner's livelihood relies

substantially from the store that SNAP redemptions should not be disqualified for any period.

Appellant submitted a copy of the firm's SNAP license showing an effective date of December 30, 2016, in support of these contentions.

ANALYSIS AND FINDINGS

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

FNS authorized the business as a convenience store on December 30, 2016. The case file indicates that in reaching a disqualification determination, the Retailer Operations Division considered information obtained during a December 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 business's suspicious SNAP transactions. The store visit documented the following store size, description, and characteristics:

- The business was a very small store offering a marginal quantity and variety of staple foods and carrying no unique items or offering any distinctive services.
- The business had a very limited stock of Hispanic products (e.g. Goya, La Morena) as well as many traditional American brands.
- Extensive exterior signage advertised breakfast, lunch, dinner, hot & cold sandwiches, wraps, paninis, quesadillas, cold beers, ATM, NY lottery, hot breakfast sandwiches, and smoothies.
- There were no shopping carts or handheld baskets for customer use seen during the visit making it difficult for customers to carry large amounts of food to the checkout.
- The checkout area was the top of a display case containing candy and was approximately one foot deep by three feet wide. Much of the space was taken-up by various displays as well as two PIN pads leaving minimal space for purchases. The small size of the checkout would make it problematic to process large orders. The checkout had one cash register, one POS terminal, and no optical scanner as confirmed by a store employee.
- 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 business is not a specialty store and that there are no meat bundles or fruit and vegetable boxes for sale.
- The marginal stock of staple foods included many single serving and pre-packaged items with a large portion of inventory in accessory foods (candy, spices, condiments, and drinks), snacks, and ineligible items.
- The store had a large refrigerated deli display case and a kitchen/food prep area containing a cooktop grill, commercial exhaust hood, commercial slicer, deep fat fryer, prep tables, microwave oven, etc. Large menu boards and other signage advertised a wide variety of hot/cold prepared foods, sides, salads, hot drinks, and hot breakfast items. Per a store employee, store staple food stock such as deli meats and cheeses were being used in the preparation of the hot/cold, ready-to-eat prepared foods and the items in a chest freezer (hamburger patties, sausage patties, frozen fruits, French fries, etc.) were for deli use only and not for sale to the public.
- The store had no fresh unprocessed meats/seafood, no frozen unprocessed meats/seafood, an extremely limited quantity and variety of processed meats and seafood (deli meats, canned meat/poultry/fish, and jerky), no packaged lunch meats, no hot dogs, no bacon, no frozen entrees, no frozen dinners, no eggs, no fresh fruits or vegetables except for a small bowl of apples at the checkout and onions, no frozen fruits or vegetables, no 100 percent vegetable juices, a marginal quantity and variety of canned and packaged staple food items, no packaged cheeses, no yogurt, no sour cream, no butter (only margarine), no baby cereals or juices, no infant formula, no corn meal, the only bread/rolls were those being used for hot/cold ready-to-eat foods, no tamales, no tortillas, no pitas, no hot cereals, no cocoa, and few expensive staple food items.
- Ineligible items included: tobacco, alcohol, hot foods, hot drinks, household products, paper products, pet products, health and beauty items, ATM/money transfer, diapers, cell phone accessories, and candles while accessory foods included: candy, spices, condiments, coffee, tea, cooking oil, sugar, drinks, cold sandwiches, and deli salads.
- Signage was in English and there were no SNAP posters (anti-fraud, eligible items, reporting trafficking, etc.) visible in the store.
- The business's hours of operation were 6:00 AM-12:00 AM daily as confirmed by a store employee. The employee also stated that the business did not take telephone or online grocery orders, did not delivery groceries, and did not round prices up/down.
- Many food items were priced with all visible staple food prices ending in .x9 cents except for hot foods and drinks that are not eligible for purchase using SNAP. 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 items costing more than \$5.00 for sale in the store as being deli meat at \$9.96 per pound (\$2.49 for a ¼ pound per sign on deli case), deli cheese at \$9.96 per pound (\$2.49 for a ¼ pound per sign on deli case),

deli salads at \$6.99 each, and deli cold sandwiches at \$5.99 each. This listing of the most expensive items was provided by a store employee during the store visit.

