

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

26th & Clearfield Mini Market,

Appellant,

v.

**Office of Retailer Operations and
Compliance,**

Respondent.

Case Number: C0237676

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 Office of Retailer Operations and Compliance to impose a permanent disqualification against 26th & Clearfield Mini Market (hereinafter Appellant) from participating as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP).

ISSUE

The issue accepted for review is whether the Office of Retailer Operations and Compliance 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.

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 December 16, 2020, the Office of Retailer Operations and Compliance charged Appellant with trafficking based on a series of irregular SNAP transaction patterns that occurred in April 2020 through September 2020. The letter noted that the penalty for trafficking is permanent disqualification as provided by 7 CFR § 278.6(e)(1). The letter also noted that the Appellant could request a trafficking civil money penalty (CMP) in lieu of a permanent disqualification within ten days of receipt under the conditions specified in 7 CFR § 278.6(i).

Appellant responded to the charges in a letter dated December 30, 2020, that did not request or provide any supporting documentation for a CMP. The Office of Retailer Operations and Compliance notified Appellant by letter dated January 19, 2021, 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 January 27, 2020, Appellant, through counsel, appealed the Office of Retailer Operations and Compliance's assessment and requested administrative review. The appeal was granted. Appellant, through counsel, requested an extension of time to respond to the charges by an email dated March 15, 2021, and was subsequently approved for an extension until March 17, 2021. Subsequent correspondence was received on March 17, 2021.

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 April 2020 through September 2020. This involved two patterns of EBT transaction characteristics indicative of trafficking:

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

APPELLANT’S CONTENTIONS

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

- The owner feels he is not responsible for the violations as he has been responsible and stayed up-to-date on all requirements. A lot of clients are turning to little stores like his since the pandemic to purchase their basic needs. This is also an area where looting was caused and affected a lot of the big chain stores, also making clients to purchase at little grocery stores. The volume of sales increased and more merchandise was sold at the time he owned the store;
 - The owner recently sold the store and would like to clear his name from this situation;
 - Appellant reviewed the 7 CFR Section 271.2 definition of trafficking and states that the documents supplied by the Department do not support any of the regulatory definitions of trafficking. The Department’s allegations are insufficient to constitute the elements of trafficking as defined by the Code:
 - A series of Supplemental Nutrition Assistance Program EBT transactions, multiple transactions made from the accounts of individual SNAP households within a set time period; &/or
 - a series of Supplemental Nutrition Assistance Program EBT transactions being large based on the observed store characteristics and recorded food stock.
- These facts, even if true, simply do not constitute the elements or the factual predicate which meet the Code’s definition of trafficking;

- The community where the store is located, North Philadelphia, is an economically depressed food desert: the residents of this community simply have little to no transportation options to go to big-box stores 5 U.S.C. § 552 (b)(6) & (b)(7)(C). In fact many people were unable to travel; and the owner was meeting a dire need of the community;
- Appellant requests a full evidentiary hearing on both issues raised by this request, as a lack of hearing has violated the owner's substantive and procedural due process rights afforded by the United States Constitution;
- Furthermore, this is the first time that the Program has made any allegation of impropriety against the owner or his firm. Yet on the basis of these allegations, the Program has unilaterally determined to impose the most severe sanction: permanent disqualification with a denial of the imposition of a Civil Monetary Penalty. We respectfully submit that this is excessive, arbitrary, capricious, and completely lacking in substantive and procedural due process; and,
- Appellant requests that the firm be reinstated, or impose some other sanction short of permanent disqualification so that the Appellant may process SNAP benefits.

Appellant submitted a map of the firm's location, three handwritten customer statements; a Bill of Sale dated September 24, 2020, for the sale of the business and other documentation related to the sale; five pages of invoices for inventory purchases, and 26 photos of store stock 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 October 18, 2011, and the firm was classified as a small grocery store during the review period. The record indicates that the owner and the firm received a FNS warning letter in April 2018 following an undercover investigation that found SNAP violations occurring at the firm. The record also indicates that in reaching a disqualification

determination, the Office of Retailer Operations and Compliance considered information obtained during an August 26, 2020, store visit conducted by an FNS contractor to observe the nature and scope of the firm's operation, stock, and facilities. This information was then used to ascertain if there were justifiable explanations for the firm's suspicious SNAP transactions. The store visit documented the following store size, description, and characteristics:

