U.S. Department of Agriculture
Food and Nutrition Service
Administrative Review Branch
Alexandria, VA 22302

Alnahrain Market & Restaurant Corpt,	
Appellant,	
v.	**Case Number: C0199001**
Retailer Operations Division,	
Respondent.	

FINAL AGENCY DECISION

It is the decision of the U.S. Department of Agriculture, Food and Nutrition Service (FNS) that the permanent disqualification from the Supplemental Nutrition Assistance Program (SNAP) imposed upon Alnahrain Market & Restaurant Corp (hereinafter "Appellant") by the Retailer Operations Division, Investigations and Analysis Branch, hereinafter "ROD Office" is hereby sustained.

ISSUE

The issue accepted for review is whether the ROD Office took appropriate action, consistent with 7 U.S.C. § 2021, 7 CFR § 278.6(a) and 7 CFR § 278.6 (e)(1) and (i) in its administration of the SNAP when it imposed a permanent disqualification upon Appellant.

AUTHORITY

7 U.S.C. § 2023 and the implementing regulations at 7 C.F.R. § 279.1 provide that "A food retailer or wholesale food concern aggrieved by administrative action under § 278.1, § 278.6 or § 278.7 . . . may file a written request for review of the administrative action with FNS."

CASE CHRONOLOGY

In a letter dated April 26, 2017, the Retailer Operations Division charged the Appellant with trafficking, as defined in Section 271.2 of the SNAP regulations, based on a series of irregular SNAP transaction patterns that occurred during the months of September 2016 through February 2017. The letter noted that the sanction 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 10 days of receipt under the conditions specified in 7 CFR §278.6(i). The record reflects that the SNAP Office received and duly considered Appellant's replies to the Charge Letter. By a letter dated June 1, 2017, Appellant was informed that it was permanently disqualified from participation as a retail store in the SNAP and was ordered upon receipt of the letter to cease accepting SNAP benefits; consequently, Appellant ceased to accept said benefits. On June 12, 2017, Appellant requested an administrative review of the SNAP Office's decision; the request was granted.

STANDARD OF REVIEW

In appeals of adverse actions an appellant bears the burden of demonstrating by a preponderance of the evidence that the administrative actions should be reversed. That means an appellant has the burden of providing relevant evidence which a reasonable mind, considering the record as a whole, would accept as sufficient to support a conclusion that the matter asserted is more likely to be true than not true.

CONTROLLING LAW

The controlling statute in this matter is contained in the Food & Nutrition Act of 2008, as amended, at 7 U.S.C. § 2021 and in Part 278 of Title 7 of the Code of Federal Regulations (CFR). 7 U.S.C. § 2021, Part 278.6(a) and Part 278.6 (e)(1)(i) of the Regulations establish the authority upon which a permanent disqualification may be imposed upon a retail food store or wholesale food concern.

7 U.S.C. § 2021(b)(3)(B) states, *inter alia*:

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

7 CFR § 278.6(a) states, *inter alia*:

FNS may disqualify any authorized retail food store … if the firm fails to comply with the Food & 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….* (Emphasis added.)

7 CFR § 278.6(e)(1)(i) states:

Disqualify a firm permanently if: Personnel of the firm have trafficked as defined in §271.2

7 CFR § 271.2 states, *inter alia*:

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

7 CFR §278.6(f)(1) states, *inter alia*:

A civil money penalty for hardship to SNAP households may not be imposed in lieu of a permanent disqualification.

7 CFR §278.6(i) states, *inter alia*:

FNS may impose a civil money penalty in lieu of a permanent disqualification for trafficking as defined in § 271.2 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…

7 CFR §278.6(b)(2)(iii) states, *inter alia*:

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

SUMMARY OF THE CHARGES

- A series of 83 SNAP transactions 5 U.S.C. § 552 (b)(6) & (b)(7)(C) ended in same cents values (Attachment 1):
  - A series of 49 SNAP transactions 5 U.S.C. § 552 (b)(6) & (b)(7)(C) ended in $.05.
  - A series of 34 SNAP transactions 5 U.S.C. § 552 (b)(6) & (b)(7)(C) ended in $.99.
- A series of multiple SNAP transactions 5 U.S.C. § 552 (b)(6) & (b)(7)(C) were debited too rapidly to be credible (Attachment 2).
- A series of multiple SNAP transactions 5 U.S.C. § 552 (b)(6) & (b)(7)(C) were debited from individual benefit accounts in unusually short time frames (Attachment 3).
- In a series of Supplemental Nutrition Assistance Program EBT transactions 5 U.S.C. § 552 (b)(6) & (b)(7)(C), the majority or all of individual recipient benefits were exhausted in unusually short periods of time (Attachment 4).
- A series of 360 excessively large SNAP transactions 5 U.S.C. § 552 (b)(6) & (b)(7)(C) were debited from recipient accounts (Attachment 5).

