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

Willie Hill Top Market,

Appellant,

v.

Case Number: C0208814

Retailer Operations Division,

Respondent.

FINAL AGENCY DECISION

It is the decision of the U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS) that a permanent disqualification of Willie Hill Top Market (hereinafter "Appellant") from participation as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP) was properly imposed by the Retailer Operations Division.

ISSUE

The issue accepted for review is whether or not the Retailer Operations Division, in its administration of SNAP, took appropriate action, consistent with Title 7 Code of Federal Regulations (CFR) Part 278, when it imposed a permanent disqualification against Willie Hill Top Market.

AUTHORITY

7 U.S.C. § 2023 and its implementing regulations at 7 CFR § 279.1 provide that "[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."

SUMMARY OF CHARGES

The Appellant was charged with trafficking and subsequently permanently disqualified based on an analysis of EBT transaction data from January 2018 through May 2018. This involved the following transaction patterns which are common trafficking indicators:

- There were an unusual number of transactions ending in a same cents value.
- There were multiple transactions made from the accounts of individual SNAP households within a set time period.
- Excessively large purchase transactions were made from recipient accounts.

CASE CHRONOLOGY

The agency's record shows that FNS initially authorized Willie Hill Top Market for SNAP participation as a convenience store on July 26, 2017. In a letter dated June 21, 2018, the Retailer Operations Division charged the Appellant with trafficking, as defined in Section 271.2 of the SNAP regulations, based on a series of irregular SNAP transaction patterns that occurred between the months of January 2018 and May 2018. The letter noted that the penalty for trafficking is permanent disqualification as provided by 7 CFR § 278.6(e)(1). The letter also stated that the Appellant could request a civil money penalty (CMP) in lieu of permanent disqualification for trafficking, but noted that such a request must be made within 10 days of receipt of the charge letter under the conditions specified in 7 CFR § 278.6(i).

In a letter dated July 2, 2018, the Appellant, through counsel, responded to the trafficking charges by denying that any violations were occurring. The Appellant argued that FNS had not offered any evidence of program violations other than a printout of transactions "that obviously are not trafficking." The Appellant argued that in light of the firm's "flat even pricing methodology, the practice of rounding down, 5 U.S.C. § 552 (b)(6) & (b)(7)(C) between transactions and the normal transaction amounts, none of the transactions listed alone or together constitute evidence of trafficking."

In support of its response, the Appellant provided 15 undated photographs showing signage in the store indicating an even-dollar pricing structure, such as $4.00 for a gallon of milk, $3.00 for a dozen eggs, a can of Red Bull energy drink for $2.50, a pint of ice cream for $5.00, a turkey sandwich for $4.00, and candy bars for $1.00 each.

After reviewing the Appellant's response and further considering the evidence in the case, the Retailer Operations Division concluded that trafficking had occurred as charged and issued a determination letter dated July 23, 2018. This letter informed the Appellant that it would be permanently disqualified from SNAP upon receipt of the letter in accordance with 7 CFR § 278.6(c) and § 278.6(e)(1). The letter also stated that the Retailer Operations Division considered the Appellant's eligibility for a trafficking CMP according to the terms of Section 278.6(i) of the regulations, but determined that a CMP was not appropriate in this case because the 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.

In a faxed letter dated July 24, 2018, the Appellant, through counsel, appealed the Retailer Operations Division's determination by requesting an administrative review. The request was granted.

STANDARD OF REVIEW

In an appeal of adverse action, such as disqualification from SNAP participation, an appellant bears the burden of proving by a preponderance of the evidence that the administrative action should be reversed. This means that an appellant has the burden of providing relevant evidence which a reasonable mind, considering the record as a whole, would accept as sufficient to support a conclusion that the matter asserted is more likely to be true than not true.

CONTROLLING LAW AND REGULATIONS

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

7 U.S.C. § 2021(b)(3)(B) states, in part:

> ...[A] disqualification under subsection (a) shall be...permanent upon...the first occasion or any subsequent occasion of a disqualification based on the purchase of coupons or trafficking in coupons or authorization cards by a retail food store or wholesale food concern or a finding of the unauthorized redemption, use, transfer, acquisition, alteration, or possession of EBT cards...

7 CFR § 278.6(a) states, in part:

> 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, [or] 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.

