

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

Victor's Food Mart & Deli,,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0211930

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 Victor's Food Mart & Deli (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 13, 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 October 23, 2018, the Retailer Operations Division charged Appellant with trafficking based on a series of irregular SNAP transaction patterns that occurred in March through August 2018. The letter noted that the penalty for trafficking is permanent disqualification as provided by 7 CFR § 278.6(e)(1). The letter also noted that the Appellant could request a trafficking civil money penalty (CMP) in lieu of a permanent disqualification within ten days of receipt under the conditions specified in 7 CFR § 278.6(i).

Appellant, through counsel, responded to the charges in a letter dated November 1, 2018, and in materials submitted on November 5, 2018, which did not request or provide any documentation in support of a CMP. The Retailer Operations Division notified Appellant by letter dated February 13, 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 February 21, 2019, Appellant, through counsel, appealed the Retailer Operations Division's assessment and requested administrative review. The appeal was granted. No subsequent correspondence was received.

STANDARD OF REVIEW

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

CONTROLLING LAW

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

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

7 CFR § 278.6(e)(1)(i) states: "FNS shall disqualify a firm permanently if personnel of the firm have trafficked as defined in § 271.2." Trafficking is defined in part as, "The buying, selling, stealing, or otherwise effecting an exchange of SNAP benefits for cash or consideration other than eligible food". Trafficking includes "Intentionally purchasing products originally purchased with SNAP benefits in exchange for cash or consideration other than eligible food".

7 CFR §278.6(i) states: "FNS may impose a civil money penalty in lieu of a permanent disqualification for trafficking . . . if the firm timely submits to FNS substantial evidence which

demonstrates that the firm had established and implemented an effective compliance policy and program to prevent violations of the Program.”

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

SUMMARY OF THE CHARGES

The issue in this review is whether, through a preponderance of evidence, it is more likely true than not true that the questionable transactions were the result of trafficking. The charges on review were based on an analysis of SNAP EBT transaction data during the six month period of March through August 2018. 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 record provides an ALERT system printout of transactions. ALERT cannot detect fraud, but rather raw data and patterns associated with fraud;
- Price lists are provided that show prices ending in .00 and .50 cents. Almost all of the same cents transactions are for low values which are strong and compelling evidence that no trafficking was occurring. The store also rounds transactions down to a whole dollar amount for the sake of simplicity in entering the POS amount. The store is located in a rough neighborhood with impatient customers and rounding sometimes results in a loss to the business. While not a savvy business approach, it does not constitute trafficking;
- Ten of the multiple transactions happened **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** which simply shows another purchase on the same visit or someone from the neighborhood [sic]. The other 11 transactions were **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** later which simply means the customer came back the next day. According to the SNAP software

algorithm, the trafficking model is that a customer makes a purchase and then waits for nearly half a day or a full day before making another transaction. In fact, in roughly half of the flagged transactions, a full day passed before the next transaction. In a rough neighborhood, customers often hang around and then come back remembering something else they need. This is a far cry from the situation where customers arrive by car and typically collect all their items before proceeding to the register once. The level of variance in the gap is clearly indicative that there is nothing nefarious behind these transactions;

- The excessively large purchases are to be expected due to the nature of the neighborhood and the very high volume of transaction and traffick in the store. The attached photos and invoice taken today show the store often has long lines, large inventory, and frequent and regular customers. Many walk to the store and come by every day or more than once a day. The store also carries bulk items and pricier items and the items typically associated with a larger supermarket as shown by the attached price lists and photos. It is natural that transactions would be larger than the small stores catering to only drinks and chips. One or two baby formula purchases would easily put a transaction on this list which covers transactions 5 U.S.C. § 552 (b)(6) & (b)(7)(C). It is very difficult to get out of a store for less than that amount so the claim is unusual. Additionally, customers often make large purchases early in the month when funds are available. The fact that the store is so well stocked, offers wide and varied range of items, covers large grocery and bulk items, and has a high number of transactions shows that this is normal. For a store with few transactions, many large transactions would be suspicious, but in this store many, many more transactions were not large;
- There are no allegations of any direct evidence suggesting trafficking. The definition of trafficking as defined at 7 CFR 271.2 indicates that there needs to be evidence of the exchange of SNAP benefits for cash or consideration other than eligible food. In this case, where there is no evidence other than an ALERT printout that caught hundreds of transactions that obviously are not trafficking, it casts doubt on the entire method of determining trafficking. In light of the price lists and the explanation of rounding down, the roughly 5 U.S.C. § 552 (b)(6) & (b)(7)(C) gap between transactions and the normal transaction amounts, none of the transactions listed alone or together constitute evidence of trafficking. Appellant cited two court cases in support of its contentions.