APPELLANT'S CONTENTIONS

In Appellant's reply to the Charge Letter and in its written request for review dated June 12, 2017, it was argued that:

1. The store is located in a high minority/low income area. Customers utilize SNAP and are primarily Arabic. The firm sells products specific to this population.
2. The firm has never before committed violations and had no prior warnings. There are no irregularities in the store's operations that might warrant targeting the store for investigation.
3. 278.6(b)(1) requires the ROD Office to send the firm a letter of charges that shall specify the violations it considers constitute a basis for disqualification. This means the ROD Office must specifically state the wrong-doing of Appellant. This was not done. The attachments provided in the Charge Letter are enormously vague and lack evidence to support the allegations. The ROD Office fails to point to specific instances or evidence of violations. The attachments to the Charge Letter do not specifically align with the definition of trafficking under Section 271.2. The ROD Office has failed to provide any information regarding redemption data or transaction reports as referenced in 7 C.F.R. § 278.6(a); moreover, no disqualification from WIC has occurred. Thus the ROD Office failed to meet the requirements of 7 C.F.R. § 278.6(a). The ROD Office did not refute Appellant's Reply to the Charge Letter; thus the ROD Office failed to comply with 278.6(b). The ROD Office cannot allege that Appellant's Reply to the Charge Letter was inadequate when it could not provide Appellant with specific allegations to respond to.
4. Because of the lack of facts or information to support the ROD Office's assertions of trafficking, Appellant has been denied due process. Due process requires parties be given adequate notice and a meaningful opportunity to be heard. Appellant cites case law in support thereof. The Charge Letter does not create a factual basis for violations not reflected in agency records; the transactions contained in the Charge Letter cannot legally qualify as trafficking as defined by Section 271.2. The ROD Office's actions are arbitrary, capricious, fundamentally unfair and fail to achieve a legitimate purpose.
5. Section 278.6(a) requires a disqualification to result from evidence obtained through an on-site investigation; however, there is no indication such investigation occurred.
6. Regarding Attachment 1 (same-cents transactions):

- 49 transactions end with a value of $.05, which correspond with fruit chewys priced at $.05. Customers often pick-up and purchase any given number of these upon arriving at the register. Appellant provides photographs of these items in support thereof.
- 34 transactions end in $.99; this is done to incentivize sales as customers tend to pay more attention to the dollar values and not the cents values; this is a common method of retail pricing. A significant number of food products offered at the store are priced to end in $.99.
- The ROD Office has no actual fact or evidence of trafficking on the basis of Attachment 1 transactions and as such the transactions cannot legally qualify as trafficking as defined by 7 CFR 271.2.

7. Regarding Attachment 2 (rapid transactions):
    - During busy periods, or when groups of customers are at the register, store practice is to process customers through a makeshift assembly line whereby one employee tabulates totals and obtains SNAP cards while a second employee swipes the cards and a third bags the groceries. So when customers approach the register totals are

already known and the card merely needs to be swiped. Exhibit E shows the counter set-up with multiple employee chairs to accommodate this process. This method is a highly efficient and well-executed process.

  - Attachment 2 is based on a review of transactions without additional investigation or inquiry; there is no factual evidence to support the charges, which are overly vague, devoid of proof that they represent violations and cannot legally qualify as trafficking under 7 CFR 271.2.

