

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

Victoria’s Market,

Appellant,

v.

**Office of Retailer Operations and
Compliance,**

Respondent.

Case Number: C0177088

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 Office of Retailer Operations and Compliance to impose a permanent disqualification against Victoria’s Market (hereinafter Appellant) from participating as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP).

ISSUE

The issue accepted for review is whether the Office of Retailer Operations and Compliance 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 October 24, 2019.

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 April 20, 2015, the Office of Retailer Operations and Compliance charged Appellant with trafficking based on a series of irregular SNAP transaction patterns that occurred in June through November 2014. The letter noted that the penalty for trafficking is permanent disqualification as provided by 7 CFR § 278.6(e)(1). The letter also noted that the Appellant could request a trafficking civil money penalty (CMP) in lieu of a permanent disqualification within ten days of receipt under the conditions specified in 7 CFR § 278.6(i).

Appellant, through counsel, responded to the charges in a letter dated May 1, 2015, that did request a CMP, but contained no supporting documentation. This response also contained a Freedom of Information Act (FOIA) request. FNS responded to the FOIA request in a letter dated July 7, 2015, that was received by counsel on July 8, 2015. Appellant appealed the FOIA response and work on the case was suspended. FNS responded to the FOIA appeal in a letter dated September 16, 2019, that was received by counsel on September 20, 2019. A reminder notice was sent to counsel by the Office of Retailer Operations and Compliance on September 23, 2019, providing notification that any additional information must be received within 10 days. No additional information was received and the Office of Retailer Operations and Compliance notified Appellant by letter dated October 24, 2019, 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 November 1, 2019, Appellant, through counsel, appealed the Office of Retailer Operations and Compliance's assessment and requested administrative review. The appeal was granted. Appellant obtained new counsel and was approved for an extension of time to submit additional information. Subsequent correspondence was received from both attorneys.

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 June through November 2014. This involved four patterns of EBT transaction characteristics indicative of trafficking:

1. There were an unusual number of transactions ending in a same cents value.
2. Multiple purchase transactions were made too rapidly to be credible.
3. Multiple transactions were made from individual benefit accounts in unusually short time frames.
4. 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 same cents transactions in Attachment 1 occur over a six month period averaging less than two .50 cents transactions per day. Considering the store is open 14 hours per day that’s less than one every seven hours. It’s amazing that these do not appear more often given the number of items such as energy drinks, soda, chips, and candy that end in .50 cents. Additionally, there are a number of items with prices ending in .00 and .50 cents that result in an overabundance of transactions that must by the laws of mathematics end in either .00 or .50. The Department arbitrarily selected just .00 and .50 with no information provided on the rate of occurrence of other number sets such as .10, .20, etc. which would be simple to ascertain whether the transactions in Attachment 1

are the result of exploitation or random occurrence. The paucity of information on the transactions reflects the specious nature of the charge;

- Attachment 2 alleges that multiple withdrawals by recipients were too rapid to be credible. Of these, 20 occurred over more than an 5 U.S.C. § 552 (b)(6) & (b)(7)(C) period thereby undercutting any claim of them being in unusually short timeframes. Owners are unable to prevent recipients from using their benefits at any time or in any manner of their choosing. There are times when a family member lends the card to another member resulting in multiple short term withdrawals. There are also recipients who have life issues and are not as organized or skilled as average individuals. The owner has seen a person make a purchase and shortly thereafter make another because of their inability to conceptualize in a clear and rational manner what is needed to sustain him or her. Some recipients purchase only what they can carry and return within hours to purchase the balance;
- The allegations of excessively large purchases in Attachment 3 are because the business is a large well stocked store with a substantial variety of goods that, in some cases, are relatively expensive. The store sells meats, infant formula, and energy drinks, all of which are costly, so it is no surprise that some transactions that seem excessively large are in fact just ordinary payments for SNAP items. A quick analysis of this Attachment shows that 46 percent of transactions are less 5 U.S.C. § 552 (b)(6) & (b)(7)(C). The most comprehensive government study of average EBT purchases (Analysis of EBT Benefit redemption Patterns: Methods for Obtaining, Preparing, and Analyzing the Data, FNS USDA November 2005) documents that approximately 16 percent of all EBT purchases 5 U.S.C. § 552 (b)(6) & (b)(7)(C). EBT purchases at the store amount to similar percentages when compared to total sales meaning the store is in line with what would be predicted by the government's own research. Also, a small grocery's pricing structure is very different than a large supermarket that counts on volume to make a reasonable return on capital. Small stores require a substantial inventory mark-up to justify the investment. The National Association of Convenience Stores Annual Report shows that the typical mark-up for SNAP eligible items in a small store is 65 percent. The owner states that Hartford supports a markup of 100 percent that results in larger than expected sales;
- Case law supports that vendors have a property interest subject to constitutional protection in continued SNAP participation and cannot be deprived of this interest without due process. Further, an administrative penalty must be set aside if it is arbitrary or capricious. A factual predicate for a finding of trafficking does not exist and a permanent disqualification is both unwarranted and in violation of regulations and case law. A careful review of the evidence and rationale demonstrates by a preponderance of the evidence that the disqualification should be reversed;
- The time delays in this matter have deprived the owner of due process since more than five years have elapsed since the dates in the charge letter. The substantial delay impairs the ability to respond factually to the charges to disprove them. While the USDA cites hundreds of transactions going back over five years, the untimeliness of notice to the owner resulted in an inability and lack of opportunity to fairly oppose the finding. In addition to the factual and statistical anomalies and inconsistencies cited in the January 10, 2020, response, due to the lengthy lookback period, the owner's records regarding these transactions are unavailable. Timely notice would have allowed research into what