7 CFR § 271.2 states, in part:

> Trafficking means: The buying, selling, stealing, or otherwise effecting an exchange of SNAP benefits issued and accessed via Electronic Benefit Transfer (EBT) cards, card numbers and personal identification numbers (PINs), or by manual voucher and signature, for cash or consideration other than eligible food, either directly, indirectly, in complicity or collusion with others, or acting alone...

7 CFR § 271.2 states, in part:

> Eligible foods means: Any food or food product intended for human consumption except alcoholic beverages, tobacco and hot food and hot food products prepared for immediate consumption...

7 CFR § 278.6(b)(1) states, in part:

> Any firm considered for disqualification...under paragraph (a) of this section...shall have full opportunity to submit to FNS information, explanation, or evidence concerning any instances of noncompliance before FNS makes a final administrative determination. The FNS regional office shall send the firm a letter of charges before making such determination. The letter shall specify the violations or actions which FNS believes constitute a basis for disqualification.... The letter shall inform the firm that it may respond either orally or in writing to the charges contained in the letter within 10 days of receiving the letter...

7 CFR § 278.6(c) states, in part:

> The letter of charges, the response, and any other information available to FNS shall be reviewed and considered by the appropriate FNS regional office, which shall then issue the determination. In the case of a firm subject to permanent disqualification under paragraph (e)(1) of this section, the determination shall inform such a firm that action to permanently disqualify the firm shall be effective immediately upon the date of receipt of the notice of determination from FNS, regardless of whether a request for review is filed in accordance with part 279 of this chapter.

7 CFR § 278.6(b)(2)(ii) states, in part:

> 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).

7 CFR § 278.6(b)(2)(iii) states:

> If a firm fails to request consideration for a civil money penalty in lieu of a permanent disqualification for trafficking and submit documentation and evidence of its eligibility within the 10 days specified in § 278.6(b)(1), the firm shall not be eligible for such a penalty.

7 CFR § 278.6(i) states, in part:

> 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...

APPELLANT'S CONTENTIONS

The Appellant, through counsel, made the following summarized contentions in its request for administrative review, in relevant part:

- The charge letter attachments appear to be a printout of transactions from the agency's ALERT system. The ALERT system analyzes daily SNAP transactions and data based on parameters programmed into the system to detect patterns. Of course, ALERT cannot detect fraud itself, but rather raw data and patterns associated with fraud. ALERT is notorious for identifying false positives when in fact there is no fraud or trafficking.
- Regarding transactions ending in a same-cents value, almost all of those ended with .00, indicating either that the price of the item was an even-dollar amount or that the total transaction amount had been rounded.
- Setting flat pricing does not constitute trafficking. Neither does rounding down transaction totals at checkout.
- The explanation for .00 or .50 transactions is obvious. The Appellant rounded down in some cases for the sake of simplicity at the point of sale. This kind of business in a rough neighborhood with impatient customers sometimes results in rounding at a loss to the

business, but not to SNAP. While not a savvy business approach, it does not constitute trafficking.

- In support of a .00 or .50 pricing structure, the Appellant refers to its previously submitted photographs showing signs throughout the store listing several products at even-dollar amounts.
- Regarding multiple transactions in an unusually short timeframe, three sets of transactions took place 5 U.S.C. § 552 (b)(6) & (b)(7)(C), which obviously are within the same visit when a customer forgot an item, for example.
- 5 U.S.C. § 552 (b)(6) & (b)(7)(C). According to ALERT, the model for alleged trafficking is apparently when customers make one purchase, then wait 5 U.S.C. § 552 (b)(6) & (b)(7)(C) hanging around before making another transaction. Of course, there is another perfectly logical explanation: the customer simply came back the next day or much later the same day.
- ALERT's output regarding transactions with a short timeframe is shocking. Apparently if customers make a purchase and then wait 5 U.S.C. § 552 (b)(6) & (b)(7)(C) to make their next purchase, that is suspicious.
- In the Appellant's neighborhood, customers often hang around in the street, and sometimes around the neighborhood. Sometimes they take a cigarette break, then walk around and remember that they need something else at the store. Many customers live nearby and shop every day or every week. It is a far cry from the situation where customers arrive by car and typically collect all their items before proceeding to the register once. The level of variance in the gap is clearly indicative that there is nothing nefarious behind these transactions.
- Regarding excessively large purchases, 5 U.S.C. § 552 (b)(6) & (b)(7)(C), which is hardly a whopping amount and is not unexpected given the store's inventory and selection.
- One or two baby formula purchases would easily put a transaction onto the list, 5 U.S.C. § 552 (b)(6) & (b)(7)(C). It is very difficult to get out of a store for less than that amount.
- Customers often make large purchases toward the beginning of the month when funds are available. The fact that most of the large transactions 5 U.S.C. § 552 (b)(6) & (b)(7)(C) or so speaks for itself.
- There is no direct evidence collected suggesting that trafficking occurred. For trafficking to be said to have occurred, there needs to be evidence of the exchange of SNAP benefits for cash or consideration other than eligible food.
- Appellant cites two court cases, *Fells v. United States* and *Brothers Food & Liquor, Inc. v. U.S.* to support its argument that the Retailer Operations Division failed to prove that trafficking was occurring at Willie Hill Top Market.
- Where there is no evidence other than an ALERT printout that lists hundreds of transactions that are obviously not trafficking, it casts doubt on the entire method of determining trafficking.
- In light of the flat even pricing methodology, the practice of rounding down, 5 U.S.C. § 552 (b)(6) & (b)(7)(C) between transactions, and the normal transaction amounts, none of the transactions listed alone or together constitute evidence of trafficking. As such, Appellant requests that there be a finding of no violation.