8. Regarding Attachment 3 (repetitive transactions):
   - Customers sometimes do not know their SNAP balance and make a small purchase in order to obtain the balance.
   - Entire households come to shop together and make multiple purchases; typically secondary transactions 5 U.S.C. § 552 (b)(6) & (b)(7)(C) items hurriedly brought to the counter and add to a purchase that has just been processed.
   - It is common for customers to purchase goods from the store while waiting on specialty meats and/or breads to be prepared, which constitute secondary transactions.
   - It is not uncommon for a clerk to discover items in the cart that a customer had not presented for purchase with the main purchase.
   - Attachment 3 is based on a review of transactions without additional investigation or inquiry; there is no factual evidence to support the charges, which are overly vague, devoid of proof that they represent violations and cannot legally qualify as trafficking under 7 CFR 271.2.
9. Regarding Attachment 4 (balance depletions):
   - Appellant cannot control customers' exhaustion of benefits.
   - Sometimes employees will discount the purchase total when a customer attempts a purchase that exceeds the account balance, especially with long-standing patrons of the store.
   - The charge essentially asks the store to prove a negative when there is no specific evidence offered. Attachment 4 is based on a review of transactions without additional investigation or inquiry; there is no factual evidence to support the charges, which are overly vague, devoid of proof that they represent violations and cannot legally qualify as trafficking under 7 CFR 271.2.
   - Analyzed through the spectrum of Occam's Razor, it is likely that the balance depletions is because the purchase amount is near or greater than the available balance. For the ROD Office to show otherwise requires an extrapolation of wholly speculative guess work that at best results in inference stacked upon inference.
10. Regarding Attachment 5 (excessively large transactions):
    - There is simply no way to control large purchases by a customer using SNAP benefits and the firm would be in violation of SNAP policies if it limited purchase amounts.
    - Households buy large amounts of items intended to last prolonged periods of time due to transportation difficulties.
    - The firm serves ethnic communities that have ceremonial and/or traditional celebrations; customers will buy sizable amounts of goods to feed numerous guests and will also purchase more expensive items such as certain meats that are traditional but not necessarily a common purchase.

- Attachment 5 is based on a review of transactions without additional investigation or inquiry; there is no factual evidence to support the charges, which are overly vague, devoid of proof that they represent violations and cannot legally qualify as trafficking under 7 CFR 271.2.
- The Charge Letter reflects customer activity due to the firm's marketing and pricing strategies that encourage purchases; the firm cannot refuse sales simply because of increase in volume.

11. A disqualification would result in the store closing in a matter of days; the majority of customers use SNAP benefits to make their purchases. A disqualification would also work a hardship upon exclusively non-English-speaking SNAP customers.
12. The firm has never received any warning of violations prior the ROD Office's April 26, 2017 Charge Letter. The ROD Office therefore violated regulations at 278.6(d)(2) which requires that it consider prior action taken to warn a firm of the possibility that violations are occurring. The ROD Office never considered this prior action and in fact never warned the firm that EBT transactions appeared unusual, irregular and inexplicable. Such a violation by the ROD Office prevents any penalty, including disqualification.
13. Appellant requests that the disqualification be dismissed, or, in the alternative, the penalty be reduced to a warning.
14. Alternatively, appellant requests consideration of a civil money penalty.

ANALYSIS AND FINDINGS

At the outset it should be noted that the ROD Office ordered a contracted store visit to the Appellant firm as part of its investigation into Appellant's questionable transaction activity; the visit was conducted on March 5, 2017, as a result of which documentation was obtained including photographs of the interior and exterior of the store, a store layout diagram and a store inventory survey. This documentation reflected the following:

- No optical scanners.
- One cash register.
- One card reader.
- No hot food.
- Commercial baking area present. Photos: 1, 3, 4, 10 and 19.
- No dining area.
- Deli section present.
- No meat/seafood bundles/specials or fruit/vegetable boxes.
- Numerous bags of rice. Cooler containing meat labeled "HALAL," appears to be frozen whole chicken. Small upright freezer contained small amount of meat. Photos: 4, 5, 6, 15 (2), 16 (2), 25, 26 and 41.
- Store does not appear to carry large or bulk meat items such as whole/half carcasses of goat, lamb or beef.
- Small chest freezer containing items marked "HALAL," some of which appeared to be meat items. Photos: 5 and 6.
- Approximately 2500 square feet of store space.