the myriad purchases were for, the recipients making the purchases, the pricing, and other elements of the transactions alleged in the materials. The receipts, price lists, and other documentation from 2014 were unavailable by the time the charge letter was received in 2015 and the requested backup information was provided much later. Years after the fact, these records cannot be researched;

- The delay between the transactions and the charge letter notice deprived the owner of due process rights to continued program participation and this lack of notice has resulted in her inability to respond factually and has resulted in irreparable injury. USDA has not proven that the market failed to comply with regulations, and has not established abuse except by using old statistics taken out of context without regard for scenarios that occur frequently in such neighborhoods and with the recipient clientele. The owner has clearly been deprived of her rights without the opportunity to fairly oppose the proceedings;
- The disqualification has and will have a severe impact on the business due to the type of clientele, the location of the business, and the high number of SNAP recipient customers and could put the store out of business. The owner has an interest in continued SNAP participation, yet the time limits have eliminated any reasonable opportunity to respond in writing to the allegations because of the loss of evidence needed to do so. The alleged same cents transactions could easily be explained and itemized if those transactions were available. Timely notice would have allowed research of the records to establish exactly what was purchased as well as the pricing at that time. The multiple withdrawals could also be itemized with such records. Such records would establish that a customer may have purchased groceries and returned later for an additional items or bought a beverage on the way out after buying groceries. The large transactions also could be substantiated with records that are not available more than three years after the date of the charge letter;
- The owner denies the allegations that trafficking took place at her business and requests a CMP in order to preserve her rights under Section 278.6(f)(1) in lieu of permanent disqualification. Her disqualification would cause hardship to SNAP households because there is no other SNAP retailer in the area selling as large a variety of staple foods at comparable prices. The owner also has an effective compliance program that has been in effect since 2008 when the store was purchased and the fact that there have been no incidents is proof of the efficacy of the policy and program. All employees are trained shortly after being hired and the owner continues to monitor them until they exhibit a firm grasp of the precepts noted herein. There have been two employees during the last year and the owner has insured that each individual working the cash register has a firm grasp of what is eligible under SNAP and knows how to handle the transactions. The owner was not aware of, did not approve, did not benefit from, or was not in any way involved in the conduct or approval of trafficking violations. This is a small family business that is closely supervised and the owner would not tolerate any violations; and,
- If the Department should feel that the owner did engage in other practices inimical to the regulations, it is requested that a lifetime disqualification be mitigated and a disqualification period in accordance with those for non-trafficking offenses be imposed. A short disqualification period of approximately three months is requested.

Appellant submitted no evidence or other rationales in support of these contentions.

ANALYSIS AND FINDINGS

Stores caught in trafficking violations consistently display particular, characteristic transaction patterns including those cited in the charge letter. 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. Without supporting evidence and rationale, assertions that the firm has not violated program rules do not constitute valid grounds for overturning the determination.