The preceding may represent only a brief summary of the Appellant's contentions presented in this matter. However, in reaching a decision, full attention was given to all contentions and evidence presented, including any not specifically summarized or explicitly referenced herein.

ANALYSIS AND FINDINGS

The primary issue for consideration in a case based on suspicious SNAP redemption data is whether or not the Retailer Operations Division adequately established that the Appellant firm engaged in the violation of trafficking. In other words, did the Retailer Operations Division, through a preponderance of the evidence, establish that it is more likely true than not true that the irregular and unusual transactions cited in the charge letter were the result of trafficking?

Contractor Store Visit

The case file indicates that in reaching a disqualification determination, the Retailer Operations Division considered not only the Appellant firm's EBT transactions, but also information obtained during a March 26, 2018, store visit which was conducted by an FNS contractor to observe the nature and scope of the firm's operation, stock, and facilities. This store visit information was used to ascertain if there were justifiable explanations for the firm's irregular SNAP transaction patterns. The store visit report and photographs documented the following store size, description, and characteristics:

- Willie Hill Top Market is a convenience store, approximately 1,600 square feet in size, operating in the city of Bridgeport, Fairfield County, Connecticut.
- At the time of the contractor's visit, the firm did not have any shopping carts for customer use, but did have two small hand-held shopping baskets, which is not unusual for stores of this size. Customers shopping in such stores generally purchase only as much food as they can carry in their arms.
- The store visit photographs show one cash register for food purchases and agency records reflect the use of one EBT point-of-sale device.
- It appears that the firm does not use optical scanners to process transactions.
- The checkout area consists of a small, cluttered countertop where items can be placed for purchase. The constricted checkout area is not suitable for conducting large or rapid transactions as there is very little space on the counter to place more than a few items at a time and little room for customers to maneuver with large amounts of groceries.
- The store's staple food stock is sufficient in each of the four staple food categories.
- SNAP-eligible, non-staple accessory food items available at the store include carbonated and uncarbonated drinks, snacks, candy, and condiments. The store also sells ineligible, nonfood items, including tobacco products, alcoholic beverages, lottery tickets, personal care items, and other miscellaneous household merchandise.
- There is no indication from the store visit report that the firm has a special pricing structure. From all indications, the prices of products end in a variety of cents values. For example, the contractor's photographs show a can of Vienna sausage listed for $1.25; a bag of cashews or peanuts sells for $0.99; a loaf of Holsum bread costs $1.99; a 20-ounce bottle of Fanta soda sells for $1.75; a bottle of Powerade sells for $2.50, and a 15-ounce box of Cheerios sells for $4.49.

- According to the contractor, the store owner indicated that transaction totals are not rounded up or down at checkout.
- The most expensive food items for sale at the store include a case of Red Bull energy drink for $30.00; cans of infant formula for $18.99 or $17.99 each, and a box of cereal for $5.99. It should be noted that the vast majority of SNAP households that contain infants and children under the age of five also participate in the Special Supplemental Nutrition Program for Women, Infants and Children (WIC). It is uncommon for such households to purchase expensive cans of infant formula with their SNAP benefits; rather, they normally use WIC vouchers to make such purchases.