Appellant submitted price lists, photos of store signage for hot and cold prepared food prices, and photos of individual food items in support of these contentions.

ANALYSIS AND FINDINGS

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

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

Store Background and FNS Store Visit

FNS initially authorized the firm on June 4, 2009. The case file indicates that in reaching a disqualification determination, the Retailer Operations Division considered information obtained during an August 19, 2018, store visit conducted by a FNS contractor to observe the nature and scope of the firm's operation, stock, and facilities. This information was then used to ascertain if there were justifiable explanations for the firm's suspicious SNAP transactions. The store visit documented the following store size, description, and characteristics:

- The firm was a small convenience store offering a very limited 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, primarily Goya products. There were no other ethnic or specialty food items.
- The store visit report and photos showed no shopping carts or hand baskets for customer use thus severely limiting the amounts of food that could be moved to the checkout.
- No food packages, bundles, case sales, bulk items, or other sales were evident that would explain the unusual transactions and no cased items were available for purchase.
- The store visit report specifically noted that the firm was not a specialty store and that there were no meat bundles, seafood specials, or fruit/vegetable boxes for sale.
- There was only one checkout area located on top of a glass display case that was approximately 4.0 feet wide and 1.5 feet deep leaving a limited area for customers to place their purchases. The 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 manager.
- The firm had a very limited stock of staple foods that also included many single serving and pre-packaged items with a significant portion of inventory in drinks, candy, snacks, condiments, single serving noodle soups, and cold prepared foods as well as many ineligible items, particularly hot prepared food items.
- There was a large commercial kitchen/food preparation area with a range of equipment that included a cooktop grill, deep fat fryer, oven, microwave ovens, commercial slicer, stainless steel prep tables, and refrigerated storage. Per the manager, store staple food stock is used in the preparation of the hot/cold foods making it difficult to determine if a food item is actually for sale or only for use in food preparation. There was an extensive posted menu listing the available hot/cold sandwiches, cold salads, hot side orders, and hot breakfast items as well as a printed piece of paper listing the price per

pound for three types of cheese. No deli meats or deli meat per pound pricing were noted.

