

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

V & T Deli Grocery LLC,

Appellant,

v.

Case Number: C0209679

Retailer Operations Division,

Respondent.

FINAL AGENCY DECISION

The U.S. Department of Agriculture, Food and Nutrition Service (FNS), finds that there is sufficient evidence to support the determination by the Retailer Operations Division to impose a permanent disqualification against V & T Deli Grocery LLC (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 15, 2018.

AUTHORITY

According to 7 U.S.C. § 2023 and the implementing regulations at 7 CFR § 279.1, “A food retailer or wholesale food concern aggrieved by administrative action under § 278.1, § 278.6 or § 278.7 . . . may . . . file a written request for review of the administrative action with FNS.”

CASE CHRONOLOGY

By letter dated July 11, 2018, the Retailer Operations Division charged Appellant with trafficking based on a series of irregular SNAP transaction patterns that occurred in November 2017 through April 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 responded to the charges in a letter submitted via fax on July 14, 2018, which did not request or provide any documentation in support of a CMP. The Retailer Operations Division notified Appellant by letter dated August 15, 2018, that the firm was permanently disqualified from participation as a SNAP retailer in accordance with 7 CFR § 278.6(c) and 278.6(e)(1) for trafficking violations. This letter also stated that Appellant was not eligible for the CMP because insufficient evidence was submitted to demonstrate that it had established and implemented an effective compliance policy and program to prevent SNAP violations.

By letter postmarked August 22, 2018, Appellant appealed the Retailer Operations Division's assessment and requested administrative review. The appeal was granted. Subsequent correspondence postmarked August 30, 2018, was also 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 November 2017 through April 2018. This involved two patterns of EBT transaction characteristics indicative of trafficking:

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

APPELLANT’S CONTENTIONS

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

- The firm never sold or did any illegal activities. The only mistake the owner made was to “over sale the balance in one for a single card”;
- Regarding the multiple transactions, the area has large families with only one card. Most of the time, the cardholder sends their child to the store during the day to make purchases even though the cardholder had already made a purchase at the store. The owner cannot keep track of all the people coming to his store since there are so many different families with their own cards that it is impossible to remember all these transactions. The firm is unable to show itemized purchases and is also not aware of any regulation that limits the number of times a beneficiary can use their card in any given time;
- The excessively large purchases are because families are composed of more than three members. The firm cannot itemize sales and offers a large variety of food and household items for sales as shown by the attached receipts. Some businesses have

been disqualified from SNAP for various reasons and this has also increased EBT sales. It is very hard for the owner to keep control of these sales among the other customers;

- The owner will install a point of sale system in order to properly keep better records and better demonstrate the purchases made;
- The owner has been with the program for a long time trying to keep everything the way it should be. The firm is very diligent in following SNAP regulations and most importantly ethical. The neighborhood is one of the poorest in the state. The owner would provide SNAP participant's testimony, but cannot identify them. He requests USDA reverse investigate and ask the participant's if any aspect of the business is unethical; and,
- The owner requests consideration that the store is how the owner makes a living. The area is based on people using SNAP and a store without SNAP will be a total loss.

