

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

Village Deli,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0214808

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 Village 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 August 21, 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 February 8, 2019, the Retailer Operations Division charged Appellant with trafficking based on a series of irregular SNAP transaction patterns that occurred in July 2018 through October 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 by letter sent via fax on February 15, 2019, and by letter dated March 7, 2019, neither of which requested a CMP or provided documentation

in support of one. The first response requested a 30 day extension to respond to the charges and both responses contained Freedom of Information Act (FOIA) requests. USDA FNS responded to the FOIA request in a letter dated April 2, 2019, that was received by counsel on April 3, 2019. The Retailer Operations Division notified counsel through letters dated July 15, 2019, and July 23, 2019, of the deadline to submit any additional information following receipt of the FOIA response. Counsel responded stating that Appellant had previously responded to the charges. The Retailer Operations Division then notified Appellant by letter dated August 21, 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 August 28, 2019, Appellant, through counsel, appealed the Retailer Operations Division's assessment and requested administrative review. The appeal was granted. Subsequent correspondence was received.

STANDARD OF REVIEW

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

CONTROLLING LAW

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

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

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

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

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

SUMMARY OF THE CHARGES

The issue in this review is whether, through a preponderance of evidence, it is more likely true than not true that the questionable transactions were the result of trafficking. The charges on review were based on an analysis of SNAP EBT transaction data during the four month period of July 2018 through October 2018. This involved two patterns of EBT transaction characteristics indicative of trafficking:

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

APPELLANT’S CONTENTIONS

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

- The owner denies the charges and is elderly and ill with a limited ability to speak English. She does not understand the nature of the charges and has no knowledge or information relating to the charges. The owner has operated the firm for 17 years and her husband for 10 years prior to that without any violations or charges by USDA. The owner also has an outstanding reputation for honesty. Both the owner and her husband are entirely dependent on the firm’s modest income;
- There were one or more retail stores near the Appellant firm that ceased SNAP operations during the period between July and October 2018 and are what caused the spike in the firm’s business that was reported by USDA computers. There was a market located three blocks away that changed ownership and was without EBT for a couple of months;
- Counsel’s review of the charges reveals no unlawful activity or violations of federal law or regulations and that most of the asserted charges are vague, nonspecific, conclusory, and nonfactual allegations which are incapable of eliciting informed responses from the owner. The data encompassed by the charge letter is entirely meaningless and does not

- lend itself to a responsive answer or the interdisposition of a factual defense;
- Trafficking is defined as “the exchange of firearms, ammunition, explosives, or controlled substances . . . for SNAP benefits”. However, there is no evidence that the owner or the firm ever engaged in trafficking as defined. Therefore there is no documentation or evidence to form the factual bases of the alleged charges and/or violations. The statistical data in the charge letter is entirely nonrelevant and meaningless in the absence of accompanying facts and does not lend itself to a responsive answer or the interdisposition of a factual defense. At no time during the specified period of the charges was the very ill owner on, in, at, or near the firm and she has no knowledge of information related to the alleged matter. For the foregoing reasons, there is no factual or legal basis for the charges alleged by USDA and therefore they should be dismissed with prejudice and the instant proceedings against the firm be terminated; and,
 - Many SNAP recipients depend on the store because it is convenient and familiar. The firm is struggling to keep operating without SNAP and the owner is not sophisticated enough to understand how the EBT algorithm works. There is no reason why the owner would now start breaking the law in her golden years after having been honest all her life.

Appellant submitted an affidavit signed by the owner affirming to the correctness and truth of the response, a handwritten letter by the owner, copies of previous correspondence sent to or received from USDA, and a handwritten seven page petition asking that EBT be restored at the firm 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 May 12, 2004. The record indicates that in reaching a disqualification determination, the Retailer Operations Division considered information obtained during a December 7, 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 typical small grocery store offering a very limited quantity and variety of staple foods and carrying no other unique items or offering any distinctive services. The store stocked traditional American brands as well as an extremely 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 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 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 bundles, seafood specials, or fruit/vegetable boxes for sale.
- The checkout area was a night window approximately 1.5 feet wide and 1.5 feet high set into a plastic security barrier 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 manager who also was the owner's daughter.
- 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 soda, candy, snacks, and other drinks as well as many ineligible items.
- There was a large commercial kitchen and food prep area with a cooktop grill, deep fat fryer, microwave oven, a large commercial exhaust hood, stainless steel prep tables, refrigerated storage, a commercial slicer, a commercial scale, etc. There was a large interior menu board advertising hot and cold sandwiches and hoagies as well as burgers, hot sides, and hot breakfast items while exterior signage advertised hoagies, steaks, and deep fry. The store visit report noted that store stock, specifically deli meats/cheeses and fresh vegetables were being used in the preparation of the hot and/or cold prepared foods.
- The firm had no fresh or frozen unprocessed meat, no fresh or frozen unprocessed seafood, a limited quantity and variety of processed meats and seafood (canned meat, poultry, and fish; hot dogs; sausages; bacon; deli meats; processed brown & serve sausages, processed chicken, and jerky), an extremely limited selection of frozen dinners and frozen entrees, eggs, no fresh or frozen fruit, no fresh vegetables except for what was being used in the preparation of the hot and/or cold foods, an extremely limited selection of frozen vegetables, dried beans, no other dried fruit or vegetables, no packaged nuts, single serving packaged nuts, 100 percent fruit juices, no 100 percent vegetable juices, no fruit cocktails, a minimal selection of canned soups, a minimal quantity and variety of canned and packaged staple food items, limited varieties of deli cheese, packaged cheese, no single serving cheese, no yogurt, several single serving yogurt, no single serving yogurt drinks, no butter, margarine, one sour cream, fresh milk, single serving fresh milk, canned milk, two cartons of half & half, no coconut milk, no soy milk, no Lactaid milk, no powdered milk, single serving milk drinks, no cottage cheese, no cream cheese, bread, rolls, tortillas, no pitas, no tostadas, corn meal, flour, sugar, rice, cold cereal, no single