- The firm was a very small store of approximately 500 SF offering an extremely limited quantity and variety of staple foods and carrying no unique items or offering any distinctive services. The store stocked traditional American brands and had no ethnic or specialty food items.
- The store was deficient in the Meat, Poultry, or Fish staple food category, one of the four required staple food categories for authorization as a SNAP retail food store.
- The store visit report noted that store employees told the FNS contract reviewer that "the store was empty due to recent looting events over the summer. They have been slowly adding stuff back into the building, but many empty shelves remain."
- The store visit report and photos showed no shopping carts or hand baskets for customer use thus severely limiting the amounts of food that could be moved to the checkout.
- No food packages, bundles, case sales, bulk items, or other sales were evident that would explain the unusual transactions and no SNAP eligible cased items were available for purchase.
- The store visit report specifically noted that the firm was not a specialty store and that there were no meat bundles, seafood specials, or fruit/vegetable boxes for sale.
- The checkout area was an opening approximately 4.0 feet wide and 1.0 foot deep set into a wall of plastic display cases containing candy, cigarettes, and other nonfood items. The checkout area had food displays and a PIN pad leaving a very limited area for customers to place their purchases and also had a large chest freezer containing ice cream directly in front that would make it difficult for customers to place their purchases on the checkout counter. The very small checkout area would make it problematic to process large orders. The checkout area had one cash register with one POS terminal and no optical scanner.
- The firm had an extremely limited stock of relatively inexpensive staple foods that also included many single serving and pre-packaged items with a significant portion of inventory in soda, candy, snacks, other drinks, and ineligible items.
- The firm's hours of operation were open 9:00 AM-7:00 PM daily as confirmed by the store owner.
- 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 owner, specifically stated that most food prices end in .x9 cents. A price ending in .x9 cents is a common pricing structure for stores of this type. The visit report has space to list the four most expensive food items costing more than \$5.00 for sale in the store. In this case, there was only one item priced over \$5.00 and it was a 96 ounce container of corn oil priced at \$8.49 with there being six containers in stock. This listing of the most expensive item was provided by the store owner during the store visit.

- The firm was not a WIC vendor. While the firm did stock a very limited selection of baby foods, most SNAP households with infants or small children are WIC participants and therefore would be purchasing these products using WIC vouchers, not SNAP EBT.
- The store visit photos showed many minimally stocked or empty shelves, coolers, and display racks. The quantity and variety of the store's staple food inventory was only a small fraction of what was present during the previous FNS visit on March 13, 2019.

Multiple transactions in unusually short time frames

This Attachment documents 216 individual transactions in 86 sets of two or more transactions conducted by 47 different households in a short period of time. 5 U.S.C. § 552 (b)(7)(E). The high percentage of same cents transactions combined with the large number of same cents high dollar transactions is irregular and suspicious for this type store. 5 U.S.C. § 552 (b)(7)(E). Appellant offered no potential explanations for these repeating dollar values and the store visit photos revealed no signs posted to indicate special food packages, bundles, bulk items, case sales, or other sales that would explain the unusual number of transactions ending in these same cents values. When such repetitive patterns are unsupported by special pricing structures, it appears that these transaction amounts are contrived and in the absence of compelling evidence to the contrary, are suggestive of trafficking. Per the store visit, the firm did not offer a special pricing strategy that would routinely result in these repeating ending cents values and it stocked just one item priced at \$5.00 or more (a 96.0 ounce container of corn oil priced at \$8.49). It is unclear how so many high dollar value transactions could routinely end in the same ending cents value considering the firm's pricing plan and available stock. This is very unusual and is a strong indicator of trafficking in SNAP benefits. Only three of the 216 transactions in this Attachment occurred on or after the September 24, 2020, date of sale of the Appellant firm. The exclusion of these three transactions has no impact on the permanent disqualification determination.

This Attachment also contains several transactions occurring outside of the firm's business hours of 9 AM- 7 PM as reported during the August 26, 2020, store visit. It is an indication of trafficking when multiple transactions are occurring outside of reported store business hours.