The available inventory of SNAP-eligible food at the time of the store visit showed stock that would be typical of a convenience store or corner market, where households normally purchase a limited number of items to complement their overall dietary needs. There was no indication that SNAP households would be inclined to regularly visit Willie Hill Top Market to purchase very large quantities of groceries, especially considering the absence of shopping carts and the availability of larger SNAP-authorized stores in the area. Given the available inventory and the store's characteristics, this review could find no reason why the Appellant firm's SNAP redemption patterns differed so significantly from those of nearby, similar-sized competitors.

SNAP Transaction Analysis

Charge Letter Attachment 1: There were an unusual number of transactions ending in a same cents value. This attachment lists 154 transactions ending in .00, 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in SNAP benefits, and 219 transactions ending in .50, 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in SNAP benefits. When such transactions are not supported by a specific pricing structure at the store, they are a strong indicator of trafficking in SNAP benefits. As noted earlier, the contractor's report shows that prices in the store end in a variety of cents values. As such, the likelihood that so many transactions, which would logically consist of random items from the store's shelves, would so frequently and legitimately end in .00 or .50 is very low.

The Appellant argued that the patterns found in Attachment 1 are simply due to even-dollar pricing or rounding down at the checkout counter. According to the Appellant, the setting of flat pricing does not constitute trafficking, nor does rounding down transaction totals at checkout. The Appellant believes that the explanation is obvious: rounding down in some case is done for simplicity at the point of sale. While not necessarily a savvy business approach, it does not constitute trafficking. In support of these arguments, the Appellant submitted 15 undated photographs showing several signs throughout the store listing products at even-dollar amounts.

With regard to these contentions, it is true that even-dollar pricing or rounding down at the point of sale does not, by itself, indicate that trafficking is occurring. Such business practices are not prohibited by SNAP regulations. But the Appellant has not been charged with setting prices at even-dollar amounts; neither has it been charged with rounding. Instead, the firm has been charged with trafficking because the store's characteristics do not support large numbers of even-dollar transactions. For instance, evidence from the store visit report shows that many, if not most, of the items in the store have a price with a cents value ending in 9, such as .49 or .99. When adding randomly selected items together with such a pricing structure, it is very rare for the total purchase

amount to end in .00 or .50. Occasional .00 or .50 transaction totals are to be expected, of course, particularly when there are some items in the store with prices that conform to such amounts. But when a firm has more than 300 such transactions in the span of just five months, additional explanation and evidence is necessary to for this review to conclude that the transactions are legitimate.

It should be noted that none of the handwritten pricing signs visible in the Appellant's photographs were hanging in the store at the time of the contractor's visit. It appears quite clear that these signs were added to the shelves and refrigeration unit doors after receipt of the trafficking charge letter. Such action suggests that merchandise pricing may have been fabricated to make it appear that large numbers of .00 and .50 transactions were justified by a supposed even-dollar pricing structure.

As for rounding, the contractor indicated that it completed its report in collaboration with store personnel. The employee who signed the contractor's store review consent form was one of the firm's owners. According to the contractor, store personnel indicated that the firm does not engage in rounding up or down at checkout. This is contrary to the argument now being made by Appellant's counsel.

Rounding also offers no benefit to either the firm or the customer. While the firm does not use optical scanners, a typical cashier would find it no more difficult or time-consuming to enter in the full price of an item than it would to enter in a rounded form of each item. Additionally, a customer's remaining SNAP balance is listed at the bottom of every EBT transaction receipt where the customer can plainly see it. Thus, there is little rationale for rounding transaction totals. Finally, if rounding was truly time-saving or convenient, then it would stand to reason that the firm would round up or down virtually all transactions at the store. But that is not the case here.

It should be noted that the Appellant did not provide any evidence, such as itemized cash register receipts, in either its response to the charge letter or in its request for administrative review to prove that the transactions in question were legitimate purchases of eligible food. Without a reasonable explanation or compelling evidence to demonstrate that the transactions in this attachment were legitimate, this review has little option but to conclude that the transactions listed in Attachment 1 were likely due to trafficking violations.

Charge Letter Attachment 2: Multiple transactions were made from individual benefit accounts in unusually short timeframes. This attachment lists 30 sets of transactions (70 transactions in all) 5 U.S.C. § 552 (b)(6) & (b)(7)(C). 5 U.S.C. § 552 (b)(7)(E).

