

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

Woerners Liquors,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0214209

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 Woerners Liquors (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 June 24, 2019.

AUTHORITY

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

CASE CHRONOLOGY

By letter dated March 8, 2019, the Retailer Operations Division charged Appellant with trafficking based on a series of irregular SNAP transaction patterns that occurred in August 2018 through January 2019. 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 dated March 20, 2019, that requested a CMP and included documentation in support of one. The Retailer Operations

Division notified Appellant by letter dated June 24, 2019, that the firm was permanently disqualified from participation as a SNAP retailer in accordance with 7 CFR § 278.6(c) and 278.6(e)(1) for trafficking violations. This letter also stated that Appellant was not eligible for the CMP because insufficient evidence was submitted to demonstrate that it had established and implemented an effective compliance policy and program to prevent SNAP violations.

By letter dated July 1, 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 six month period of August 2018 through January 2019. 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 is located in a low income neighborhood in a downtown building that contains 145 Section 8 residents that results in a higher than the normal amount of EBT customers. The average customer is a single adult living in the building. Most customers buy groceries for the entire household as would a customer at a fully-fledged grocery store. The owner describes customer behavior as unstructured and unpredictable. They normally make purchases based on their needs for the moment and may make another purchase after their first one before going upstairs to their apartment. Large amounts of Starbucks coffee grinds are sold in large packages with one to three packages being purchased in one transaction. The area also has the highest concentration of homeless people in the state. These customers do not store items away, but purchase more items at the firm as their needs arise. Each card can be used numerous times throughout the day as there are numerous unemployed individuals and homeless people that have very different buying habits. The firm also pays the 10 cent bag fee required by the State for its customers. Per the rule book, every recipient is treated with respect and questions are not asked about their buying habits. EBT cards have no photo or a limit making it impossible to curb multiples or big transactions. Any card holder can purchase food items as long as they have the PIN so, the retailer doesn’t have any option but to complete the transactions;
- The firm has a vast stock of food with day-to-day inventory valued **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** at any given time including both EBT and non-EBT items. Items sold are characteristic of a typical grocery store. The firm has a high volume of sales and reported Cost of Goods incorporating both EBT and non-EBT sales.

This is supported by the wholesale invoices for EBT items as well as the price list for EBT items showing there are significant mark-ups. The firm does 5 U.S.C. § 552 (b)(6) & (b)(7)(C) monthly SNAP sales with most in the first two weeks and then four or five transactions a day for about 5 U.S.C. § 552 (b)(6) & (b)(7)(C);

- The firm has been a SNAP retailer since 2009 and has had no permit or licensing issues for the last 20 years. The firm received a report from USDA in 2016 that was a clean sheet;
- Since becoming SNAP authorized, the owner has implemented an effective compliance policy as described for each of the four criteria in Section 278.6(i) of SNAP regulations. Under Criterion 1, store ownership has ensured full compliance with USDA FNS obligations and meets Criterion 1 for a trafficking CMP by having implemented an effective compliance policy and providing a photocopied booklet to each employee with issues concerning EBT processing being addressed quarterly. Criterion 2 is met since the compliance policy was in effect prior to the violations and clearly states no exchange of cash for SNAP, customers cannot share an EBT card, any EBT card questions must be addressed to the manager, any employee engaging in EBT misuse will be terminated, and only qualified items can be sold using EBT. Criterion 3 is met as ownership coached and trained its employees and was available onsite for any questions that may arise. The contents of the training manual are discussed and reviewed with employees and partners on a regular basis and each employee is reminded to never give cash back for EBT purchases, to disallow sales to known friends of the card user if it appears the card user is outright paying for the groceries of a person that is not part of their household, and to disallow sales on unqualified EBT items. Criterion 4 is met as store ownership was not aware of, did not approve, did not benefit from, or was not in any way involved in the conduct or approval of trafficking violations; or it is only the first occasion in which a member of firm management was aware of, approved, benefited from, or was involved in the conduct of any trafficking violations by the firm. Since the charge letter was received, the owner now disallows purchases of large volumes of drinks and Starbucks coffee grinds which has resulted in higher per unit transactions;
- The firm is surrounded by low income families and aging residents in wheel chairs who can barely walk and definitely need the firm in the community; and customers come-in with their own dollies to pick-up cases of soda, coffee, and Gatorade so USDA should study the buying habits of recipients by sitting behind the register instead of flagging the transactions; and,
- The owner requests FNS to approve the CMP for the reasons cited above.