In the absence of 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 evidence trafficking as the most likely explanation. Each Attachment furnished with the charge letter represents the questionable and unusual patterns of SNAP transactions indicative of trafficking which were conducted at the Appellant firm 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 June 20, 2008. The record indicates that in reaching a disqualification determination, the Office of Retailer Operations and Compliance considered information obtained during an August 21, 2014, 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 transactions. The store visit documented the following store size, description, and characteristics:

- The firm was a small convenience store offering a very minimal quantity and variety of staple foods and carrying no unique items or offering any distinctive services. The store stocked traditional American brands as well as a limited variety of canned and packaged Hispanic foods. There were no other ethnic or specialty food items.
- The store visit report and photos showed no shopping carts and a small number of handheld baskets for customer use. The baskets were shoved in between a cooler and the wall with a floor mat stuffed into the top basket indicating they were not used often.
- No food packages, bundles, case sales, bulk items, or other sales were evident that would explain the unusual transactions and no SNAP eligible cased items were available for purchase.
- The store visit report specifically noted that the firm was not a specialty store and that there were no meat packages, fish specials, or fruit and vegetable boxes for sale.
- The only checkout area was an opening approximately 1.0 foot wide and 1.0 foot deep set into a plastic display wall with food displays on both sides leaving a very limited area for customers to place their purchases. There also was a large ice cream freezer directly in front of the checkout area that customers must reach over in order to place their purchases onto the checkout counter and combined with the very small checkout area would make it problematic to process large orders. The checkout area had one cash register, a POS terminal, and no optical scanner as confirmed by the store clerk.

- The firm had a very minimal stock of staple foods that also included many single serving and pre-packaged items with a significant portion of inventory in soda, candy, snacks, other drinks, and ineligible items, particularly hot prepared food items.
- There was a commercial kitchen/food preparation area with a posted menu listing the available hot/cold foods as well as a posted price list with the per pound prices for the deli meats and cheeses. It appears that store staple food stock (deli meats, deli cheeses, fresh vegetables, etc.) is being used in the preparation of the hot/cold prepared foods.
- The firm had no fresh or frozen unprocessed meat, no fresh or frozen unprocessed seafood except for a few packages of Pollock, several boxes of Goya dried seafood, a limited quantity and variety of processed meats and seafood (canned meat, poultry, and fish; bacon; hot dogs; sausages; deli meats; processed brown and serve sausages; processed chicken wings; six small canned hams; and jerky), no frozen dinners, no frozen entrees, eggs, no fresh fruit except for six limes and several bananas, a very limited quantity of fresh vegetables (lettuce, tomatoes, onions and green peppers) that were being used in the preparation of the hot and cold foods, no frozen fruit, a very limited quantity and variety of frozen vegetables (corn cobs, mixed vegetables, and broccoli), dried beans, raisins, no other dried fruit or vegetables, no packaged nuts, 100 percent fruit and vegetable juices, several packaged fruit cups, canned soups, a minimal quantity and variety of canned and packaged staple food items, deli cheese, packaged cheese, no single serving cheese, no yogurt, no single serving yogurt, no single serving yogurt drinks, no butter, margarine, no sour cream, fresh milk, one single serving fresh milk, canned milk, no half & half, coconut milk, no soy milk, no Lactaid milk, no powdered milk, no single serving milk drinks, no cottage cheese, no cream cheese, bread, rolls, tortillas, no pitas, no tostadas, corn meal, AP flour, corn flour, sugar, rice, cold cereal, no single serving cold cereal, hot cereal, no single serving Ramen noodle soup, canned pasta, no single serving pasta, dry pasta, no dry noodles, no pancake mix, baking mixes, mac&cheese, single serving mac&cheese, no cold ready-to-eat sandwiches, a variety of frozen heat and eat single serving foods (small pizzas, breakfast items, pot pies, waffles, and pizza rolls), cooking oil, coffee, no tea, no cocoa, no spices, baby cereal, baby foods, infant formula, soy infant formula, and very few expensive staple food items.
- Ineligible items included: tobacco, alcohol, household products, paper products, hot foods, ATM, health and beauty items, and electronics accessories while accessory foods included: candy, condiments, snacks, baked goods, cooking oil, baking mixes, sugar, single serving ice cream, coffee, and un/carbonated drinks.
- The firm's hours of operation, as confirmed by the clerk, were open 24/7.
- Signage was in English and Spanish and there were no SNAP posters (anti-fraud, eligible items, reporting trafficking, etc.) visible in the store.
- Most food items were priced and the many FNS store visit photos showed that most food prices end in .x9 cents. A price ending in .x9 cents is the most common pricing structure for stores of this type.
- While the firm did stock infant formula and baby foods, it was not a WIC vendor. Most SNAP households with infants or small children are WIC participants and therefore would be purchasing these baby foods, formula, and other WIC products using WIC vouchers at a WIC vendor, not SNAP EBT at the Appellant firm.

Unusual numbers of transactions ending in a same cents value

This Attachment lists 1,250 transactions with 979 transactions ending in the same cents value of .00 and 271 transactions ending in the same cents value of .50 cents.