For example, 5 U.S.C. § 552 (b)(6) & (b)(7)(C). The two transactions totaled 5 U.S.C. § 552 (b)(6) & (b)(7)(C), an extraordinary amount for a convenience store like Willie Hill Top Market, which has no shopping carts and a very constricted checkout counter. 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

Considering the amount of food it would take to add up to these transaction totals and considering the availability of much larger stores in the area, it seems very unlikely that SNAP customers would repeatedly visit a convenience store to make such large purchases.

The Appellant has argued that transactions taking place 5 U.S.C. § 552 (b)(6) & (b)(7)(C) are "obviously within the same visit when a customer forgot an item for example." The Appellant further states that the explanation for the transactions in Attachment 2 is perfectly logical: the customer simply came back to the store at a later time after the initial transaction. The Appellant argues that the ALERT system's model is to deem suspicious any set of transactions where a customer makes an initial purchase and then waits approximately
5 U.S.C. § 552 (b)(6) & (b)(7)(C) to make their next purchase. The Appellant contends that such behavior is absolutely typical of the neighborhood and is not nefarious in nature.

Unfortunately, this review does not agree with the Appellant's characterizations. The transaction patterns found in this attachment are highly irregular, especially when compared with similar stores in the area. If customer behavior in the area where the Appellant store is located was so typical, then it stands to reason that nearby stores would have very similar SNAP transaction patterns. But that is simply not the case. It should be made clear that SNAP regulations do not provide limitations on the number of transactions that can be made by SNAP households or how large the individual transactions can be. However, the transactions noted in the charge letter are questionable not because they exceed any limits for use, but rather because they display patterns of use that are inconsistent with the store's documented physical characteristics and in comparison with similar stores in the area. It should be further noted that the transactions identified in the charge letter are not marginally abnormal, but decidedly so. This review does not contend that the EBT transactions detailed in the charge letter are overtly suspicious when they occur on an occasional or intermittent basis. But when such transactions form repetitive and questionable patterns on a consistent basis over a substantial period of time, such activity is considered highly irregular, and a firm's intent to comply with program regulations is called into question.

It must be noted that the Appellant has offered no evidence at all to prove that the questionable transactions were legitimate purchases of eligible food. Anecdotal explanations without supporting documentation do little to convince this review that the transactions in Attachment 2 were legitimate. Because the Appellant has offered little information beyond conjecture and has submitted no evidence to support its claims, it is reasonable for this review to conclude that trafficking was a likely cause of the transaction patterns listed in this attachment.

Charge Letter Attachment 3: Excessively large purchase transactions were made from recipient accounts. This attachment lists 171 SNAP transactions
5 U.S.C. § 552 (b)(6) & (b)(7)(C). These large transactions are not consistent with other convenience stores in the state of Connecticut. The Retailer Operations Division has determined that during the review period, the average SNAP transaction amount for a convenience store in Connecticut was $8.67. In Fairfield County, the average was a bit higher, at $9.20 per transaction. But the average transaction in Attachment 3 is more than five times larger than the average purchase amount for this store type.

Given that the Appellant firm has a moderate inventory of staple foods and other SNAP-eligible items, it is probable that there would be an occasional purchase where the transaction amount is high, 5 U.S.C. § 552 (b)(6) & (b)(7)(C). As such, there may well be some legitimate SNAP transactions sprinkled among the transactions listed in Attachment 3. However, as noted earlier,

there is no evidence that the firm would be likely to have SNAP redemption patterns that differ significantly from nearby, similar-sized competitors, especially considering the absence of shopping carts and the severely constricted checkout area. The substantial number of high-dollar transactions in a five-month period calls into question the legitimacy of these transactions.

Attachment 3 lists seven transactions for 5 U.S.C. § 552 (b)(6) & (b)(7)(C) or more during the review period, including a high of 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Another 59 transactions were between 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Considering how many food items it would typically take to add up to 5 U.S.C. § 552 (b)(6) & (b)(7)(C) or more, and considering that the store does not have any shopping carts, and given the fact that there are much larger grocery stores in the area with substantially greater inventory and variety, this review finds it unlikely that SNAP households would legitimately choose to spend large portions of their benefit allotments at a small store such as Willie Hill Top Market.