Appellant submitted affidavits from the owners on employee training, sales, and the buying habits of customers; statements from four employees regarding their SNAP training; statements from two customers on their purchases, a price list with mark-up; an FNS 2016 investigation report; wholesale invoices for stock purchases; store photos; and profit and loss statements for the charge period 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 July 28, 2009. Contrary to Appellant's claim of having had no SNAP violations or investigations since becoming SNAP authorized, the case record shows that the firm received a warning letter in February 2016 and again in October 2016 for selling ineligible items in exchange for SNAP benefits during undercover investigations. The record also indicates that in reaching a disqualification determination, the Retailer Operations Division considered information obtained during a May 25, 2018, store visit conducted by a FNS contractor to observe the nature and scope of the firm's operation, stock, and facilities. This information was then used to ascertain if there were justifiable explanations for the firm's suspicious SNAP transactions. The store visit documented the following store size, description, and characteristics:

- The firm was a small store offering a minimal 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 a limited variety of canned and packaged Hispanic foods. There were no other ethnic or specialty food items.
- The store visit report and photos showed no shopping carts 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 except for bottled water.
- The store visit report specifically noted that the firm was not a specialty store and that there were no meat bundles, seafood specials, or fruit/vegetable boxes for sale.
- There was only one checkout area that was approximately 4.0 feet wide and 1.5 feet deep with displays on both sides leaving a limited area for customers to place their purchases. The small checkout area would make it problematic to process large orders. The checkout area had one cash register, a POS terminal, and an optical scanner as confirmed by the store manager.
- The firm had a minimal stock of staple foods that also included many single serving and pre-packaged items with a significant portion of inventory in soda, candy, snacks, and other drinks as well as many ineligible items.

- The firm had no fresh or frozen unprocessed meat, no fresh or frozen unprocessed seafood, a moderate quantity and variety of processed meats and seafood (canned meat, poultry, and fish; hot dogs; sausages; bacon; packaged lunch meats; jerky; and processed meat, poultry, and fish frozen entrees), no deli meats, a moderate selection of frozen dinners, cartons of eggs, no fresh vegetables, an extremely limited selection of fresh fruit (limes and bananas at checkout), an extremely limited selection of frozen vegetables (gumbo mix vegetables), no frozen fruit, dried beans, no other dried fruit or vegetables, no packaged nuts, a limited stock of single serving nuts, 100 percent fruit and vegetable juices, a moderate selection of canned soups, a moderate quantity and variety of canned and packaged staple food items, no deli cheese, packaged cheese, single serving cheese, no yogurt, single serving yogurt, single serving yogurt drinks, an extremely limited selection of butter sold by the stick, no margarine, sour cream, fresh milk, single serving milk, canned milk, half & half, no coconut milk, no soy milk, no Lactaid milk, no powdered milk, single serving milk drinks, several cottage cheese, cream cheese, bread, no rolls, tortillas, no pitas, no tostadas, corn meal, flour, sugar, rice, cold cereal, single serving cold cereal, hot cereal, many single serving Ramen noodle soups, canned pasta, no dry pasta, dry noodles, pancake mixes, baking mixes, many frozen heat&eat foods (pizza, burgers, sandwiches, pot pies, TV dinners, breakfast bowls, lasagna, spaghetti, burritos, burgers, etc.), many cold ready-to-eat sandwiches, mac&cheese, single serving size mac&cheese, cooking oil, coffee, tea, cocoa, no baby foods/cereals, no infant formula, no soy infant formula, and few expensive staple food items.
- Ineligible items included: lottery, tobacco, tobacco accessories, alcohol, household products, paper products, pet products, health and beauty items, ATM, hot foods, hats, sunglasses, newspapers, and incense while accessory foods included: candy, condiments, snacks, baked goods, cooking oil, baking mixes, sugar, single serving ice cream, spices, coffee, tea, cocoa, and un/carbonated drinks.
- The firm's hours of operation, as confirmed by the store manager, were 8:00 AM-2:00 AM 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 store manager, 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 29 ounce package of chicken priced at \$9.99, a 13 ounce package of pork priced at \$6.99, a 2.85 ounce package of beef priced at \$6.99, and a one pound package of turkey priced at \$5.99. It was noted that there were less than 10 units of the 29 ounce chicken in stock. This listing of the most expensive items was provided by the store manager during the store visit.
- The firm was not a WIC vendor.