- The firm had no fresh or frozen unprocessed meat or seafood, no processed meat or seafood except for canned items and jerky, no hot dogs, no deli meats, no packaged lunch meats, no sausages, no bacon, no frozen entrees, no frozen dinners, many cartons of eggs, very limited quantities and varieties of fruit and vegetables, no frozen fruit or vegetables, no dried fruit, only one package of dried beans, 100 percent fruit and vegetable single serving drinks, no nuts, a limited selection of canned soups, a very limited stock of canned or packaged staple food items, only three types of deli cheese, a minimal stock of packaged cheese, no cheese dips, only one yogurt, no single serving yogurt, no sour cream, only three packages of butter, only two packages of margarine, a limited stock of canned milk, several single serving milk drinks, several containers of fresh milk, several loafs of bread, no rolls, no pitas, tortillas, tostadas, no corn meal, flour, sugar, rice, several hot cereals, several cold cereals, no single serving cold cereals, many single serving Ramen noodle soups, several canned pasta, several dry pasta, no dry noodles, pancake mixes, baking mixes, mac&cheese, no frozen foods, cooking oil, jars of instant coffee, tea, cocoa, a moderate selection of baby foods and infant formula, and very few expensive staple food items.
- Ineligible items included: tobacco, tobacco accessories, hot food, hot coffee, household and paper products, pet products, auto products, health and beauty items, and ATM while accessory foods included: candy, spices, condiments, snacks, baking mixes, cooking oil, sugar, single serving ice cream, ice cream, coffee, tea, cocoa, and un/carbonated drinks.
- Signage was in English and there were no SNAP posters (anti-fraud, eligible items, reporting trafficking, etc.) visible in the store.
- The firm's hours of operation were 7 AM-9 PM Monday-Thursday, 8 AM-10 PM Friday- Saturday, and 8 AM-9 PM Sunday as confirmed by the manager. The manager also stated that the firm did not take online grocery orders, did take phone grocery orders, did not deliver groceries, and did not round transaction totals up/down.
- Many food items were priced and comments on the FNS store visit report, completed in conjunction with the manager, specifically stated that most food prices end in .x9 cents. A review of store visit photos confirmed the pricing structure of .x9 cents for many food items and also showed several other items priced differently such as deli cheeses with prices ending in .00 and .50 cents per pound; milk with prices ending in .00, .50, and .75 cents; juices with prices ending in .50 cents; juice concentrates priced at \$2.65; and tostados priced at \$2.50. A price ending in .x9 cents is the most common pricing structure for stores of this type.
- The store visit report listed the four most expensive food items costing more than \$5.00 for sale in the store as being a 12.4 ounce container of infant formula priced at \$20.49, one pound of mozzarella cheese priced at \$6.50 per pound, one pound of cheddar cheese priced at \$6.00 per pound, and one pound of American cheese priced at \$5.50 per pound. This listing was provided by the manager during the store visit.
- While the firm was a WIC vendor and stocked a moderate selection of baby foods and infant formula, 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 store visit report and photos showed many empty or marginally stocked shelves, coolers, and display racks. The quantity and variety of the store's staple food inventory was less than that seen during the previous FNS store visit on April 16, 2016.

Unusual numbers of transactions ending in a same cents value

This attachment lists 1,212 transactions with 755 transactions ending in the same cents value of .00 cents and 457 transactions ending in the same cents value of .50 cents.

5 U.S.C. § 552 (b)(6) & (b)(7)(C) It is also noted that the nine largest transactions ending in .00 cents and the six largest transactions ending in .50 cents were all manually key-entered transactions. 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 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 cent transactions combined with the large number of same cents high dollar transactions is irregular and suspicious for this type store.

Appellant submitted handwritten price lists that show prices ending in .00 and .50 cents. Almost all of the same cents transactions are for low dollar values which are strong and compelling evidence that no trafficking was occurring. The store also rounds transactions down to a whole dollar amount for the sake of simplicity in entering the POS amount. The store is located in a rough neighborhood with impatient customers and rounding sometimes results in a loss to the business. While this is not a savvy business approach, it does not constitute trafficking.

The inventory report and numerous photos from the FNS store visit show a very limited stock of staple foods that includes only four items priced at \$5.50 each or higher on the day of the visit making it highly questionable that such a large number of high dollar SNAP transactions could be for legitimate food purchases. The most expensive food item, infant formula, would most likely be purchased by WIC recipients using WIC vouchers since the firm is a WIC vendor and not by SNAP recipients using SNAP benefits. The other three most expensive food items were all deli cheeses priced at \$5.50, \$6.00, and \$6.50 per pound. The visit report, completed in conjunction with the store manager, specifically notes that the firm's pricing structure has the majority of food prices ending in .x9 cents and that the firm does not round transaction totals up or down. The firm's pricing structure is further supported by store visit photos showing many foods with prices ending in .x9 cents and by Appellant's price lists showing many items with prices ending in .x9 cents. A very large percentage of items on the price lists are inexpensive accessory food items (candy, snacks, baked goods, ice cream, gum, drinks, and condiments). Most food items are priced from \$1.00-\$4.00/\$4.50 and the price lists also include items with prices of .49, .79, & .99. 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 or .50 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. Also, the inclusion of any item with a price ending in .x9 cents would make it impossible for a transaction total to end in .00 or .50 cents. Appellant's claim of rounding transactions down to a whole dollar

amount for the sake of simplicity in entering the POS amount is also refuted by the store manager's statement that the firm does not round transaction totals up or down.