There are also some unusually repetitive transaction totals found in this attachment. For example, 5 U.S.C. § 552 (b)(6) & (b)(7)(C). This review could find no evidence of specially-priced food packages, such as meat bundles or boxes of produce, so these repetitive totals stand out as warranting further explanation.

It is also unusual that many of the customers who made large purchases at Willie Hill Top Market shopped at much larger supermarkets or superstores just a short time before or after shopping at the Appellant firm. For example, 5 U.S.C. § 552 (b)(6) & (b)(7)(C). In another example, 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

In each of the examples above, it is difficult for this review to comprehend what was available at Willie Hill Top Market that would not have been available at a substantially larger supermarket just a short time later, especially one with shopping carts to help transport a large amount of merchandise.

The Appellant has argued that most of the transactions in Attachment 3 5 U.S.C. § 552 (b)(6) & (b)(7)(C), which it believes is not unexpected given the store's inventory and selection. The Appellant further claims that one or two baby formula purchases would easily put a transaction onto the list. According to the Appellant, it is very difficult to get out of a store for less 5 U.S.C. § 552 (b)(6) & (b)(7)(C). The Appellant states, "The fact that most of the large transactions 5 U.S.C. § 552 (b)(6) & (b)(7)(C) or so speaks for itself."

Unfortunately, 5 U.S.C. § 552 (b)(6) & (b)(7)(C) transactions at a convenience store do not speak for themselves; neither is it difficult to leave a convenience store without spending 5 U.S.C. § 552 (b)(6) & (b)(7)(C). As noted earlier, the average convenience store transaction in Fairfield County is just $9.20. What is it about Willie Hill Top Market that prompts such spending from SNAP customers when other similar-sized stores in the area do not experience such behavior? The Appellant's contentions simply do not resolve this question.

As to the claim that one or two purchases of infant formula would easily place a transaction onto the list in Attachment 3, such a claim would be reasonable if most SNAP households with infants actually purchased the bulk of their formula needs with SNAP benefits. However, the vast

majority of SNAP households containing children under the age of five are eligible for and participate in the WIC program. Infant formula is part of the WIC food package. Because infant formula is so expensive, most households use their WIC benefits to purchase such items in order to save their SNAP benefits for other foods.

It is unfortunate that the Appellant has not offered a single piece of evidence, such as cash register receipts, or inventory and accounting records, to help prove that the transactions listed in Attachment 3 were legitimate purchases of eligible food, such as infant formula. Without such documentation, this review has little option but to conclude that the transactions listed in this attachment were likely the result of trafficking.

It is the finding of this review that the attachments furnished with the charge letter adequately identify the irregular patterns of SNAP transactions which indicate that trafficking was likely taking place. If viewed in a vacuum, the transactions themselves may not seem particularly unusual. However, they are substantially different when compared with similar stores in the area and are markedly different than normal shopping patterns of SNAP households. Based on these and other factors, such as the store's physical characteristics and inventory, the case of trafficking is convincing.

In an appeal of adverse action, the onus is on the Appellant to prove, by a preponderance of the evidence, that the administrative action should be reversed. This means submitting sufficient and compelling evidence that would lead a reviewer to conclude that trafficking did not occur. Unfortunately, the Appellant has not offered any relevant evidence and its anecdotal contentions do not sufficiently address the specific transactions listed in the charge letter. Therefore, it is the conclusion of this review that the transactions in the charge letter were, more likely than not, the result of trafficking violations committed by the Appellant.

Trafficking Case based on EBT Data

The primary argument made by the Appellant in this case relates to USDA's use of a fraud detection system known as ALERT. The Appellant contends that the ALERT system cannot detect fraud, but simply produces raw data and patterns associated with fraud. According to the Appellant, ALERT is notorious for identifying false positives when in fact there is no fraud or trafficking. Further, the Appellant argues that in order for trafficking to be said to have occurred, there needs to be direct evidence of the exchange of SNAP benefits for cash or consideration other than eligible food. The Appellant states: "…[W]here there is no evidence other than an ALERT printout that caught hundreds of transactions that obviously are not trafficking, it casts doubt on the entire method of determining trafficking."