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 visit photos 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 cents transactions combined with the large number of same cents high dollar transactions is irregular and suspicious for this type store.

Appellant contends the same cents transactions in Attachment 1 occur over a six month period and average less than two .50 cents transactions daily. Considering the store is open 14 hours a day that's less than one every seven hours. It's amazing these do not appear more often given the number of items such as energy drinks, soda, chips, and candy that end in .50 cents. Additionally, there are a number of items with prices ending in .00 and .50 cents that result in an overabundance of transactions that must by the laws of mathematics end in either .00 or .50. The Department arbitrarily selected just .00 and .50 with no information provided on the rate of occurrence of other number sets such as .10, .20, etc. which would be simple to ascertain whether the transactions in Attachment 1 are the result of exploitation or random occurrence. The paucity of information on the transactions reflects the specious nature of the charge.

Contrary to Appellant's assertions, the inventory report and numerous photos from the 2014 FNS store visit show the Appellant firm offering a very limited stock of staple foods that included no fresh or frozen unprocessed meats or seafood except for a few packages of Pollock, no fresh fruits other than six limes and several bananas, no fresh vegetables other than those being used in the preparation of hot and cold foods, no frozen fruits, and a very limited quantity and variety of frozen vegetables. Additionally, the firm carried very few expensive eligible food items making it questionable that such a large number of high dollar SNAP transactions could be for legitimate food purchases. While the firm did have a limited stock of infant formula and baby foods, most SNAP households with infants or small children are WIC participants and therefore would be purchasing these products using WIC, not SNAP EBT. A review of the many FNS store visit photos shows most food items are individually priced and that Appellant's pricing structure has food prices ending in .x9 cents, as opposed to .00 and .50 as claimed by Appellant. The purchase of multiple items with prices ending in .x9 cents would not result in a transaction total ending in a same cents value of .00 or .50 cents as multiples of .x9 (e.g. .09, .18, .27, etc.) seldom have a value ending in .00 or .50 cents making it statistically impossible that this many store transactions would end in .00 and .50 cents with legitimate food purchases. The purchase of a single item with a price ending in .x9 cents would also make it impossible for any transaction totals to end in .00 or .50 cents.

While some of the transactions in this Attachment may have been for legitimate staple food purchases, particularly those in the lowest 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.

Rapid Transactions

This Attachment documents 40 sets of back-to-back transactions made in rapid order at the same POS terminal. The irregular transaction data cited in this Attachment shows all 40 transaction sets were conducted 5 U.S.C. § 552 (b)(6) & (b)(7)(C). The same household conducted both of the transactions in only five of the 40 sets. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Five of the second transactions were manually key-entered as opposed to swiped transactions. It is also noted that 33 of the individual transactions end in .00 cents which is not supported by the firm's pricing structure or inventory as previously discussed.

Appellant provided no documentation or explanation to support the legitimacy of the listed transactions in this Attachment. While Appellant's correspondence dated January 10, 2020, does mention Attachment 2, it describes it as being multiple withdrawals by SNAP recipients and cites 20 transactions occurring over a 5 U.S.C. § 552 (b)(6) & (b)(7)(C) period which is actually the transactions in Attachment 3, not Attachment 2.

Based on the very limited number of expensive items for sale at the Appellant firm, it is likely that transactions equaling or exceeding 5 U.S.C. § 552 (b)(6) & (b)(7)(C) would consist of more than 20 items. SNAP benefit 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 area; 2) the customer making multiple trips bringing items to the checkout counter for large purchases since the firm has no 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 for carry-out; 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 area 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 very limited counter space as well as manually key-entering lengthy EBT card numbers adds additional time to transactions.

The Appellant firm processed large numbers of transactions, 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.

Additionally, the many individual transactions (33 out of 80) in this Attachment ending in .00 cents is not supported by the firm's pricing structure of food item prices ending in .x9 cents. The purchase of several items with prices ending in .x9 cents would most likely not result in a total ending in a same cents value of .00 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.

Based on this discussion, as well as the stock and facilities present at the Appellant firm, it is unbelievable that these large dollar value transaction sets could occur in the short periods of time listed if they involved legitimate eligible food purchases. It is therefore more likely that the transactions listed in this Attachment are attributable to trafficking.

Multiple transactions in unusually short time frames

This Attachment documents 141 individual transactions in 62 sets of two or more transactions conducted by 46 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 45 of the 62 sets. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Seventeen transaction sets are comprised of three individual transactions while the remaining 45 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 the multiple transactions are because store owners are unable to prevent recipients from using their benefits at any time or in any manner of their choosing. There are times when a family member lends the card to another member resulting in multiple short term withdrawals. There are also recipients who have life issues and are not as organized or skilled as the average individual. The owner has seen a person complete a transaction and shortly thereafter make another because of their inability to conceptualize in a clear and rational manner as to what is needed to sustain him or her through a longer period. Some recipients purchase only what they can carry home and then return within hours to purchase the balance.