- The store was a not a WIC vendor. While the business did stock several jars of baby food, most SNAP households with infants or small children are WIC participants and therefore would be purchasing these products using WIC vouchers, not SNAP EBT.
- The quantity and variety of the store's staple food inventory was less than that seen during the previous FNS store visit on December 22, 2016.

Unusual numbers of transactions ending in a same cents value

This attachment lists 467 transactions **5 U.S.C. § 552 (b)(6) & (b)(7)(C).**
5 U.S.C. § 552 (b)(6) & (b)(7)(C).

When such repetitive patterns are unsupported by special pricing structures they are a strong indicator of trafficking in SNAP benefits. The FNS store report and photographs revealed no signs posted to indicate special food packages, bundles, case sales, or other sales that would explain the unusual number of transactions ending in these same cents values and no bulk items were available for purchase. The high percentage of same cent transactions combined with the large number of same cents high dollar transactions is irregular and suspicious for this type store.

Appellant contends that the store owner's business model prices his sandwiches, his best-selling items, at .00 and soft drinks at .50 so there is nothing unusual about the transactions in a same cents value. The business model may not match the nationwide computer model used by FNS and cannot be used to permanently disqualify an owner without any other proof of wrongdoing.

The inventory report and photographs from the FNS store visit show the Appellant business offers a marginal stock of staple foods. Additionally, the business was noted as carrying few expensive eligible food items making it questionable that such a large number of high dollar SNAP transactions could be for legitimate food purchases. Contrary to Appellant's claim of sandwiches priced at .00 cents, FNS photographs of the numerous posted menus show cold sandwiches and cold salads with prices ending in .99 cents. There are several hot foods with prices ending in .00 and .50 cents; however, hot foods may not be purchased using SNAP benefits. The store visit report also specifically notes that Appellant's pricing structure has food prices ending in .x9 cents which was confirmed by the many photographs included with the report. The purchase of several items with prices ending in .x9 cents would most likely not result in a total ending in a same dollar amount of .00, .50, .75, or .99 cents as multiples of nine seldom have a value ending in these amounts making it statistically impossible that this many store transactions would end in these amounts with legitimate food purchases.

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

Multiple transactions in unusually short time frames

This Attachment documents 26 individual transactions in 12 sets of two or more transactions conducted by 11 different households in a short period of time. **5 U.S.C. § 552 (b)(6) & (b)(7)(C).**

Two sets are comprised of three individual transactions and the remaining 10 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 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 contends the suspicious multiple transactions were not unusual and were legitimate transactions for the store. Regular customers would often call and place a large grocery order and then purchase additional items in a separate transaction when they pick up their telephone order. They would also make purchases on their way home from picking-up their children at school or to and from church. Some recipients allow others to use their card or they themselves use their card for other families. Most do not own cars, but live in the immediate area and have to make multiple trips to carry heavy shopping bags to their apartments. It is not credible that the owner would risk permanent disqualification by allowing the sum of 26 flagged transactions in 12 sets. It is incumbent on FNS to consult with individual card holders to ascertain whether their usage was in accordance with FNS rules and regulations.

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 convenience store's stock and facilities and are thus indicative of trafficking. **5 U.S.C. § 552 (b)(6) & (b)(7)(C).** These transaction sets also do not contain the characteristics of a household returning later in the day to purchase a forgotten item or two as all 12 sets have subsequent transactions

5 U.S.C. § 552 (b)(6) & (b)(7)(C), far more than the cost of a forgotten item or two.

It is certainly not unusual for a small number of SNAP households to conduct multiple transactions in a short period of time. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). 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 business during the period under review.

FNS store visit reports contain specific questions that are asked of store employees during store visits. These include questions such as whether the business offers telephone/online ordering or delivery. The December 1, 2017, report for the Appellant business explicitly states that the business does not allow telephone orders or offer delivery.