With regard to these contentions, this review acknowledges that a conclusion of trafficking cannot be drawn from EBT data alone, nor would it be possible to do so in a case based primarily on inconsistent redemption data. It is noted that USDA employs a computerized fraud detection tool to identify EBT transactions that form patterns having characteristics indicative of trafficking. However, this tool does not, by itself, determine or conclude that trafficking has occurred. FNS's Retailer Operations Division must still analyze the transaction data and patterns with other factors, such as observations from a store visit, an analysis of customer shopping

behavior, and a comparison with similar stores in the area, and then render a determination as to whether or not the questionable transactions were, more likely than not, the result of trafficking. The legality of this method is identified in 7 CFR § 278.6(a) which states, in part, "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, [or] evidence obtained through a transaction report under an electronic benefit transfer system** …." [Emphasis added.]

Prior to a disqualification determination, the accused firm is given ample opportunity to reply to the charges and provide any information and evidence it deems appropriate in justifying as legitimate the transaction activity detailed in the charge letter.

It should be noted that this reviewer has thoroughly examined the documentation and information provided by the Retailer Operations Division and has found no evidence to suggest that the agency simply manufactured numerical data and declared it to be trafficking. From all indications, the Retailer Operations Division obtained the EBT data, found it to be suspicious in comparison to other area stores of similar size, and then undertook a thorough analysis before concluding that trafficking was likely occurring.

It is important to restate here that in an appeal of adverse action, the onus is on the Appellant to prove by a preponderance of the evidence that the administrative action should be reversed. Despite being given a specific list of questionable transactions, the Appellant has chosen to offer no evidence of any kind, such as itemized cash register receipts or inventory records, to prove that the specific transactions listed in the charge letter were legitimate purchases of eligible food.

Court Cases

The Appellant has cited two court cases to support its argument that the Retailer Operations Division failed to prove that trafficking was occurring.

With regard to these citations, it must be noted that considerations of legal precedent through case law is beyond the scope of this review. Instead, the role of this review is limited to whether or not the Retailer Operations Division, in its administration of SNAP, took appropriate action consistent with the Food and Nutrition Act of 2008, as amended, and the regulations promulgated under the Act when it imposed a permanent disqualification against Willie Hill Top Market. Therefore, any application of a supposed judicial precedent would best be addressed in a judicial review in a court of law. Accordingly, no further findings or conclusions are rendered in this regard.

Civil Money Penalty

As noted earlier, the Retailer Operations Division determined that the Appellant firm was not eligible for a civil money penalty in lieu of permanent disqualification for trafficking because it did not submit sufficient evidence to demonstrate that it had established and implemented an effective compliance policy and training program to prevent SNAP violations.

In accordance with regulations at 7 CFR § 278.6(b)(2), in order for a civil money penalty to be considered, a firm must not only notify FNS that it desires the agency to consider a trafficking CMP in lieu of permanent disqualification, but it must also submit appropriate documentation within designated timeframes. The case record shows that the Appellant did not request a civil money penalty when it originally replied to the charge letter and there is no evidence that the Appellant submitted any documentation that would indicate that the firm had a compliance policy or training program of any kind. Therefore, in accordance with 7 CFR § 278.6(b)(2)(iii) and § 278.6(i), a civil money penalty in lieu of permanent disqualification for trafficking is not an option in this case.

CONCLUSION

An analysis of the Appellant's EBT transaction record was the primary basis for the decision by the Retailer Operations Division to permanently disqualify Willie Hill Top Market from SNAP participation. This data provided sufficient evidence for this review to conclude that the questionable transactions and patterns listed in the charge letter were more likely than not the result of trafficking violations committed by the Appellant. Likewise, the Appellant has not proven, by a preponderance of the evidence, that the administrative action should be reversed.

Based on a review of all available information and evidence in this case, the decision to impose a permanent disqualification against the Appellant, Willie Hill Top Market, under the ownership of 5 U.S.C. § 552 (b)(6) & (b)(7)(C) and 5 U.S.C. § 552 (b)(6) & (b)(7)(C), is sustained.

RIGHTS AND REMEDIES

Applicable rights to a judicial review of this decision are set forth in Section 14 of the Food and Nutrition Act of 2008 (7 U.S.C. § 2023) and in Section 279.7 of the SNAP regulations. If a judicial review is desired, the complaint, naming the United States as the defendant, must be filed in the U.S. District Court for the district in which the Appellant owner resides or is engaged in business, or in any court of record of the State having competent jurisdiction. If a complaint is filed, it must be filed within 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.

JON YORGASON
Administrative Review Officer

February 13, 2019