serving cold cereal, hot cereal, single serving Ramen noodle soups, canned pasta, single serving pasta, dry pasta, dry noodles, no pancake mixes, baking mixes, frozen heat & eat foods (Hot Pockets, mac&cheese, pot pies, waffles, lasagna, sandwiches, etc.), mac&cheese, no single serving size mac&cheese, cooking oil, coffee, tea, cocoa, a limited selection of baby foods/cereals, four containers of infant formula, no soy infant formula, and few expensive staple food items.

- Ineligible items included: tobacco, hot food, household products, paper products, pet products, auto products, health and beauty items, ATM, clothing, and candles while accessory foods included: candy, condiments, snacks, baked goods, cooking oil, baking mixes, sugar, ice cream, single serving ice cream, spices, coffee, tea, cocoa, and un/carbonated drinks.
- The firm's hours of operation, as confirmed by the manager, were 9:00 AM-9:00 PM daily. The manager also stated that the firm did not take phone or online orders, did not deliver groceries, and did not round transaction totals up or down.
- Signage was in English and there were no SNAP posters (anti-fraud, eligible items, reporting trafficking, etc.) visible in the store.
- Most food items were individually priced and comments on the FNS store visit report, completed in conjunction with the cashier, specifically stated 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.
- The FNS store visit report listed the four most expensive food items costing more than \$5.00 for sale in the store as being: a 12.4 ounce container of Similac priced at \$17.99, a 20 pound bag of canilla rice priced at \$14.99, an 29.0 ounce package of fried chicken priced at \$10.99, and a 5.0 pound bag of French fries priced at \$5.99. It was noted that there were less than 10 units of all four of the expensive food items in stock that included four containers of Similac, five packages of chicken, six bags of rice, and five bags of fries. This listing of the most expensive items was provided by the manager during the store visit.
- Although the firm was a WIC vendor, most SNAP households with infants or small children are WIC participants and therefore would be purchasing these products using WIC vouchers, not SNAP EBT benefits.
- The store visit photos showed several empty or minimally stocked shelves and coolers.

Multiple transactions in unusually short time frames

This Attachment documents 52 individual transactions in 23 sets of two or more transactions conducted by 10 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 16 of the 23 sets. **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. Six transaction sets are comprised of three individual transactions while the remaining 17 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 offered no documentation or explanation to support the legitimacy of the listed transactions in this Attachment.

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 small grocery 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, or of households making a separate purchase to check their balance followed by another transaction as 20 of the 23 transaction sets 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 minimally stocked small grocery store within a short period of time when there are many larger retail food stores where these households are regularly shopping that includes two super stores, one medium grocery store, and three small grocery stores located within a 1.0 mile radius of Appellant's location with the nearest small grocery store only three to four blocks away. 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 as 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 5 U.S.C. § 552 (b)(6) & (b)(7)(C) when the comparable average small grocery store SNAP transaction amount in Delaware County during the review period was \$11.83. These multiple transactions indicate that the amounts were contrived in an attempt to avoid suspiciously high transactions that would be indicative of trafficking by breaking them into multiple, smaller amounts. FNS transaction data shows that this same pattern of multiple transactions in unusually short time frames is not evident at other nearby like type grocery stores further supporting that trafficking was occurring at the Appellant firm during the period under review.

The Retailer Operation Division's 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 small grocery 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 minimally stocked small grocery 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 and/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). Appellant offered no explanation as to why a household with unfettered access to transportation, as evidenced by its shopping at nine other stores located up to 6.77 miles away, would spend nearly four times as much at Appellant's minimally stocked store when the super store would have offered a much greater quantity and variety of staple foods at better prices.