The Retailer Operation Division's analysis of the shopping patterns for households listed in this Attachment shows that 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. Appellant's contentions fail 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 marginally stocked store. Common sense dictates that it is improbable that households would choose to spend large dollar amounts at the Appellant business 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 business.

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 135 individual EBT transactions 5 U.S.C. § 552 (b)(6) & (b)(7)(C). The substantial number of high dollar transactions is uncharacteristic for a convenience store of this size offering a

marginal stock of staple foods and calls into question the legitimacy of these transactions. The SNAP transactions listed are substantially higher than the average SNAP transaction amount of \$7.99 for this store type in New York County. The 135 excessively large SNAP EBT transactions represent more than 45.7 percent of all SNAP redemptions at Appellant's business during the review period. This is unusual and indicative of trafficking.

The evidence under review shows that SNAP households shopping at the Appellant business 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 business. The large dollar 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 business, where the eligible food stock is limited, **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** of their purchases at larger food stores.

Evidence shows the business has irregular SNAP transaction data as compared to like type stores in New York County. **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. This unusual spike does not appear in the transaction count and dollar volume averages for other New York County convenience stores. These high dollar transactions are considered to be irregular and suspicious based on the Appellant store's food inventory and pricing. The Retailer Operations Division determined there was no credible reason for the Appellant business to have these numbers of transactions at high dollar levels given the marginal stock of staple foods and the lack of any specialty, bulk, or ethnic foods that might sell for high dollar amounts and therefore considered this to be a strong indication of trafficking. None of Appellant's contentions explain these unusual and suspicious differences.

A comparison by the Retailer Operations Division of Appellant's SNAP redemptions to that of nearby like type stores that had redemptions for the review period shows similar differences. Additionally, none of these nearby stores exhibit the same suspicious transaction patterns listed in the charge letter even though all are located in proximity to Appellant's location and would be expected to share the same SNAP customer base and shopping patterns. This is a further indication that the SNAP transactions in this Attachment and the others do not represent legitimate food purchases. The Retailer Operations Division considered all of these to be indicators of unusual and suspicious activity.

Appellant contends many of the large purchases were made immediately after benefits were added and resulted from well-established customers placing large advance orders and paying for it when they pick it up or have it delivered. **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. During hot weather, customers will also buy in bulk to avoid having to go out numerous times. The residents do not prefer to shop

at the larger supermarkets as they are crowded with long lines selling the same items for similar prices. In New York City, the use of a grocery store to fulfill shopping needs is a cultural way of life as the groceries are closer, more convenient, open longer, and competitively priced, if not cheaper, than large supermarkets. Again, the owner would not risk disqualification for the sum of the 135 violative transactions. It is ludicrous for FNS to refuse to allow an owner to sell large containers of Enfamil without risking allegations of trafficking. Additionally, the store was always well- stocked with staple foods specifically designed to accommodate low income customers selling fruit, vegetables, and other cooking ingredients including rice, beans, and pasta. The store also sold a vast array of sandwiches which were one of the owner's best-selling items. The majority of store patrons are regular customers.

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 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 business since its cost of goods is higher than that of larger stores such as supermarkets or super stores.

Information obtained during the FNS store visit on December 1, 2017, shows that the Appellant business is a very small store of approximately 800 SF that offers a marginal quantity and variety of SNAP eligible staple food items, many accessory foods, and many ineligible items. Much of the inventory for sale consists of inexpensive snacks, candy, spices, condiments, beverages, and single serving foods as well as many ineligible items. Since the Appellant business offers no fresh unprocessed meats/seafood, no frozen unprocessed meats/seafood, an extremely limited quantity and variety of processed meats and seafood (deli meats, canned meat/poultry/fish, and jerky), no packaged lunch meats, no hot dogs, no bacon, no frozen entrees, no frozen dinners, no eggs, no fresh fruits or vegetables except for a small bowl of apples at the checkout and onions, no frozen fruits or vegetables, no 100 percent vegetable juices, a marginal quantity and variety of canned and packaged staple food items, no packaged cheeses, no yogurt, no sour cream, no butter (only margarine), no baby cereals or juices, no infant formula, no corn meal, the only bread/rolls were those being used for hot/cold ready-to-eat sandwiches, no tamales, no tortillas, no pitas, no hot cereals, no cocoa, and few expensive staple food items, these patterns are deemed to be suspicious. The fact that tobacco, alcohol, hot foods, hot drinks, household products, paper products, pet products, health and beauty items, ATM/money transfer, diapers, cell phone accessories, and candles are not eligible for purchase with SNAP benefits also provides no justification for the high transaction amounts.