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. These transaction sets do not contain the characteristics associated with a household purchasing a forgotten item right after checking-out, of household members/friends shopping together and making separate purchases, of a household dividing its purchases, or of households making a separate purchase to check their balance followed by another transaction as 58 of the 62 transaction sets occur 5 U.S.C. § 552 (b)(6) & (b)(7)(C). 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Appellant offers no explanation as to why households would conduct up to three sizeable transactions at a very minimally stocked convenience store within a short period of time when there are many larger retail food stores where these households are regularly shopping that include one super store, two supermarkets, one large grocery store, three medium grocery stores, 16 small grocery stores, and 27 convenience stores located within a 1.0 mile radius of Appellant's location with the nearest medium grocery store less than two blocks away while the nearest super store and supermarket are four and six blocks away, respectively. These larger stores would offer a much greater quantity and variety of foods at lower prices than the Appellant firm and their proximity would make it unlikely that any SNAP recipient would consider the Appellant firm to be their primary source for groceries.

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 5 U.S.C. § 552 (b)(6) & (b)(7)(C) when the comparable average convenience store SNAP transaction amount in Hartford County during the review period was \$9.47. 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 Office of Retailer Operations and Compliance's analysis of shopping patterns for households listed in this Attachment shows they have ready access to transportation as evidenced by their shopping at a variety of comparably sized or larger food stores located nearby and at a distance from Appellant's location, including super stores and supermarkets. Their analysis also showed numerous households that shopped at the Appellant firm and at a super store and/or supermarket 5 U.S.C. § 552 (b)(6) & (b)(7)(C) and inexplicably spent more at Appellant's convenience store than they did at the super stores and/or supermarkets. Appellant failed to offer any explanation or rationale as to why households who are regularly shopping and spending large dollar amounts at many larger and better stocked stores would conduct multiple purchases often totaling to comparable or higher dollar amounts at a very minimally stocked convenience store. There is no legitimate reason why households would spend so much of their SNAP allotment at the Appellant firm when they clearly had access to and frequently shopped at supermarkets and super stores. 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 or supermarkets they were already regularly shopping at for less money and therefore the more plausible explanation is that these households were trafficking SNAP benefits at the Appellant firm.

5 U.S.C. § 552 (b)(6) & (b)(7)(C). This shopping pattern is indicative of trafficking as Appellant's very minimally stocked convenience store would have no eligible food items that could not have been purchased at the far better stocked super store for less money. Appellant offered no explanation as to why a household with unfettered access to transportation as evidenced by its shopping at 23 other stores, that included five super stores and three supermarkets, located up to 9.84 miles away would spend so much of its limited SNAP benefits at Appellant's very minimally stocked store when the larger stores would have offered a much greater quantity and variety of staple foods at better prices. It is also noted that this household primarily shopped at stores located more than two miles from Appellant's location during the review period. This shopping pattern indicates that this household likely resided closer to these more distant stores than to the Appellant firm. Since the Appellant firm stocks no unique food items or offers any distinctive services, trafficking is likely the only reason why a household would travel miles away from its regular shopping area to spend large amounts of money at a very minimally stocked convenience store.

It is highly unlikely that the Appellant firm stocked any eligible food items that would not be available at the super stores, supermarkets, and the other larger grocery stores the households in this Attachment were regularly shopping at and these stores would also likely have significantly lower food prices yet these households continued to spend large dollar amounts at a convenience store with a very minimal stock of staple foods. The more plausible explanation is that these households were trafficking at the firm. Other households analyzed exhibited similar shopping patterns indicative of trafficking. There is no legitimate reason why these households would spend so much of their SNAP allotments at a very minimally stocked convenience store when they clearly had access to and frequently shopped at nearby and distant supermarkets and super stores. Appellant also offered no explanation as to why households residing at a distance would use their limited cash resources to travel miles from their residence to shop at Appellant's very minimally stocked convenience store.

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 524 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 offering a very minimal stock of staple foods and calls into question the legitimacy of these transactions.

The transactions are also substantially higher than the average SNAP transaction amount of \$9.47 for this store type in Hartford County. This is unusual and indicative of trafficking.

This Attachment also includes an unusually high number of transactions for the exact same dollar amount with the majority of transactions ending in .00 cents such as:

5 U.S.C. § 552 (b)(6) & (b)(7)(C) to list some of the many higher dollar transactions that are not supported by store inventory or pricing.