The fact that the largest transactions in this Attachment were all manually key-entered is also very suspicious. Manual transactions are those in which the card's magnetic strip is not being read by the store's POS device and the clerk must manually key-enter the lengthy EBT card number. A review of other EBT transactions on the dates of the manual transactions show that Appellant's POS device was functioning properly as there were swipe transactions before and after the manual transactions. When the magnetic strip on an EBT card fails, it can no longer be swiped and replacement EBT cards contain different identification numbers. An example of the suspicious nature of these transactions is shown by one of the households whose shopping patterns were analyzed by the Retailer Operations Division. This household conducted 10 transactions at the firm during the six month review period and nine of these were manual transactions with seven occurring during a 16 day period. This household conducted numerous swiped transactions at 26 other stores using the same EBT card throughout the review period. It is an indication of trafficking when the same card is used for both manual and swipe transactions.

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 genuine. 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 65 individual transactions in 28 sets of two or more transactions conducted by 19 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 18 of the 28 sets. **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. Nine sets are comprised of three individual transactions while the remaining 19 sets are comprised of two individual transactions. It is not a usual shopping pattern to see so many purchases, in a short period of time, by the same recipients as documented in this Attachment. Multiple transactions conducted by the same household within a short period of time is a method which violating stores use to avoid single high dollar transactions that cannot be supported by store inventory and structure. These sets of transactions appear to be in amounts which are indicative of trafficking.

Appellant contends that 10 of the multiple transactions happen **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** which simply shows another purchase on the same visit or someone from the neighborhood [sic]. The other 11 transactions were **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** later which simply means the customer came back the next day. According to the SNAP software algorithm, the trafficking model is that a customer makes a purchase and then waits for nearly half a day or a full day before making another transaction.

In fact, in roughly half of the flagged transactions, a full day passed before the next transaction. In a rough neighborhood, customers often hang around and then come back remembering something else they need. This is a far cry from the situation where customers arrive by car and typically collect all their items before proceeding to the register once. The level of variance in the gap is clearly indicative that there is nothing nefarious behind these transactions.

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 or of household members/friends shopping together and making separate purchases as 22 of the 28 transaction sets occur 5 U.S.C. § 552 (b)(6) & (b)(7)(C). The transaction sets also do not contain the characteristics of a household returning later in the day or sending their child to purchase a forgotten item or two as all of the 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. Appellant's contentions also provide no explanation as to why households would conduct up to three sizeable transactions at the Appellant firm within a short period of time.

It is certainly not unusual for a small number of SNAP households to conduct multiple transactions in a short period of time. However, it is unusual that subsequent transaction dollar amounts are substantial in these transaction sets and that all of the sets in this Attachment 5 U.S.C. § 552 (b)(6) & (b)(7)(C) when the comparable average convenience store SNAP transaction amount in New Haven County during the review period was \$7.89. 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. Additionally, the fact that 49 of the 65 individual transactions end in .00 or .50 cents supports trafficking as previously discussed since the Appellant firm's pricing structure and inventory do not support the large dollar transactions ending in .00 or .50 cents that are found in this Attachment.

The Retailer Operation Division'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 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 very minimally stocked store. Common sense dictates that it is improbable that households would choose to spend large dollar amounts at the Appellant firm if their purchases consisted solely of eligible food items that could be purchased at any of the super stores and/or supermarkets they were already regularly shopping at and therefore more likely than not that these households were trafficking SNAP benefits at the Appellant firm.