As previously discussed, the Appellant business does not offer telephone ordering or delivery so Appellant's assertions relating to these are without merit. Furthermore, Appellant's contention that SNAP residents do not prefer to shop at supermarkets is unsubstantiated as are the claims that the Appellant business was always well stocked with fruits, vegetables, rice, beans, and pasta. The analysis of shopping patterns conducted by the Retailer Operations Division shows that the same households shopping at the Appellant business are also regularly shopping at larger stores including super stores and supermarkets located nearby and at a distance. Specifically, 134 of the 243 households listed in the charge letter shopped at a super store or supermarket 5 U.S.C. § 552 (b)(6) & (b)(7)(C) of having conducted a suspicious transaction at the Appellant business. These include the super store located 280 yards from Appellant's location and the two supermarkets located 334 and 440 yards away. The FNS store visit report also refutes Appellant's claims by showing that the Appellant business stocks an extremely limited selection of fresh fruits and vegetables consisting of a small bowl of apples at the checkout counter and a minimal quantity of onions, no frozen fruits and vegetables, only canned beans (no dried beans), four boxes of dry pasta (thin spaghetti only), canned pasta, and no infant formula. Even if the business stocked infant formula, most SNAP households with infants or small children are WIC participants and therefore would be purchasing these products using WIC vouchers at WIC vendors, not SNAP EBT at the Appellant business. There is a WIC vendor in the middle of Appellant's block less than a one minute walk away as well as a large grocery store offering SNAP and WIC located 334 yards away that is open until 10:00 PM daily. Whether the owner would or would not risk disqualification for the sum of the 135 violative transactions does not provide a basis to support the legitimacy of the listed transactions in this Attachment.

Increasing 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 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 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. The Appellant business has a small checkout area and no shopping carts thereby making it difficult to facilitate the great quantities of eligible food items required to make up these high dollar transactions. Therefore, it is improbable that the food items purchased in these large 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.

Other Contentions

It is important to state that this review encompasses and documents the examination of the primary and relevant information in this case, the purpose of which is to determine whether Appellant demonstrates, by a preponderance of the evidence, that the disqualification should be reversed. In this case, if Appellant demonstrates by a preponderance of evidence that it did not engage in trafficking SNAP benefits, then such transactions will be considered legitimate and the disqualification reversed. If 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 involvement in store operations, ownership is accountable for the proper training of staff and the monitoring and handling of SNAP 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. While Appellant claims five unblemished years of SNAP operations, the business was not authorized until December 2016.

With regards to Appellant's contention that FNS should be looking into the SNAP recipients conducting the transactions listed in the Attachments, no ruling will be rendered as the scope of this review is limited solely to the factors pertaining to the permanent disqualification of the Appellant business. Therefore, Appellant's contention regarding recipients cannot be used to reverse or mitigate the decision of the Retailer Operations Division.

Contrary to Appellant's interpretation, the three criteria in SNAP regulations at section 278.6(d) are not bases to be met in order for a firm to be disqualified, but are factors that FNS considers in determining the appropriate sanction level for firms that have violated SNAP regulations and could include temporary or permanent disqualification. 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 firms that have not received warnings or previously been sanctioned. SNAP regulations do not require evidence of intent in order to disqualify a retail store for trafficking.