Multiple transactions in unusually short time frames

This Attachment documents 115 individual transactions in 38 sets of two or more transactions conducted by 14 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 27 of the 38 sets. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). One set is comprised of six individual transactions, five sets of five transactions, six sets of four transactions, and eight sets of three transactions while the remaining 18 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 average customer is a single adult living in the building and that the multiple transactions listed in this Attachment are because customer behavior is unstructured and unpredictable. They normally make purchases based on their needs for the moment and may make another purchase after their first one before going upstairs to their apartment. The area also has the highest concentration of homeless people in the state. These customers do not store items away, but purchase more items at the firm as their needs arise. Each card can be used numerous times throughout the day as there are numerous unemployed individuals and homeless people that have very different buying habits. EBT cards have no photo or a limit making it impossible to curb multiples or big transactions. Any card holder can purchase food items as long as they have the PIN so, the retailer doesn't have any option but to complete the transactions.

SNAP households have no limit on the number of times they may use their benefits or the dollar value of eligible food they may purchase. The SNAP transactions listed in this Attachment are questionable not because they exceed any limits for use, but rather because they display characteristics of use inconsistent with the nature and extent of a convenience store's stock and facilities and are thus indicative of trafficking. These transaction sets do not contain the characteristics associated with a household purchasing a forgotten item right after checking-out, 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 32 of the 38 transaction sets 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 to purchase a forgotten item or two as all of the sets have subsequent transactions 5 U.S.C. § 552 (b)(6) & (b)(7)(C) with 36 of the 38 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 also offers no explanation as to why households would conduct up to six sizeable transactions at a minimally stocked convenience store within a short period of time when there are many larger retail food stores located nearby and at a distance where these households are regularly shopping. There are 46 comparably sized or larger SNAP retailers within a 0.47 mile radius that include a super store, a supermarket, a large grocery store, four medium grocery stores, and six small grocery stores. Two of the small grocery stores and a medium grocery store are all located within two to three blocks of

Appellant's location. These nearby 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 also noted that the FNS report on redemptions states, "Households most often redeemed their benefits at supermarkets and supercenters. Purchases at supermarkets and supercenters accounted for nearly two-thirds of all transactions and more than 80 percent of all benefits redeemed". The many sizeable transactions in a short period of time is also unusual and suspicious considering that according to the Appellant, most of the firm's customers are either single adults living in the building or homeless individuals. Per Appellant's contentions, neither of these two groups of customers would have a need to conduct multiple high dollar transactions since both purchase items based on their needs at the 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 5 U.S.C. § 552 (b)(6) & (b)(7)(C) when the comparable average convenience store SNAP transaction amount in San Francisco County during the review period was \$8.46. 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 convenience store than they did at the super stores and/or supermarkets. Appellant failed to offer any explanation or rationale as to why households who are regularly shopping and spending large dollar amounts at many larger and better stocked stores would conduct multiple purchases often totaling to comparable or higher dollar amounts at a minimally stocked 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 and therefore the more plausible explanation is that these households were trafficking SNAP benefits at the Appellant firm.

5 U.S.C. § 552 (b)(6) & (b)(7)(C). This household exhausted its entire monthly allotment in a matter of hours leaving no benefits for food purchases until the next month's issuance. Depleting a household's entire allotment within one day is inconsistent with the normal shopping behavior of SNAP benefit households and is indicative of trafficking. Trafficking is further supported by the fact that the California SNAP database shows this household's reported

residence is 1.7 miles away from Appellant's location meaning that it was travelling more than 3.0 miles round trip out of its way and past the super store where it regularly shopped to shop at Appellant's minimally stocked convenience store. There is no legitimate reason why these households would spend so much of their SNAP allotment at a minimally stocked convenience store when they clearly had access to and frequently shopped at supermarkets and super stores located nearby and at a distance. The more plausible explanation is that these 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 124 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 minimal stock of staple foods and calls into question the legitimacy of these transactions. The transactions are also substantially higher than the average SNAP transaction amount of \$8.46 for this store type in San Francisco 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. 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 convenience stores out of necessity, this is not the case when they have better alternatives. FNS records show there are 46 comparably sized or larger SNAP retailers located within a 0.47 mile radius of the Appellant firm that includes one super store, one supermarket, one large grocery store, and four medium grocery stores as well as six small grocery stores. The larger stores would offer greater quantities and varieties of staple food items at lower prices than would be found at a minimally stocked convenience store offering no fresh or frozen unprocessed meats or seafood and almost no fresh or frozen fruit and vegetables.