The evidence under review shows that SNAP households shopping at the Appellant firm are also shopping at many full-line supermarkets and super stores that offer a greater quantity and variety of SNAP eligible foods items for better prices than customers can find at the Appellant firm. These high dollar value transactions remain questionable when considering the proximity of the 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, they continue to shop and spend suspicious high dollar amounts at the Appellant firm, where the eligible food stock is minimal, 5 U.S.C. § 552 (b)(6) & (b)(7)(C) of purchases at larger food stores.

While households residing in areas with extremely limited grocery store options may conduct high dollar transactions at convenience stores out of necessity, this is not the case when they have better alternatives. FNS records show there are one super store, two supermarkets, one large grocery store, three medium grocery stores, 16 small grocery stores, and 27 convenience stores located within a 1.0 mile radius of the Appellant firm. The nearest medium grocery store is located less than two blocks away while the nearest super store and supermarket are four and six blocks away, respectively, as well as additional larger stores located further away. The larger stores would offer greater quantities and varieties of staple food items at lower prices than would be found at a very minimally stocked convenience store offering no fresh or frozen unprocessed meats or seafood and virtually no fresh produce.

The difference in the average SNAP transaction amount, the total SNAP transaction dollar volume, and the total SNAP transaction count for Hartford County convenience stores during the review months and at the Appellant firm is significant. Appellant's average SNAP transaction amount is only 13.52 percent larger than Hartford County convenience stores while its average SNAP transaction dollar volume is 5 U.S.C. § 552 (b)(6) & (b)(7)(C) larger and its total SNAP transaction count more than triple the County average 5 U.S.C. § 552 (b)(6) & (b)(7)(C). The very high number of SNAP transactions and the extremely large dollar volume combined with the much lower average SNAP transaction dollar amount 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 Office of Retailer Operations and Compliance considered all of these to be indicators of unusual and suspicious activity.

The firm also had irregular SNAP transaction data compared to like type stores in Hartford County. A comparison of Appellant's redemption data to the average for County convenience stores using ten dollar increments shows that Appellant's transaction count and dollar volume is significantly higher than that of like type stores in all ranges 5 U.S.C. § 552 (b)(6) & (b)(7)(C). It is unusual that Hartford County convenience stores began averaging less than one transaction in each range 5 U.S.C. § 552 (b)(6) & (b)(7)(C), nearly double that of like type County stores. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). This transaction pattern and the unusual spike in both transaction numbers and dollar volume do not appear in the transaction patterns or in the transaction count and dollar volume averages for other like type stores. These large dollar transactions are considered to be irregular and suspicious based on the firm's food inventory. The Office of Retailer Operations and Compliance determined there was no credible reason for the firm to have transactions at these dollar levels given the very minimal 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 the high dollar value transactions listed in this Attachment are because the business is a large store that is well stocked with a substantial variety of goods that, in some cases, are relatively expensive. The store sells meats, infant formula, and energy drinks, all of which are costly, so it is no surprise that some of the transactions that seem excessively large are in fact just ordinary payments for food, vegetables, and other SNAP items. A quick analysis of this Attachment shows that 46 percent of transactions are for less 5 U.S.C. § 552 (b)(6) & (b)(7)(C). The most comprehensive government study of average EBT purchases (*Analysis of EBT Benefit redemption Patterns: Methods for Obtaining, Preparing, and Analyzing the Data, FNS USDA November 2005*) documents that approximately 16 percent of all EBT purchases amount 5 U.S.C. § 552 (b)(6) & (b)(7)(C). The percent of EBT purchases at the store amount to similar percentages when compared to total sales meaning that the store is in line with what would be predicted by the government's own research. Also, the pricing structure in a small grocery is very different from that of a large supermarket that counts on volume to make a reasonable return on capital. Small stores require a substantial mark-up on inventory to justify the investment. The National Association of Convenience Stores State of the Industry Annual Report shows that the typical mark-up for SNAP eligible items in a small store is 65 percent. The owner states that the Hartford market supports a markup of 100 percent that will result in larger than expected sales.