5 U.S.C. § 552 (b)(6) & (b)(7)(C). During the review period, these households regularly shopped at super stores and supermarkets. There is no legitimate reason why these households would spend so much of their SNAP allotment at a very minimally stocked convenience store when they clearly had access to and frequently shopped at supermarkets and super stores located nearby and at a distance. The more plausible explanation is that these household was trafficking at the firm. Other households analyzed exhibited similar shopping patterns indicative of trafficking.

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

High Dollar Value Transactions

This Attachment lists 238 individual EBT transactions 5 U.S.C. § 552 (b)(6) & (b)(7)(C). The substantial number of high dollar transactions is uncharacteristic for a grocery store offering a very limited 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 \$7.89 for this store type in New Haven County. This is unusual and indicative of trafficking.

The evidence under review shows that SNAP households shopping at the Appellant firm are also shopping at many full-line supermarkets and super stores, located nearby as well as at a distance from Appellant's location that offer a greater quantity and variety of SNAP eligible foods items for better prices than customers can find at the Appellant firm. The high dollar value transactions remain questionable when considering the proximity of these other stores that would be better shopping options for consumers. Based on their shopping patterns, transportation does not appear to be an issue for these households. Yet, these recipients continue to shop and spend suspicious high dollar amounts at the Appellant firm, where the eligible food stock is limited, 5 U.S.C. § 552 (b)(6) & (b)(7)(C) of their purchases at larger food stores.

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 33 comparably sized or larger SNAP retailers located within a 1.06 mile radius of the Appellant firm that includes one super store and two supermarkets with the closest supermarket just one block from Appellant's location. These 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, an extremely limited selection of fresh produce, and no frozen produce.

The difference in the average SNAP transaction amount, the total SNAP transaction dollar volume, and the total SNAP transaction count for New Haven County convenience stores during

the review months and at the Appellant firm is significant. Appellant's average SNAP transaction dollar amount is just 9.0 percent larger than that of New Haven County convenience stores while its total SNAP transaction count 5 U.S.C. § 552 (b)(7)(E) larger than the County average and its average SNAP transaction dollar volume is 5 U.S.C. § 552 (b)(7)(E) larger. The extremely high number of SNAP transactions combined with the low 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 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 do not represent legitimate food purchases. The Retailer Operations Division considered these to be indicators of unusual and suspicious activity.

The firm had irregular SNAP transaction data compared to like type stores in New Haven County. A comparison of Appellant's redemption data to County convenience stores using ten dollar increments shows that Appellant's transaction count and dollar volume are substantially higher in all ranges than those of like type stores 5 U.S.C. § 552 (b)(6) & (b)(7)(C) at which point transactions stop. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). This transaction pattern and the unusual spikes 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 Retailer Operations Division determined there was no credible reason for the firm to have transactions at these dollar levels given the very limited 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 excessively large purchases are to be expected due to the nature of the neighborhood and the very high volume of transaction and traffick in the store. The attached photos and invoice taken today show the store often has long lines, large inventory, and frequent and regular customers. Many walk to the store and come by every day or more than once a day. The store also carries bulk items and pricier items and the items typically associated with a larger supermarket as shown by the attached price lists and photos. It is natural that transactions would be larger than the small stores catering to only drinks and chips. One or two baby formula purchases would easily put a transaction on this list which covers transactions 5 U.S.C. § 552 (b)(6) & (b)(7)(C). It is very difficult to get out of a store for less than that amount so the claim is unusual. Additionally, customers often make large purchases early in the month when funds are available. The fact that the store is so well stocked, offers a wide and varied range of items, covers large grocery and bulk items, and has a high number of transactions shows that this is normal. For a store with few transactions, many large transactions would be suspicious, but in this store many, many more transactions were not large.