- Food storage area approximately 1000 square feet.
- Comments: "Store owner reports he has not set up the restaurant yet. Also I reported hot foods because the store has a bakery but the bread is sold cold."
- Most visible prices were in standard retail variations of $.x9. Photos: 7, 8, 10, 11, 12, 13, 14, 15, 17 (2), 18, 20 (2), 21 (2), 22 (2), 23, 24 (2), 25 (2), 26, 27, 29, 30 (2), 31, 32, 33, 34, 35, 36 (2), 38, 40, 43 and 46.
- Sparsely stocked cooler, one shelf labeled "Halal Kill." Photos: 17, 27, 29 and 39.
- Store accepts WIC benefits. Photos: 3, 20, 21, 30 and 31.
- The firm maintained a substantial inventory of accessory food items, convenience food items, housewares/kitchen utensils/cookware, gift items, tobacco-related products (hookahs), paper products, cleaning supplies, laundry detergent and other non-food items.
- Check-out counter approximately 1 X 1 foot and surrounded by snack foods and non-food items such as health and beauty products. Small flats of produce adjacent to the counter. Photos: 3, 7, 8, 9 and 13.
- Walk-in freezer contained non-food items, blankets, a bicycle, a meat-cutter and stainless steel shelving units. Photo: 11.
- Typical small grocery store also selling ethnic food products. Photos: 2, 10, 37 and 42.

The documentation presents no indication of advertised specials, promotions or bulk or expensive food items. As noted above, photographs reflect that several visible prices of food and other items were in standard retail variations of $.x9. The checkout area was set up in convenience store fashion, utilizing a small check-out area (approximately 1 by 1 feet of useable space) but was otherwise cluttered/surrounded by snack foods and non-food items such as health and beauty products and other non-food items. This documentation reflects that the firm was a typically-stocked small grocery store selling ethnic Middle Eastern products in all relevant respects. It is worth noting that the average SNAP purchase in a small grocery store in the state of Tennessee during the analysis period was $22.93, reflecting that large purchases are not routinely made in such stores.

In regard to contention 1 above, the record reflects that the ROD Office understood and considered Appellant's location and that the firm carried products catering to Arabic customers. This was noteworthy in the ROD's analysis of the firm's transaction activity in comparison to similar stores in the area, as will be referenced later in this review.

Regarding contention 2 above, the record further reflects that the Appellant firm did in fact receive a prior warning, in a Warning Letter issued June 6, 2016 specifically referencing a violation committed on April 14, 2016. Moreover, it should be noted that a warning letter is not a statutory or regulatory prerequisite to a disqualification: the presence of a prior warning may in some cases increase the sanction imposed on a firm (see §278.6(e)(2), (3)(i) & (ii), (4) and (6)), while the lack of a warning does not decrease a sanction properly imposed or prevent the imposition of such a sanction. Additionally, a record of program participation with no previously or subsequently documented violations does not constitute valid grounds for dismissing the present serious charges or for mitigating the impact of the violations upon which they are based. There is no provision in the Act, regulations or agency policy that reverses or reduces a sanction based upon a lack of prior and/or subsequent violations or assurances of future compliance by a

firm and its owners, managers and/or employees; likewise, sanctions for prior violations are not prerequisite to sanctions due to later violations. Moreover, prior sanctions may precipitate an increase in the severity of a later sanction (see §278.6(e)(6)). Further, as noted above, the Food & Nutrition Act of 2008 provides that a store's disqualification "*shall be* (emphasis added) permanent upon ... the first occasion of... trafficking."

With regard to contention 3 above, the ROD Office's Charge Letter dated April 26, 2017 specifically charged the firm with SNAP-benefit trafficking and provided Attachments 1 through 5 as evidence thereof; the Charge Letter did not, nor is it required, to provide Appellant the totality of the ROD Office's evidence in support of said charges.

It should be noted that while the Retailer Operations Division is required to consider and evaluate all evidence and responses that are provided by the Appellant in accordance with 7 CFR § 278.6(c), it is under no obligation in the determination letter to expound, point-by-point, on every contention or piece of evidence presented or to provide proof to Appellant's satisfaction that trafficking occurred. The determination letter clearly states that consideration was given to the information and evidence available to the Retailer Operations Division and to the reply made by the Appellant. After an evaluation of all information, the Retailer Operations Division determined SNAP-benefit trafficking had occurred at the firm. Implied in the letter is the determination that the evidence or response by the Appellant was either not credible or was insufficient to prove that trafficking had not occurred. While the determination letter may not have been as comprehensive as the Appellant wishes, this review finds that due process was appropriately applied and that there was not any negligence on the part of the Retailer Operations Division in the manner in which it explained its disqualification decision.

The Appellant states that the charge letter did not specify what subpart of the trafficking definition under 7 CFR § 271.2 pertains to the charges against the Appellant. Namely the charges did not state whether specific transactions involved the buying or selling of SNAP benefits for cash or consideration other than eligible food; or the exchange of firearms, ammunition, explosives or controlled substances. (It should be noted that any such violations warrant permanent disqualification.) Therefore, the Appellant concludes that a charge of trafficking cannot be assessed against the store.