Appellant submitted photos, purchase receipts from suppliers, and letters from the block captain and a customer 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 July 25, 2013. The case file shows that the firm was disqualified as a WIC vendor in 2016 for overcharging. It also shows that in reaching a disqualification determination, the Retailer Operations Division considered information obtained during a May 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 very small grocery store with narrow aisles and high shelves offering a very limited quantity and variety of staple foods and carrying no unique items or offering any distinctive services.
- The store visit report and photos showed no shopping carts or hand baskets for use by customers making it difficult for them to carry large amounts of food 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 or fruit and vegetable boxes for sale.
- The checkout area was set into a plastic display wall and was approximately 2.5 feet wide and 1.5 foot deep. There 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 would make it problematic to process large orders. The checkout counter had a cash register, no optical scanner, and a POS terminal as confirmed by a store employee.
- The store 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.
- The store had no fresh unprocessed meat or seafood, no frozen unprocessed meat or seafood, a moderate quantity and variety of processed meats (bacon, hot dogs, canned meat/poultry/ fish, deli meats, and some jerky), no processed seafood except for canned fish, no packaged lunch meats, no sausages, no frozen entrees, no frozen dinners, several cartons of eggs, a very limited selection of fresh fruit and vegetables (bananas, tomatoes, six heads of lettuce, 10 white onions, and potatoes), no frozen fruits or vegetables, a very limited selection of single serving nuts and packaged nuts, a limited selection of canned soups, a very limited quantity and variety of canned and packaged staple food items, several deli cheeses, no packaged cheeses, a limited number of single serving yogurts, no sour cream, several packages of butter and margarine, a very limited selection of baby foods, no infant formula, a minimal selection of bread/rolls, no pitas, no tortillas, no tostadas, no corn meal, a limited selection of cold cereals, a very limited selection of hot cereals, flour, rice, many single serving noodle soups, a very limited selection of dry pasta/noodles, several boxes of mac&cheese, and no expensive staple food items.
- There was a large refrigerated deli case containing deli meats and cheeses that are sold by the pound, even though the menu board did not list any per pound prices, as well as the fresh vegetables cited above. The firm sold a wide variety of cold sandwiches and the store employee reported that store stock (e.g. deli meats and cheeses, bread, rolls, and fresh vegetables) are used in the preparation of the made to order sandwiches.
- Ineligible items included: tobacco, household and paper products, health and beauty items, ATM, phone accessories, diapers, charcoal, lighter fluid, gloves, hats, and clothing while accessory foods included: candy, spices, condiments, cooking oil, sugar, snacks, baked goods, single serving 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 daily as confirmed by a store employee. The store employee also stated that the firm did take phone orders, but did not take online grocery orders; did not deliver groceries; and did not round prices up or down.
- Most food items were priced with all visible food prices ending in .x9 cents except for a very few items priced differently such as some snack items and single serving drinks with manufacturer's pricing of two for \$1.00 and 75 cents. Comments on the FNS store visit report specifically stated that most food prices ended in .x9 cents. A price ending in .x9 cents is the most common pricing structure for stores of this type.
- The FNS store visit report listed the four most expensive food items costing more than \$5.00 for sale in the store as being one pound of beef bacon priced at \$7.99, one pound of turkey breast priced at \$6.99, one pound of bacon priced at \$5.69, and 12 ounces of turkey bacon priced at \$5.69. This listing of the most expensive items was provided by the store employee during the store visit.
- The firm was a not a WIC vendor.
- The store visit report and photos showed many empty or marginally stocked shelves and display racks as well as thick dust on stock indicating a slow turnover of inventory.
- The quantity and variety of the store's staple food inventory was less than that seen during the previous FNS store visit on July 13, 2013.

Multiple transactions in unusually short time frames

This Attachment documents 70 individual transactions in 27 sets of two or more transactions conducted by 21 different households in a short period of time. Four households were responsible for 10 of the 27 sets. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). It is unusual and suspicious that there are 19 transactions ending in a same cents value of .25, .50, .75, or .00 cents accounting for nearly a third of the transactions in this Attachment that are not supported by either the store inventory or by the store's pricing structure of prices ending in .x9 cents. 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 21 of the 27 sets. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). One set is comprised of six individual transactions, one set is comprised of five individual transactions, and nine sets are comprised of three individual transactions while the remaining 16 sets are comprised of two individual transactions. It is not a usual shopping pattern to see so many purchases, in a short period of time, by the same recipients as documented in this Attachment. Multiple transactions conducted by the same household within a short period of time is a method which violating stores use to avoid single high dollar transactions that cannot be supported by store inventory and structure. These sets of transactions appear to be in amounts which are indicative of trafficking.

Appellant contends the multiple transactions are because the area has large families with only one card. Most of the time, the cardholder sends their child to the store during the day to make purchases even though the cardholder had already made a purchase at the store. The owner cannot keep track of all the people coming to his store since there are so many different families with their own cards that it is impossible to remember all these transactions. The firm is unable

to show itemized purchases and is also not aware of any regulation that limits the number of times a beneficiary can use their card in any given time.

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 or of household members/friends shopping together and making separate purchases as all, 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 in amounts 5 U.S.C. § 552 (b)(6) & (b)(7)(C) with 20 of the 27 sets having 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 five or six sizeable transactions at the very minimally stocked Appellant firm within a short period of time.