The difference in the average SNAP transaction amount, the total SNAP transaction dollar volume, and the total SNAP transaction count for San Francisco County convenience stores during the review months and at the Appellant firm is significant. Appellant's average SNAP

transaction amount is 6.5 percent smaller than that of San Francisco County convenience stores while its average SNAP transaction dollar volume is 93.43 percent larger and its total SNAP transaction count is 5 U.S.C. § 552 (b)(7)(E) larger than the County average. The high number of SNAP transactions and the high dollar volume combined with the lower than average transaction 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 San Francisco County. A comparison of Appellant's redemption data to the average for County convenience stores using ten dollar increments shows that Appellant's transaction count and dollar volume significantly exceeds that of like type stores in all ranges 5 U.S.C. § 552 (b)(6) & (b)(7)(C) at which point transactions stop. It is unusual that San Francisco County convenience stores began averaging less than one transaction in each range 5 U.S.C. § 552 (b)(6) & (b)(7)(C), significantly less than that of the Appellant firm. 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 minimal stock of staple foods and the lack of any specialty, bulk, or ethnic foods that might sell for large dollar amounts and also considered this to be a strong indication of trafficking. None of Appellant's contentions explain these unusual and suspicious differences.

Appellant contends the firm has a vast stock of food with day-to-day inventory 5 U.S.C. § 552 (b)(6) & (b)(7)(C) at any given time including both EBT and non-EBT items. Items sold are characteristic of a typical grocery store. The firm has a high volume of sales and reported Cost of Goods incorporating both EBT and non-EBT sales. This is supported by the wholesale invoices for EBT items as well as the price list for EBT items showing there are significant mark-ups. The firm does 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in monthly SNAP sales with most in the first two weeks and then four or five transactions a day 5 U.S.C. § 552 (b)(6) & (b)(7)(C) Appellant also claims customers come-in with their own dollies to pick-up cases of soda, coffee, and Gatorade and large amounts of Starbucks coffee grinds are sold in large packages with one to three packages being purchased in one transaction. Appellant submitted affidavits from the owners on store sales and the buying habits of customers, statements from two customers on their purchases, a price list with mark-up an FNS 2016 investigation report, wholesale invoices for stock purchases, store photos, and profit and loss statements for the charge period 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 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 May 25, 2018, shows that the Appellant firm offers a minimal quantity and variety of SNAP eligible staple food items, many accessory foods, and many ineligible items. Much of the inventory for sale consists of inexpensive snacks, candy, drinks, and various single serving foods as well as many ineligible items. The fact that lottery, tobacco, tobacco accessories, alcohol, household products, paper products, pet products, health and beauty items, ATM, hot foods, hats, sunglasses, newspapers, and incense are not eligible for purchase with SNAP benefits also provides no justification for the high transaction amounts. No evidence was submitted by Appellant in support of its claim that the firm has 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in stock at any given time.

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 also has a small checkout area and no shopping carts or handbaskets 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 minimal stock of staple food items also makes it improbable that the high dollar transactions in this Attachment were for the purchase of eligible food items and more likely that the amounts were contrived.

A detailed analysis of invoices and receipts submitted for inventory purchases was conducted by the Retailer Operations Division and the dollar amount of eligible food purchases plus markup compared to the firm's SNAP redemptions for the review period. A review of the invoices provided showed that the majority of stock is for beverages, snack items, and inexpensive goods typically found in convenience stores. The Retailer Operations Division analyzed the information provided and applied a standard 40 percent markup. Their analysis determined that the firm did have sufficient stock to support SNAP redemptions during the months under review; however, inventory alone is not sufficient to explain the unusual and suspicious patterns of transactions cited in the charge letter. The analysis also noted several invoices containing errors and formatting discrepancies as well as one invoice for a different firm casting doubt on the legitimacy of the invoices provided and indicating that some of the invoices may have been fabricated for the purposes of presentation to FNS. The Profit & Loss statements do not provide a breakdown of income sales into those from SNAP eligible goods and they are not further broken-down into EBT and non-EBT sales. As such, these documents offer no evidence to explain the unusual pattern of transactions at the Appellant firm.