Records show 97 SNAP retailers located within a 0.5 mile radius of Appellant's location that includes three super stores, three supermarkets, four large grocery stores, and a large number of smaller and specialty stores. These also include two small grocery stores within 88 yards of Appellant's location. Appellant's claim

that the nearby supermarket closes in the early evening is incorrect. A check of store web sites shows that the nearby super store is open until 9:00 PM Monday-Saturday while the nearest supermarket is open until 10:00 PM Monday-Friday.

Appellant has offered no evidence that the owner discontinued operation of the business on or about October 23, 2017, when it alleges the owner cancelled his permit and returned the EBT machine. This claim is refuted by the facts that the owner did not request to be withdrawn as a SNAP retailer until December 4, 2017, Appellant's POS device was in operation until December 5, 2018, and that FNS records contain a Bill of Sale dated December 15, 2017, from the purchaser of the business thereby disputing Appellant's contentions that the business closed in October 2017. That the Appellant business was sold on December 15, 2017, has no bearing on the outcome of the trafficking investigation that resulted in the permanent disqualification.

The owner and the business were charged with trafficking based on a computer analysis of the store's transactions for the months of May 2017 through October 2017. 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.

The issue under review involves a charge of trafficking SNAP benefits based on EBT transaction data. 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**" (Emphasis added). In the present case, the data presented in the Attachments is solely based on the SNAP EBT transactions conducted at the Appellant business 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 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, a transaction comparison and analysis of like type and larger stores, and analysis of shopping patterns for recipient households conducting transactions at the Appellant business during the review period. This analysis also included a review of the business to ensure its store classification was correct and the data comparisons with like type firms valid. Additionally, there are nearby like type stores whose transaction data does not form these suspicious patterns and are therefore not at risk of disqualification for trafficking. There is also no regulatory requirement that trafficking disqualifications be based solely on on-site undercover operations.

Based on this empirical data, and in the absence of sufficient evidence for the legitimacy of such transaction patterns, a conclusion can be drawn, through a preponderance of evidence that the “unusual, irregular, and inexplicable” transactions and patterns cited in the 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.

The evidence under review shows SNAP activity indicative of trafficking. Neither the Food and Nutrition Act of 2008, as amended, nor the regulations issued pursuant thereto cite any minimum dollar amount of cash or SNAP benefits, or number of occurrences, for such exchanges to be defined as trafficking. Nor do they cite any degrees of seriousness pertaining to trafficking of SNAP benefits. Trafficking is always considered to be the most serious violation, even when the exchange of SNAP benefits for cash is dollar-for-dollar or is conducted by a non-managerial store clerk. This is reflected in the Food and Nutrition Act, which reads, in part, that disqualification “shall be permanent upon the first occasion of a disqualification based on trafficking by a retail food store.” In keeping with this legislative mandate, Section 278.6(e)(1)(i) of the SNAP regulations states that FNS shall disqualify a firm permanently if personnel of the firm have trafficked. There is no agency discretion in the matter of what sanction is to be imposed when trafficking is involved and second chances are not an authorized option under existing regulations.

It is recognized that some degree of economic hardship is a likely consequence whenever a store is disqualified from participation in SNAP. However, there is no provision in the SNAP regulations for waiver or reduction of an administrative penalty assessment on the basis of possible economic hardship to the firm or to ownership resulting from imposition of such penalty. To allow ownership to be excused from an assessed administrative penalty based on purported economic hardship to the firm would render virtually meaningless the enforcement provisions

of the Food and Nutrition Act of 2008, as amended, and the enforcement efforts of the USDA. Furthermore, giving special consideration to economic hardship to the firm would forsake fairness and equity, not only to competing stores and other participating retailers who are complying fully with program regulations, but also to those retailers who have been disqualified from the program in the past for similar violations. Therefore, ownership's contention that the firm may incur economic hardship based on the assessment of an administrative penalty does not provide any valid basis for dismissing the charges or for mitigating the penalty imposed. The fact that store ownership sold the business prior to the permanent disqualification also removes any possibility of economic hardship resulting from the disqualification.

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 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.

No documentation or other evidence was 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 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 three 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

May 23, 2018