It is certainly not unusual for a small number of SNAP households to conduct multiple transactions in a short period of time. However, it is unusual that subsequent transaction dollar amounts are substantial in these transaction sets and that all of the sets in this Attachment total more 5 U.S.C. § 552 (b)(6) & (b)(7)(C) when the comparable average small grocery store SNAP transaction amount in Philadelphia County during the review period was \$8.85. 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 store visit report also specifically notes that Appellant's pricing structure has most food prices ending in .x9 cents which was confirmed by the photos included with the report and also by the store employee who completed the store visit form in conjunction with the contract reviewer and answered "no" to the question asking if the firm had a pricing structure with most priced ending in amounts other than .x9 cents. The store employee also answered "no" to the question of whether the firm ever rounded transaction totals up or down to whole dollar amounts. 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, .25, .50, or .75 cents as multiples of nine seldom have a value ending in these amounts making it statistically impossible that this nearly one third of the transactions in this Attachment would end in these amounts with legitimate food purchases. This further supports that the transaction amounts were contrived and are the result of trafficking.

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 much smaller and very minimally stocked grocery 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). There is no legitimate reason why this household would spend so much of its SNAP allotment at a very minimally stocked small grocery store when it clearly had access to and frequently shopped at supermarkets and super stores located nearby and at a distance. The more plausible explanation is that this 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 174 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 \$8.85 for this store type in Philadelphia 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 small grocery or convenience stores out of necessity, this is not the case when they have better alternatives. FNS records show there are 64 comparably sized or larger SNAP retailers located within a one mile radius of the Appellant firm that includes a super store, two supermarkets, and five well-stocked medium grocery stores with the closest medium grocery located just 158 yards from Appellant's location. All of these larger stores would offer greater quantities and varieties of staple food items at lower prices than would be found at a very

minimally stocked small grocery store offering no fresh or frozen unprocessed meats or seafood and virtually no fresh or frozen produce.

The firm had irregular SNAP transaction data compared to like type stores in Philadelphia County. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). While there are normally fewer transactions in these higher ranges, the data shows that most stores of this type do still have a small number of them further supporting that the Appellant firm may be dividing larger trafficking transactions into smaller ones as previously discussed. Dividing large transactions into a series of smaller transactions has long been a technique used by retailers to avoid suspicion when trafficking SNAP benefits. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). The unusual spikes in both transaction numbers and dollar volume do not appear 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 because families are composed of more than three members. The firm cannot itemize sales and offers a large variety of food and household items for sales as shown by the attached receipts. Some businesses have been disqualified from SNAP for various reasons and this has also increased EBT sales. It is very hard for the owner to keep control of these sales among the other customers. Appellant provided receipts and invoices for inventory purchases, photos of store stock, and two customer statements in support of these contentions.

The SNAP transactions noted in this Attachment are not presumed to be trafficking because they exceed a set dollar amount; they are questionable because they are inconsistent for this type of store and store stock. A shopping pattern analysis by the Retailer Operations Division shows that households in this Attachment are regularly shopping at much larger stores, and conducting high dollar value transactions, yet are conducting comparable or higher dollar value transactions at the Appellant firm. It makes no sense for a household that regularly shops at larger stores and apparently has no transportation limitations to spend large dollar amounts at the Appellant firm since its cost of goods is higher than that of larger stores such as supermarkets or super stores.

Information obtained during the FNS store visit on May 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, condiments, drinks, and single serving foods as well as many ineligible items. The fact that tobacco, household products, paper products, health and beauty items, ATM, phone accessories, diapers, charcoal, lighter fluid, gloves, hats, and clothing 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. The firm has an extremely 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.

A detailed analysis of invoices submitted for inventory purchases was conducted by the Retailer Operations Division and the dollar amount of eligible food purchases compared to the firm's SNAP redemptions for the review period. Out of the 698 invoices/receipts submitted, only 233 were dated within the review period. Two undated invoices as well as invoices for non-food purchases such as cell phone payments, tobacco license renewal, Home Depot, etc. were not included. Some invoices were handwritten with illegible product descriptions, but these purchases were included to give the benefit of the doubt to the retailer. This invoice analysis confirms that no expensive foods were purchased and shows that the vast majority of products purchased were snack foods, soda, other beverages, and candy. Staples such as bread, eggs, and milk were purchased in smaller quantities. The Retailer Operations Division analyzed the invoices and receipts provided for the months of November 2017, December 2017, and March 2018 as these months had the most comprehensive supply of invoices and receipts. Non-food items were separated out and the owner provided mark-up of 35 percent was used. The results of their analysis showed that inventory purchases were sufficient to cover SNAP redemptions for the months of November and December 2017, but were not for March 2018. Adding a standard 20 percent to redemptions to factor in credit/debit card and cash sales results in the firm having insufficient food inventory to support purchases in all three months reviewed. Insufficient inventory is a sign of trafficking. It is also noted that sufficient inventory alone does not explain the suspicious transactions patterns such as rapid and consecutive transactions by households during the same store visit or in a single day or excessively large purchase transactions.