5 U.S.C. § 552 (b)(6) & (b)(7)(C).

5 U.S.C. § 552 (b)(6) & (b)(7)(C).

There is no reasonable explanation why these households would spend so much of their SNAP allotment at a small grocery store with a very limited stock of staple foods 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 households were 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 114 individual EBT transactions 5 U.S.C. § 552 (b)(6) & (b)(7)(C). The substantial number of high dollar transactions is uncharacteristic for a small 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 \$11.83 for this store type in Delaware 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 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 very 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 small grocery stores out of necessity, this is not the case when they have better alternatives. FNS records show there are two super stores located within a 0.62 mile radius of the Appellant firm where households listed in these Attachments are regularly shopping 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 minimally stocked small grocery store offering no fresh or frozen unprocessed meats or seafood and no fresh fruit and vegetables.

The difference in the average SNAP transaction amount, the total SNAP transaction dollar volume, and the total SNAP transaction count for Delaware County small grocery stores during the review months and at the Appellant firm is significant. Appellant's average SNAP transaction amount is 24.6 percent less than that of Delaware County small grocery stores while its average SNAP transaction dollar volume is 44.4 percent larger and its total SNAP transaction count is nearly double the County average at 91.45 percent. The extremely high number of SNAP transactions and the 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 Retailer Operations Division 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 Delaware County. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). This transaction pattern does 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 does not specifically address the unusual pattern of high dollar value transactions in this Attachment, but does contend that there were one or more retail stores near the Appellant firm that ceased SNAP operations during the period between July and October 2018 and are what caused the spike in the firm's business that was reported by USDA computers. There was a market located three blocks away that changed ownership and was without EBT for a couple of months. Appellant submitted a handwritten letter by the store owner identifying the nearby market and also submitted a petition asking that EBT be restored at the firm.

Regarding Appellant's contentions, the charge letter makes no mention of there being a spike in the firm's business, mentioning only unusual, irregular, and inexplicable shopping patterns by SNAP recipients consisting of multiple transactions within a set time period and transactions that are large based on the store's characteristics and recorded food stock. This Review Officer analyzed SNAP records and determined that the specific store cited by the store owner in her handwritten letter was permanently disqualified as a SNAP retailer effective September 21, 2017, and therefore would have had no impact on transactions at the Appellant firm nearly one year later. There were only two SNAP retailers that stopped accepting SNAP benefits in 2018 prior to the period under review that were located within proximity of the Appellant firm. Both stores were located 0.79 or more miles from Appellant's location and since there are other SNAP retailers nearer to the location of these stores there would have been no impact on the Appellant firm's sales. The seven page petition merely lists names of individuals with no documentation to show that they are in fact SNAP recipients or that they actually shop at the Appellant firm. It also provides no evidence to support the legitimacy of the charge letter transactions and therefore is of no evidentiary value.

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 FNS store visit on December 7, 2018, shows that the Appellant firm offers a very limited 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. The fact that tobacco, hot food, household products, paper products, pet products, auto products, health and beauty items, ATM, clothing, and candles 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 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 limited 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.

It is further noted that SNAP redemptions at the Appellant firm fluctuated unusually following the store visit on December 7, 2018. The volume of SNAP redemptions at the Appellant firm decreased 10.15 percent from November 2018 to December 2018 while the number of SNAP transactions decreased 7.27 percent and the average dollar amount of SNAP transactions decreased 3.15 percent over the same period. It would normally be expected that SNAP transactions would increase, not decrease, over the holiday season. 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 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 ownership signed the certification page of the SNAP retailer authorization application to become a SNAP retailer and again when it signed the SNAP reauthorization application, 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 violations of the SNAP 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.

That counsel's review of the charges reveals no unlawful activity or violations of federal law or regulations is not supported by the federal regulations. Trafficking is defined at 7 CFR § 271.2 as "The buying, selling, stealing, or otherwise effecting an exchange of SNAP benefits for cash or consideration other than eligible food". A second paragraph under this regulatory definition expands trafficking to include the exchange of firearms, ammunition, explosives, or controlled substances for SNAP benefits, but the exchange of SNAP benefits for cash is the primary meaning. The use of store transaction data to provide evidence of trafficking is discussed in the next paragraph.

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 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.

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.

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.

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 request or provide substantial evidence that it met all four criteria required by 7 CFR §278.6(i). Based on the above, the Retailer Operations Division’s decision not to impose a CMP in lieu of disqualification is sustained as appropriate pursuant to 7 CFR §278.6(i).

CONCLUSION

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

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

RIGHTS AND REMEDIES

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

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

ROBERT T. DEEGAN
ADMINISTRATIVE REVIEW OFFICER

January 6, 2020