5 U.S.C. § 552 (b)(7)(E). The dollar amounts of subsequent transactions in each set are substantial and nearly equal or exceed the dollar amount of the initial transaction in 78 of the 86 sets. 5 U.S.C. § 552 (b)(7)(E). Given the many steps required to complete a SNAP transaction combined with the lack of expensive items and no optical scanner at the Appellant firm, it is highly unlikely that these two transactions could have occurred in these extremely short periods of time if they consisted of solely SNAP eligible food items and more likely than not that they are indicative of trafficking. Two sets are comprised of five individual transactions, eight of four transactions, and 23 of three transactions while the remaining 53 sets are comprised of two transactions. It is not a usual shopping pattern to see so many purchases, in a short period of time, by the same recipients as documented in this Attachment. Multiple transactions conducted by the same household within a short period of time is a method which violating stores use to avoid single high dollar transactions that cannot be supported by store inventory and structure. These sets of transactions appear to be in amounts which are indicative of trafficking.

Appellant offered no explanation for the unusual transaction patterns in this Attachment other than saying that a lot of customers are shopping and buying basic needs at little stores due to the pandemic and looting that affected the big chain stores is also making clients shop at little stores. If Appellant's statement were true, then it would be expected that similar patterns would be found at all "little" grocery stores in proximity to the Appellant firm. However, a review of transaction patterns at the three nearest small grocery stores that do not have pending investigations shows no similar transaction patterns thus repudiating Appellant's explanation. Additionally, the competitor stores appeared to be equally or better stocked and had more individual transactions than the Appellant firm during the review period, yet they had lower SNAP transaction volumes.

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 the 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 after checking-out or of multiple members of the same household shopping together and making separate purchases using the same EBT card in quick succession, as all, but two of the 86 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 or sending their child to purchase a forgotten item or two as all of the sets have subsequent transactions in amounts 5 U.S.C. § 552 (b)(7)(E) with 83 of the 86 sets having subsequent transactions 5 U.S.C. § 552 (b)(7)(E), far more than the cost of a forgotten item or two. Appellant's contentions also provide no explanation as to why households would conduct two or three or five sizeable transactions at a very poorly stocked firm 5 U.S.C. § 552 (b)(6) & (b)(7)(C). It is noted that the September 2020 FNS report on *Benefit Redemption Patterns in SNAP in FY 2017* states that while households on average did spend 77.6 percent of their benefits by mid-month with over half being expended in the first week after issuance, that 82.1 percent of all benefits were spent at a super store or supermarket. On average, households conducted 9.4 transactions per month 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Small grocery store purchases accounted for 2.6 percent of all transactions, 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Accordingly, the transaction patterns contained in the charge letter Attachments are not typical, but are unusual and indicative of trafficking.

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 small grocery store SNAP transaction amount in Philadelphia County during the review period was \$9.40. 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 grocery stores further supporting that trafficking was occurring at the Appellant firm during the period under review.

The Office of Retailer Operations and Compliance's analysis of shopping patterns for households listed in this Attachment shows they have ready access to transportation as evidenced by their shopping at a variety of larger food stores located nearby and at a distance from Appellant's location, including a variety of super stores and supermarkets. Appellant's contentions fail to offer any explanation or rationale as to why households who are shopping and spending large dollar amounts at many larger and better stocked stores would conduct multiple purchases totaling to high dollar values at a much smaller and very poorly stocked small grocery store. Common sense dictates that it is improbable that households would choose to spend large dollar amounts at the Appellant firm if their purchases consisted solely of eligible food items that could be purchased at any of the super stores and/or supermarkets they were already regularly shopping at and therefore more likely than not that these households were trafficking SNAP benefits at the Appellant firm.

5 U.S.C. § 552 (b)(7)(E)

There is no legitimate reason why this household and others with similar patterns would spend so much of their SNAP allotment at an very poorly stocked small grocery 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.

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 178 individual EBT transactions **5 U.S.C. § 552 (b)(7)(E)**. The substantial number of high dollar transactions is uncharacteristic for a small grocery store offering an extremely limited stock of staple foods and calls into question the legitimacy of these transactions. The transactions are also substantially higher than the average SNAP transaction amount of \$9.40 for this store type in Philadelphia County during the review period. This is unusual and indicative of trafficking. Only four of the 178 transactions in this Attachment occurred on or after the September 24, 2020, date of sale of the Appellant firm. The exclusion of these four transactions has no impact on the permanent disqualification determination.