Contrary to Appellant's claims of the firm being large and well stocked with some relatively expensive goods, a review of the August 21, 2014, store visit inventory report and numerous photos shows that the firm stocks no fresh or frozen unprocessed meats or seafood except for a few packages of Pollock. The only other meats or seafood in stock are canned or highly processed products such as deli foods, chicken wings, jerky, etc. The photos also show no cases of energy drinks or cases of any other products for sale at the Appellant firm. Additionally, the firm has no shopping carts that would be needed to transport the large numbers of food items required to make up the numerous high dollar value transactions listed in this Attachment. While the firm did stock some infant formula and baby foods, it was not a WIC vendor. Most SNAP households with infants or small children are WIC participants and therefore would be purchasing these baby foods, formula, and other WIC products using WIC vouchers at a WIC

vendor, not SNAP EBT at the Appellant firm. The firm's stock of fresh vegetables consisted of a limited quantity of lettuce, tomatoes, green peppers, and onions. These are the same vegetables used for the preparation of the hot and cold ready-to-eat foods sold by the firm making it likely that most, if any, customers are not purchasing fresh vegetables at the firm. Lastly, it is noted that the government study referenced by Appellant states the average convenience store SNAP transaction is \$6.04, substantially less than Appellant's average transaction **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**.

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 Office of Retailer Operations and Compliance shows that Attachment households are regularly shopping at much larger stores, and conducting high dollar transactions, yet are conducting comparable or higher dollar 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.

Information obtained during the August 21, 2019, FNS store visit on shows that the Appellant firm offers a very minimal 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, drinks, and various single serving foods as well as many ineligible items. It is specifically noted that the firm did not have any fresh or frozen unprocessed meat or seafood except for some Pollock, a limited quantity and variety of processed meat and seafood, and a very limited quantity and variety of fresh or frozen fruit or vegetables. The fact that tobacco, alcohol, household products, paper products, hot foods, ATM, health and beauty items, and electronics accessories are not eligible for purchase with SNAP benefits also provides no justification for the large transaction amounts.

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 months. The firm also has a very small checkout area and no shopping carts thereby making it extremely difficult to facilitate the great quantities of eligible food items required to make up these large dollar transactions. The fact that the firm carries a very minimal stock of staple food items also makes it improbable that the high dollar transactions in this Attachment were for the purchase of eligible food items and more likely that the amounts were contrived.

Regarding Appellant's references to case law, considerations of legal precedent through case law, or the lack thereof in relation to the present case, are beyond the scope of this review; this review relies upon the statute and regulations governing the SNAP and evaluates whether the

permanent disqualification decision was in accordance with same and sustainable by a preponderance of the evidence; Appellant's references are acknowledged in this context only.

It is further noted that SNAP redemptions at the Appellant firm fluctuated unusually following the store visit on August 21, 2014. The volume of SNAP redemptions at the Appellant firm decreased 9.66 percent from July 2014 to September 2014 while the number of SNAP transactions decreased 6.92 percent and the average dollar amount of SNAP transactions decreased 2.89 percent during the same timeframe. A pronounced fluctuation in SNAP redemptions following the store visit 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

Regarding Appellant's denial of trafficking, the purpose of this review is to either validate or to invalidate the earlier decision of the Office of Retailer Operations and Compliance and is limited to what circumstances were at the basis of the action at the time such action was made. 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 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. When store ownership signed the certification page of the SNAP retailer authorization application to become a SNAP retailer, it confirmed it understood and agreed to abide by program rules and regulatory provisions. It also agreed to accept responsibility on behalf of the firm for SNAP violations including those committed by any of the firm's employees, paid or unpaid, new, full-time or part-time. The certification is clear that store ownership understood by signing the document that violations of program rules can result in administrative actions such as fines, sanctions, withdrawal, or disqualification from the SNAP. 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.

Appellant contends the time delays in this matter have deprived the owner of due process since more than five years have elapsed since the dates in the charge letter. The substantial delay impairs the ability to respond factually to the charges to disprove them. While the USDA cites hundreds of transactions going back over five years, the untimeliness of notice to the owner resulted in an inability and lack of opportunity to fairly oppose the finding. In addition to the factual and statistical anomalies and inconsistencies cited in Appellant's January 10, 2020, response, due to the lengthy lookback period, the owner's records regarding these transactions are unavailable. Timely notice would have allowed research into what the myriad purchases were for, the recipients making the purchases, the pricing, and other elements of the transactions alleged in the materials. The receipts, price lists, and other documentation from 2014 were

unavailable by the time the charge letter was received in 2015 and the requested backup information was provided much later. Years after the fact, these records cannot be researched. The delay between the transactions at issue and the charge letter notice deprived the owner of due process rights to continued program participation and this lack of notice has resulted in her inability to respond factually and has resulted in irreparable injury. USDA has not proven that the market failed to comply with regulations, and has not established abuse except by using old statistics taken out of context without regard for scenarios that occur frequently in such neighborhoods and with the recipient clientele. The owner has clearly been deprived of her rights without the opportunity to fairly oppose the proceedings. The inability to accept SNAP could put the market out of business.