No invoices for inventory purchases were provided to support the high dollar value transactions in this Attachment and infant formula purchases would most likely be made using WIC

vouchers, not SNAP, as previously stated. Contrary to Appellant's claim that the firm is well stocked carrying a large food inventory including bulk and pricier items, Appellant's photos and price lists show no bulk or expensive food items other than infant formula. This is also supported by the 50 FNS store visit photos and inventory listing that show many empty or marginally stocked shelves and that the quantity and variety of the firm's staple food inventory was less than that seen during the previous visit on April 16, 2016. The claim that customers shop regularly at the firm and many walk to it provides no basis to support the legitimacy of these transactions.

The SNAP transactions noted in this Attachment are not presumed to be trafficking because they exceed a set dollar amount; they are questionable because they are inconsistent for this type of store and store stock. A shopping pattern analysis by the Retailer Operations Division shows that households in this Attachment are regularly shopping at much larger stores, and conducting high dollar 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 19, 2018, store visit on shows that the firm offers a very limited quantity and variety of SNAP eligible staple food items, many accessory foods, and many ineligible items, particularly hot prepared foods. Much of the inventory for sale consists of inexpensive snacks, candy, condiments, drinks, and single serving foods as well as many ineligible items. The fact that tobacco, tobacco accessories, hot foods, hot coffee, household and paper products, pet products, auto products, and health and beauty items are not eligible for purchase with SNAP benefits also provides no justification for the high 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 them 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 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 large dollar transactions. Therefore, it is improbable that the food items purchased in these high dollar amounts could be carried to the register without the use of carts and more likely that the amounts were contrived.

Many of Appellant's undated photos show signage advertising a wide variety of hot and/or cold prepared foods that include hot side orders, hot breakfast items, and cold salads. Hot foods are not authorized for purchase using SNAP benefits so these have no bearing on the matter under review. The photos showing printed milk, juice, and egg prices do match those in the FNS photos. Appellant also provided photos of specific food items such as coffee, cold cereals, 100 percent fruit juices, and infant formula all with prominently placed price stickers; however, many of these items were not evident during the FNS store visit. The infant formula is in the FNS

photos, but the 50 FNS photos show no cans or packages of coffee, only small jars of instant coffee with no price stickers. They also do not show large bottles of Ocean Spray and Juicy Juice 100 percent juices, only single serving size bottles located in the coolers. These differences support that some of Appellant's photos were staged in an effort to avoid the disqualification and therefore they are of no evidentiary value. None of Appellant's photos show large food bundles, bulk food items, expensive meats, or other specialty items and therefore provide no relevant evidence to support the legitimacy of the transactions listed in the charge letter Attachments. Appellant's photos do confirm that the firm does a significant business in the sale of hot and/or cold prepared foods and stocks a very limited quantity and variety of staple foods.

It is further noted that SNAP redemptions at the firm fluctuated unusually following the store visit on August 19, 2018, and again following receipt of the charge letter on October 24, 2018. The volume of SNAP redemptions at the Appellant firm decreased 21.27 percent from August 2018 to September 2018 while the number of SNAP transactions decreased 9.6 percent and the average SNAP transaction amount decreased 12.82 percent during the same time period. The volume of SNAP redemptions at the Appellant firm decreased 17.13 percent from October 2018 to November 2018 while the number of SNAP transactions decreased 14.92 percent and the average SNAP transaction amount decreased 2.71 percent during the same time period. A pronounced fluctuation in SNAP redemptions following the store visit and/or receipt of the charge letter is a clear indication of trafficking since, if trafficking were not occurring, there would be no abnormal fluctuations in redemption amounts.

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

Other Contentions

The purpose of this review is to either validate or to invalidate the earlier decision of the Retailer Operations Division 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, the Appellant bears the burden of proving by a preponderance of evidence that the administrative action should be reversed. That means the Appellant has the burden of providing relevant evidence that a reasonable mind, considering the record as a whole, would accept as sufficient to support a conclusion that the argument asserted is more likely to be true than untrue. Assertions that the firm has not violated program rules, by themselves and without supporting evidence and rationale, do not constitute valid grounds for dismissal of the current charges of violations or for mitigating their impact. When the store owner signed the certification page of the SNAP retailer application to become a SNAP retailer, he confirmed he understood and agreed to abide by program rules and regulatory provisions. He also agreed to accept responsibility on behalf of the firm for SNAP violations including those committed by any firm employees, paid or unpaid, new, full-time or part-time. The certification is clear that store ownership understood by signing the document that violations 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.