This Attachment also includes an unusually high number of transactions (32) ending in the same cents value of .99 cents and for the exact same dollar amount **5 U.S.C. § 552 (b)(7)(E)**, that are not supported by store inventory or pricing structure. When many transactions are of the same amount or end in the same cents, it appears that the transaction amounts are contrived and in the absence of compelling evidence to the contrary, are suggestive of trafficking. Per the store owner during the FNS store visit, the firm did not offer a special pricing strategy or have expensive eligible food stock that would routinely result in these same dollar amounts or repeating ending cents values and it stocked just one item priced at \$5.00 or more. It is

statistically unlikely that many transactions could routinely end in these same amounts and repeating .99 cents values considering the firm's .x9 pricing plan and available stock.

The evidence under review shows that SNAP households shopping at the Appellant firm are also shopping at many full-line supermarkets and super stores that offer a greater quantity and variety of SNAP eligible foods items for better prices than customers can find at the firm. These high dollar value transactions remain questionable when considering the proximity of 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 extremely limited, 5 U.S.C. § 552 (b)(7)(E) of purchases at larger food stores.

Appellant's explanation for the charge letter transactions that a lot of customers are shopping and buying basic needs at little stores due to the pandemic and looting that affected the big chain stores is also making clients shop at little stores has already been discussed and refuted in the previous section. No other explanation or rationale has been offered by Appellant as to why households that are regularly shopping at larger stores offering a greater variety and quantity of SNAP eligible foods at lower prices and who apparently have no transportation limitations would be conducting high dollar transactions at a very poorly stocked small grocery store. It is highly unlikely that the Appellant firm stocked any eligible food items that would not be available at the super stores, supermarkets, and other larger grocery stores that households were regularly shopping at and these stores would also likely have significantly lower food prices yet these households continued to spend large dollar amounts at a small grocery store with an extremely limited stock of staple foods and no shopping carts that would be needed for the large transactions in this Attachment. There is no legitimate reason why these households would spend so much of their SNAP allotments at a very poorly stocked small grocery 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 SNAP benefits at the firm. Other households exhibited similar shopping patterns indicative of trafficking. Based on this discussion, trafficking is the most viable explanation for these irregular shopping patterns.

While households residing in areas with extremely limited grocery store options may conduct high dollar transactions at convenience or small grocery stores out of necessity, this is not the case when they have better alternatives. FNS records show there was a super store, three supermarkets, a large grocery store, and 19 small grocery stores located within a 1.0 mile radius of the Appellant firm where households listed in the Attachments were regularly shopping as well as additional larger stores further away. These larger stores would offer greater quantities and varieties of staple food items at lower prices than would be found at Appellant's very poorly stocked small grocery store.

The difference in the total SNAP transaction dollar volume, the total SNAP transaction count, and the average SNAP transaction amount for Philadelphia County small grocery stores during the review months and at the Appellant firm is significant. Appellant's average SNAP transaction dollar volume is 17.79 percent larger than like type Philadelphia County stores while its total SNAP transaction count is 41.87 percent smaller, but its average SNAP transaction

amount is 5 U.S.C. § 552 (b)(7)(E) larger than the County average. The very high transaction dollar amount is abnormal based on the firm's extremely limited stock of staple foods and no expensive food items other than corn oil. 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 Office of Retailer Operations and Compliance 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 Philadelphia County. A comparison of Appellant's redemption data to the average for County small grocery stores using ten dollar increments shows that Appellant's transaction count and dollar volume was significantly lower than like type stores in the lowest ranges 5 U.S.C. § 552 (b)(7)(E), but then significantly exceeded that of like type stores in the remaining ranges 5 U.S.C. § 552 (b)(7)(E) at which point transactions stopped. 5 U.S.C. § 552 (b)(7)(E). This is indicative of the Appellant firm capping transactions at an artificially low amount to avoid suspicion. 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 Office of Retailer Operations and Compliance determined there was no credible reason for the firm to have transactions at these dollar levels given the extremely limited stock of staple foods and the lack of any specialty, bulk, or ethnic foods that might sell for large dollar amounts and also considered this to be a strong indication of trafficking. None of Appellant's contentions explain these unusual and suspicious differences.