The invoice analysis also found several receipts showing that SNAP EBT cards were used to pay for the purchases. Using the Pennsylvania SNAP database, the Retailer Operations Division identified the recipients involved, including one recipient whose reported home of record is 9.1 miles away from the Appellant firm. Purchasing store inventory using SNAP benefits is a serious violation of SNAP regulations. In the instances identified, the store owner either exchanged cash for the use of the recipient's EBT card and SNAP benefits or the recipients purchased the food items and then sold them to the store owner in exchange for cash. Both of these options meet the definition of trafficking as defined in SNAP regulations at 7 CFR 271.2.

A review of Appellant's photos shows a greater quantity and variety of products than the store visit photos and suggests that Appellant's photos were staged in an effort to avoid the permanent disqualification. The two handwritten statements are without merit. While the block captain has an active SNAP account, she did not conduct any transactions at the Appellant firm during the review period. A check of the Pennsylvania SNAP database shows the second statement belongs to a recipient whose reported home of record is 1.6 miles away thus contradicting her statement

that the firm is close by. She had no transactions at the Appellant firm until January 10, 2018, and conducted only 12 transactions at the Appellant firm during the remainder of the review period refuting her statement that she “buys all my groceries here and I spend a good amount of money and food stamps here!”. Regarding the claim that Appellant’s sales increased in the review period as a result of nearby businesses having been disqualified as SNAP retailers, a review of disqualified stores shows that only one store had been disqualified in the 12 months prior to the start of the review period. This store was disqualified in November 2017. An analysis of Appellant’s SNAP redemptions during the five months following November 2017 shows that sales at the Appellant firm were lower in four of the five months thereby showing no increase in redemptions as a result of this store’s disqualification.

Additionally, that households were shopping at super stores and supermarkets prior to, just after, or even in between suspicious transactions at the Appellant firm casts doubt on their legitimacy. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). An analysis of the household’s SNAP transactions shows that it routinely conducted sizeable transactions at the Appellant firm immediately prior to or after shopping at super stores and supermarkets. There is no reasonable explanation other than trafficking that satisfactorily explains why a SNAP household would expend a significant portion of their monthly benefits at a small grocery store with very limited staple foods when it is shopping at much larger stores on the very same day. The analysis identified other households with this same irregular pattern of high dollar value transactions at the Appellant firm and transactions, often of lower dollar value, at larger stores 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

It is further noted that SNAP redemptions at the firm fluctuated unusually following the FNS store visit on May 7, 2018. The average SNAP transaction dollar amount decreased 12.73 percent from April 2018 to June 2018, while the volume of SNAP redemptions decreased 14.67 percent during the same period. A pronounced decrease in SNAP redemptions following receipt of the charge letter is a clear indication of trafficking since, if trafficking were not occurring, there would be no abnormal fluctuations in redemption amounts.

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

Other Contentions

In an appeal of an adverse action, the Appellant bears the burden of proving by a preponderance of evidence that the administrative action should be reversed. That means the Appellant has the burden of providing relevant evidence that a reasonable mind, considering the record as a whole, would accept as sufficient to support a conclusion that the argument asserted is more likely to be true than untrue. Assertions that the firm has not violated program rules, by themselves and without supporting evidence and rationale, do not constitute valid grounds for dismissal of the current charges of violations or for mitigating their impact. A record of participation in SNAP with no previously documented instance of violations or assertions that the firm has not violated program rules, by themselves and without supporting evidence and rationale, do not constitute valid grounds for dismissal of the current charges or for mitigating the impact of those charges.

The 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.

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 any evidence to demonstrate that the firm had established and implemented an effective compliance policy and program to prevent SNAP violations within the specified timeframe. As such, the Retailer Operations Division determined that Appellant was not eligible for a trafficking CMP in lieu of permanent disqualification.

Based on the above discussion and the evidence under review, Appellant failed to meet the regulatory standard for a trafficking CMP as it did not provide substantial evidence that it met all four criteria required by 7 CFR §278.6(i). Based on the above, the Retailer Operations Division’s decision not to impose a CMP in lieu of disqualification is sustained as appropriate pursuant to 7 CFR §278.6(i).

CONCLUSION

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

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

RIGHTS AND REMEDIES

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

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

ROBERT T. DEEGAN
Administrative Review Officer

February 28, 2019