In regard to case law cited by Appellant, considerations of relevant 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 decision of the SNAP Office to impose a disqualification upon the Appellant was in accordance with same and sustainable by a preponderance of the evidence; Appellant's case law reference is acknowledged in this context only.

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

The issue under review involves a charge of trafficking SNAP benefits based on EBT transaction data. EBT transaction data is covered in SNAP regulations at 7 CFR § 278.6(a) and is addressed below. Trafficking is always considered to be the most serious violation even if it is a first offense therefore a temporary suspension or lesser penalty would not be applicable. SNAP regulations at 278.6(e)(1) clearly state that, "FNS shall disqualify a firm permanently if personnel of the firm have trafficked as defined in § 271.2." SNAP regulations at 7 CFR § 271.2, define trafficking as, "The buying, selling, stealing, or otherwise effecting an exchange of SNAP benefits for cash or consideration other than eligible food". SNAP regulations at 7 CFR § 278.6(a) clearly state that "FNS may disqualify any authorized retail food store if the firm fails to comply with the Food and Nutrition Act of 2008, as amended, or this part. Such disqualification shall result from a finding of a violation on the basis of evidence that may include facts established through on-site investigations, inconsistent redemption data, evidence obtained through a transaction report under an electronic benefit transfer system". In the present case, the data presented in the Attachments is solely based on the SNAP EBT transactions conducted at the Appellant firm during the review period. This firm was selected as a result of a series of complex algorithms that make numerous data comparisons with other like type firms during the review period. All of the transactions were then reviewed and analyzed by the Retailer Operations Division staff before the decision was made to issue a charge letter. This investigative process included a detailed examination of information obtained from various sources, including, but not limited to the inventory report and photos from the FNS store visit, a transaction comparison and analysis of like type and larger stores, and analysis of shopping patterns for recipient households conducting transactions at the Appellant firm during the review period. This analysis also included a review of the firm to ensure its store classification was correct and the data comparisons with like type firms valid. Additionally, there are nearby like type stores whose transaction data does not form these suspicious patterns and are therefore not at risk of disqualification for trafficking. There is also no regulatory requirement that trafficking disqualifications be based solely on on-site undercover operations.

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

The Food and Nutrition Act of 2008, as amended, and the regulations issued pursuant thereto do not cite any minimum dollar amount of cash or SNAP benefits, or number of occurrences, for such exchanges to be defined as trafficking. Nor do they cite any degrees of seriousness pertaining to trafficking of SNAP benefits. Trafficking is always considered to be the most serious violation, even when the exchange of SNAP benefits for cash is dollar-for-dollar or is conducted by a non-managerial store clerk. This is reflected in the Food and Nutrition Act, which reads, in part, that disqualification “shall be permanent upon the first occasion of a disqualification based on trafficking by a retail food store.” In keeping with this legislative mandate, Section 278.6(e)(1)(i) of the SNAP regulations states that FNS shall disqualify a firm permanently if personnel of the firm have trafficked. There is no agency discretion in the matter of what sanction is to be imposed when trafficking is involved and second chances are not an authorized option under existing regulations.

CIVIL MONEY PENALTY

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

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

Appellant did not request a trafficking CMP in lieu of a disqualification nor did it make any mention of how the firm met any of the four criteria needed to demonstrate that the firm had established and implemented an effective compliance policy and program to prevent SNAP violations within the specified timeframe. 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 required by 7 CFR §278.6(i).

Based on the above discussion and the evidence under review, 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

June 24, 2019