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 Office of Retailer Operations and Compliance shows that Attachment households 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 firm since its cost of goods would be higher than that of larger stores such as supermarkets or super stores.

Appellant provided 26 undated photos of the store showing fully stocked shelves, display racks, coolers, and the deli case. However, this level of stock is not supported by the more than 40 photos taken during the FNS store visit that occurred during the review period on August 26, 2020. The store visit photos show many empty or minimally stocked shelves, display racks, coolers, and the deli case. Additionally, the store visit report notes that store employees "explained the store was empty due to recent looting events over the summer. They have been slowly adding stuff back into the building, but many empty shelves remain." This is strong evidence that Appellant's photos were staged after the fact in an attempt to falsely support Appellant's contention that the firm had a nice stock of food items to meet the basic needs of SNAP households. Consequently the owner's photos do not accurately represent the normal

stocking levels found at the Appellant firm during the review period and therefore provide no explanation for the unusual transaction patterns in this Attachment.

Information obtained during the August 26, 2020, FNS store visit on shows that the Appellant firm offers an extremely limited quantity and variety of SNAP eligible staple food items, many accessory foods, and many ineligible items. Much of the inventory for sale consists of inexpensive snacks, candy, drinks, and various single serving foods as well as many ineligible items.

Higher food prices make it even more unlikely that SNAP recipients, with very limited food dollars, 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 very small checkout area and no shopping carts or hand baskets 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 an extremely limited stock of staple food items also makes it improbable that the high dollar transactions in this Attachment were for the purchase of eligible food items and more likely that the amounts were contrived.

The Office of Retailer Operations and Compliance analyzed the five pages of invoices provided by Appellant after excluding any ineligible items on individual invoices and removing one invoice that was dated outside of the review period. The remaining pages were all considered for the month of August 2020 even though some pages were undated. A 75 percent markup was applied to the invoice totals 5 U.S.C. § 552 (b)(6) & (b)(7)(C) resulting in potential eligible food sales 5 U.S.C. § 552 (b)(6) & (b)(7)(C) for the month. SNAP redemptions for the same period amounted to 5 U.S.C. § 552 (b)(6) & (b)(7)(C) showing that the firm had insufficient food inventory to support its SNAP redemptions and explain the questionable transactions occurring during the review period.

Appellant submitted three handwritten statements purportedly from store customers. The Pennsylvania SNAP database provided the account numbers for these three individuals and a review of their SNAP transactions during the review period showed that two of the households made no purchases at the Appellant firm during the review period while the customer that claimed to shop at the firm every day conducted only 20 transactions during the review period. The fact that these households were not honest about something as simple as shopping at the Appellant firm casts significant doubt on the legitimacy of their statements and of store ownership's contentions as a whole.

Lastly, a review of the transactions in both Attachments revealed a significant number of transactions occurring after reported business hours. During the August 26, 2020, store visit, which occurred near the middle of the period under review, the store owner reported business

hours of 9:00 AM-7:00 PM daily. It is an indication of trafficking when multiple transactions are occurring outside of reported store business hours.

Based on these discussions, 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 Office of Retailer Operations and Compliance 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, 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 store ownership signed the certification page of the SNAP retailer authorization and reauthorization applications to become and to stay 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 SNAP violations 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. Additionally, a record of participation in SNAP with no previously documented instance of violations does not constitute valid grounds for dismissal of the current charges of violations or for mitigating the impact of those charges.

With regards to Appellant's contention that its rights to due process were violated, section 278.6(b)(1) of the SNAP regulations provides that upon charging a firm with SNAP violations, the letter informing the firm of the charges "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." This section further states that, "Any firm considered for disqualification, shall have full opportunity to submit to FNS information, explanation, or evidence concerning any instances of noncompliance before FNS makes a final administrative determination." A review of the Office of Retailer Operations and Compliance's administrative actions regarding this matter indicates full compliance with all applicable SNAP regulations, policies, and procedures therefore no due process violations occurred. This disqualification is an administrative action and SNAP regulations provide for an administrative review of the action. The Act, as amended, and regulations provide that any firm aggrieved by an administrative review determination may seek judicial review of the determination in Federal court or a State court of record having competent jurisdiction. In such event, trial de novo proceedings ensure the firm of a full evidentiary hearing on the agency action at issue. Discovery and evidentiary hearings are not elements of the administrative review, but are part of judicial review of the final agency decision if such review is sought.