Regarding Appellant's claim of there being an excessive delay that deprived the owner of due process, the period under review was June-November 2014 and the charge letter was issued on April 20, 2015. The time between the end of the review period and the charge letter issuance was less than five months which is hardly excessive in such a complex matter as a trafficking determination. It is also noted that Appellant's May 1, 2015, reply to the charges made no allegations of excessive delay and that this claim did not appear until correspondence dated January 10, 2020, and February 14, 2020. Had store ownership actually been keeping detailed financial, inventory, transaction receipts, employee, and other records, it would be expected that these would include at a minimum the preceding six months and more likely would include the entire preceding calendar or state fiscal year. A review of store visit photos shows the firm did not have a scanner so it would not have been able to produce itemized receipts for any charge letter transactions regardless of when the charge letter was issued or the length of time between it and the cited transactions. That Appellant was unable to produce any records, even for the last months of the review, indicates that ownership was likely not keeping any detailed records.

With regards to Appellant's contention that its due process rights were violated, section 278.6(b)(1) of the SNAP regulations provides that upon charging a firm with SNAP violations, the letter informing the firm of the charges "shall inform the firm that it may respond either orally or in writing to the charges contained in the letter within 10 days of receiving the letter." This section further states that, "Any firm considered for disqualification, shall have full opportunity to submit to FNS information, explanation, or evidence concerning any instances of noncompliance before FNS makes a final administrative determination." A review of the Office of Retailer Operations and Compliance administrative actions regarding this matter indicates full compliance with all applicable SNAP regulations, policies, and procedures therefore there is no basis for Appellant's claim of due process rights being violated. This disqualification is an administrative action and SNAP regulations provide for an administrative review of the action. The Act, as amended, and regulations provide that any firm aggrieved by an administrative review determination may seek judicial review of the determination in Federal court or a State court of record having competent jurisdiction. In such event, trial de novo proceedings ensure the firm of a full evidentiary hearing on the agency action at issue.

The ownership 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 Office of Retailer Operations and Compliance 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.

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.

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. It is also noted that Appellant’s claim of there being no other SNAP retailer in the area selling as large a variety of staple foods at comparable prices is inaccurate as there is a medium grocery store less than two blocks from Appellant’s location as well as a super store and supermarket located within four and six blocks, respectively.

The Office of Retailer Operations and Compliance 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 Office of Retailer Operations and Compliance determined that Appellant was not eligible for a trafficking CMP in lieu of permanent disqualification.

To be considered eligible for a trafficking CMP a firm must establish, by substantial evidence, its fulfillment of each of the criteria listed in Section 278.6(i). SNAP regulations are explicit in what constitutes substantial evidence. Specifically, 7 CFR § 278.6(i)(2) states in relevant part, “As specified in Criterion 3 above, in determining whether a firm has established an effective policy to prevent violations, FNS shall consider written and dated statements of firm policy which reflect a commitment to ensure that the firm is operated in a manner consistent with part

278 of current FNS regulations and current FSP policy on the proper acceptance and handling of food coupons.” This section goes on to state, “As required by Criterion 2, such policy statements shall be considered only if documentation is supplied which establishes that the policy statements were provided to the violating employee(s) prior to the commission of the violation.” This section further states, “A firm which seeks a civil money penalty in lieu of permanent disqualification shall document its training activity by submitting to FNS its dated training curricula and records of dates training sessions were conducted...”

Appellant contends the owner has had an effective compliance program in effect since March 2008 when the store was purchased and the fact that there have been no incidents is proof of the efficacy of the policy and program. All employees are trained shortly after being hired and the owner continues to monitor them until they exhibit a firm grasp of the precepts noted herein. There have been two employees during the last year and the owner has insured that each individual working the cash register has a firm grasp of what is eligible under SNAP and knows how to handle them. The owner was not aware of, did not approve, did not benefit from, or was not in any way involved in the conduct or approval of trafficking violations.

Appellant did not submit a copy of the firm’s SNAP compliance policy and program, any dated training curricula and records of training sessions, any employment documentation for staff, or any other evidence supporting the existence of the compliance policy and program at the firm.

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) within the specified timeframe. Based on the above, the Office of Retailer Operations and Compliance decision not to impose a CMP in lieu of disqualification is sustained as appropriate pursuant to 7 CFR §278.6(i).

CONCLUSION

The Office of Retailer Operations and Compliance 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 four 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 Office of Retailer Operations and Compliance 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

March 12, 2020