Contrary to Appellant's claims of the firm having had no SNAP violations or investigations, the case record shows that the firm received a warning letter in February 2016 and again in October 2016 for selling ineligible items in exchange for SNAP benefits during undercover FNS investigations.

Appellant's photos are similar to those from the FNS store visits except that Appellant's photos show a far greater quantity and variety of staple and accessory foods as well as cased items than was present during either the 2018 or the 2017 FNS store visits indicating the photos were likely staged and therefore do not represent the normal stocking levels found at the Appellant firm. Additionally, no Starbucks coffee grinds or cases of drinks are visible in any of the FNS store visit photos, except for cases of water, thereby refuting Appellant's claim of customers coming-in with their own dollies to pick-up cases of soda, coffee, and Gatorade as well as large amounts of Starbucks coffee grinds. The only coffee in the FNS photos are jars of instant coffee and small cans of Café Bustelo, Yuban, & Medaglia D'Oro. Appellant's price list with markup and case prices provides no evidence of case sales as the FNS store visit photos show no cases for sale other than bottled water. Additionally, the FNS store visit report includes a section listing the firm's most expensive items offered for sale that was completed in conjunction with the store manager. The store manager did not include any case sales or Starbucks coffee thereby further rebutting Appellant's claim of the firm selling many cases of drinks and Starbucks coffee.

Neither of the two customer statements mentions making Starbucks or case purchases at the Appellant firm and no other evidence was offered by Appellant to support this claim. The statement in which the recipient claims to be storing food at his girlfriend's apartment does not mention that the recipient's reported residence, per the California SNAP database, is located 1.6 miles away. The Retailer Operations Division tried calling this recipient to review his statement, but only received a voice mail message in the name of another man. The statement by the homeless individual provides no explanation for the many large purchases occurring in the middle of the night such as five transactions (5 U.S.C. § 552 (b)(6) & (b)(7)(C)) 5 U.S.C. § 552 (b)(6) & (b)(7)(C) at the Appellant firm occurring from 12:46 AM to 1:52 AM that exhausted his entire monthly SNAP allotment. It is unlikely and suspicious that a one-person homeless household with little or no access to cooking or storage facilities would be conducting five transactions 5 U.S.C. § 552 (b)(6) & (b)(7)(C) at a minimally stocked convenience store. Rather than offering evidence supporting the legitimacy of transactions at the Appellant firm, these two statements actually provide more evidence supporting that the firm was trafficking SNAP benefits.

SNAP redemptions at the Appellant firm fluctuated unusually following the store visit on May 25, 2018. The volume of SNAP redemptions at the Appellant firm increased 41.88 percent from April 2018 to June 2018 while the number of SNAP transactions increased 43.87 percent and the average dollar amount of SNAP transactions decreased 1.31 percent during this same period of time. The significant increase in the volume and number of SNAP transactions combined with the decrease in the average dollar amount is indicative of the firm dividing large transactions into smaller transactions in an attempt to avoid suspiciously large transactions as previously discussed. 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, 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.

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.

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.

SNAP regulations are explicit in what constitutes substantial evidence. Specifically, 7 CFR § 278.6(i)(2) states in relevant part, “As specified in Criterion 3 above, in determining whether a firm has established an effective policy to prevent violations, FNS shall consider written and dated statements of firm policy which reflect a commitment to ensure that the firm is operated in a manner consistent with part 278 of current FNS regulations and current FSP policy on the proper acceptance and handling of food coupons.” This section goes on to state, “As required by Criterion 2, such policy statements shall be considered only if documentation is supplied which establishes that the policy statements were provided to the violating employee(s) prior to the commission of the violation.” This section further states, “A firm which seeks a civil money penalty in lieu of permanent disqualification shall document its training activity by submitting to FNS its dated training curricula and records of dates training sessions were conducted...”

While Appellant did submit statements by the store owners and store employees, these are either undated or dated in March 2019, after receipt of the charge letter. Appellant did not submit a copy of the firm’s SNAP compliance policy and program or any dated training curricula and records of training sessions.

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

October 21, 2019