“A sanction is not arbitrary and capricious if the agency properly adheres to its own regulations and guidelines in imposing a sanction.” *Castillo v. United States*, 989 F. Supp. 413, 417 (D. Conn. 1997). “Whether the imposition of a penalty by the FNS was arbitrary or capricious is a matter of law appropriately determined on a motion for summary judgment. *Yafaie v. United States*, 1995 WL 422169, at *1 (S.D.N.Y. July 18, 1995); see also *Lugo v. United States*, 2009 WL 928136, at *3 (S.D.N.Y. Mar. 30, 2009). The FNS followed its own regulations in determining that the Appellant firm was engaging in trafficking. Furthermore, as provided by 7 U.S.C. § 2021(b)(3)(B) and 7 CFR § 278(e)(1)(i), the FNS must permanently disqualify a store upon the “first occasion” of trafficking. Only if a store qualifies for a CMP may the FNS consider an alternate penalty. Here, however, the Appellant did not even request that the FNS consider a CMP, let alone provide the FNS or the Administrative Review Officer with any evidence of a compliance program as set forth in 7 CFR § 278.6(i). Therefore, the decision to disqualify the Appellant firm permanently from SNAP and deny a CMP was not arbitrary and capricious.

Appellant contends the firm is located in an economically depressed food desert and residents have little to no transportation options to go to big box stores. SNAP recipients are by definition low income and most cities and towns have low income neighborhoods so it is not unusual for SNAP authorized retail stores to be located in low income areas with many SNAP recipients. While these characteristics are common to many SNAP retailers, they do not provide a justification or explanation for the charge letter transactions. A review of SNAP authorized retail food stores shows a super store, three supermarkets, a large grocery store, and 19 small grocery stores are located within a 1.0 mile radius of the Appellant firm with a supermarket and the large grocery store located less than one-half mile or approximately eight to ten blocks away. It is also noted that there is scheduled, fixed route bus transportation available on West Clearfield Street as well as on other nearby streets to facilitate shopping at more distant stores.

Store ownership reported in its December 30, 2020, response to the charges that it had sold the firm on September 24, 2020. SNAP licenses are not transferrable as clearly stated on the license itself and in various other FNS documents including the SNAP retail store application and the SNAP Training Guide for Retailers. Ownership violated SNAP rules and regulations by transferring its SNAP license and by failing to timely notify FNS of the change in store ownership. Additionally, the sale of the firm does not remove the store owner’s liability for SNAP violations that occurred during his period of ownership.

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

The issue under review involves a charge of trafficking SNAP benefits based on EBT transaction data. EBT transaction data is covered in SNAP regulations at 7 CFR § 278.6(a) and is addressed

below. Trafficking is always considered to be the most serious violation even if it is a first offense therefore a temporary suspension or lesser penalty would not be applicable. SNAP regulations at 278.6(e)(1) clearly state that, “FNS shall disqualify a firm permanently if personnel of the firm have trafficked as defined in § 271.2.” SNAP regulations at 7 CFR § 271.2, define trafficking as, “The buying, selling, stealing, or otherwise effecting an exchange of SNAP benefits for cash or consideration other than eligible food”. SNAP regulations at 7 CFR § 278.6(a) clearly state that “FNS may disqualify any authorized retail food store if the firm fails to comply with the Food and Nutrition Act of 2008, as amended, or this part. Such disqualification shall result from a finding of a violation on the basis of evidence that may include facts established through on-site investigations, inconsistent redemption data, evidence obtained through a transaction report under an electronic benefit transfer system”. In the present case, the data presented in the Attachments is solely based on the SNAP EBT transactions conducted at the Appellant firm during the review period. This firm was selected as a result of a series of complex algorithms that make numerous data comparisons with other like type firms during the review period. All of the transactions were then reviewed and analyzed by the Office of Retailer Operations and Compliance 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 Office of Retailer Operations and Compliance 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 request or 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 Office of Retailer Operations and Compliance determined that Appellant was not eligible for a trafficking CMP in lieu of permanent disqualification.

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

CONCLUSION

The Office of Retailer Operations and Compliance 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 Office of Retailer Operations and Compliance 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

April 29, 2021