With regard to this contention, 7 CFR § 278.6(a) does not require that the specific subpart of 7 CFR § 271.2 be cited. Nor would it be possible to do so in a case based primarily on inconsistent redemption data or transaction data under an electronic system. The ROD Office employs a computerized fraud detection tool to identify SNAP transactions that form patterns having characteristics indicative of trafficking. This tool does not by itself determine or conclude that trafficking has occurred. The ROD Office must analyze the transaction data and patterns, often with other factors such as, in this case, observations from store visits, an analysis of customer shopping behavior and a comparison of stores in the area, and render a determination whether questionable transactions were, more likely than not, the result of trafficking.

The legality of this method is supported by 7 CFR § 278.6(a) which states, inter alia, "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, *or* (emphasis added) the disqualification of a firm from the WIC program…." [Emphasis added.]

Appellant states that no disqualification from WIC has occurred; however, there is no provision in the regulations requiring that a WIC disqualification must precede a permanent disqualification for trafficking.

In regard to contention 4 above, the agency's due process procedures are two-fold in nature: a retailer aggrieved by an agency action is afforded an opportunity to reply to the charges specified by the ROD Office; Appellant has availed itself of this first aspect of the due process procedures in the form of written replies to the ROD Office. As noted, the record reflects that the ROD Office has duly considered these replies. The second level of due process involves an administrative review, of which Appellant has likewise availed itself and in the process of which Appellant was granted an additional three weeks to provide further information in support of the request for review. Appellant did in fact provide correspondence dated June 12, 2017. The purpose of the administrative review process is to ensure that firms aggrieved by FNS's adverse actions have the opportunity to have their position fairly considered by an impartial reviewing authority prior to that adverse action becoming final. Appellant has been duly provided, and has taken, the opportunity to present to USDA through the administrative review process whatever evidence and information it deems as pertinent in support of its position that the ROD Office's adverse action should be reversed. Therefore, any evidence and information that Appellant presented to the ROD Office, as well as any such information submitted subsequently, have now been considered in this administrative review in rendering the final agency administrative decision in this case. The record does not indicate any departure from established policy or procedures with regard to Appellant's right to a fair and thorough review. Appellant has exercised its opportunity to reply to the Charge Letter and its administrative review rights, and by so doing has availed itself of the full complement of the agency's statutory and regulatory obligations with regard to due process.

With regard to Appellant's reference to case law, considerations of legal precedent through case law, or the lack thereof in relation to the present case, are beyond the scope of this review; this review relies upon the statute and regulations governing the SNAP and evaluates whether the decision of the ROD Office to impose a disqualification upon the Appellant was in accordance with same and sustainable by a preponderance of the evidence; Appellant's case law reference is acknowledged in this context only.

Regarding contention 5 above, while the regulations at § 278.6(a) provide for sanctions on the basis of on-site investigations, the same provision provides for sanctions on the basis of transaction data, as noted in the foregoing.

With regard to contention 6 above, the candy located on the counter priced at $.05, as referenced by Appellant and as seen in the photos it provided, was not present at the time of the store visit conducted on March 5, 2017; two previous stores visits (conducted 12/28/2014 and 2/21/2016) likewise do not reflect the presence of candy at such prices at or near the register. Moreover, in

order for a purchase to arrive at a large total ending in $.05, several other items would need to be purchased which combined arrive a total ending in $.00, and a single purchase of candy would then result in the total ending in $.05. Given that virtually all prices in the store ended in standard retail variations of $.99, totals ending in $.00, prior to the purchase of candy, are very unlikely. Likewise, a combination of items with prices ending in $.99 rarely produces a total also ending in $.99: e.g., 2 X $.99 = $1.98, 3 X $.99 = $2.97, 4 X $.99 = $3.96, 5 X $.99 = $4.95, etc.

Appellant again asserts that the ROD Office has no evidence of trafficking; however, the record disproves this assertion. As noted, charge letters are not required by regulation or agency policy to provide investigative techniques/case analysis standards or even to provide a totality of the evidence contained in the case file, but rather to present a firm with transactions the ROD Office has found to be implausible given various considerations and to provide the firm the opportunity to explain how such transactions may be legitimate. The record reflects that the ROD Office has provided a lengthy and comprehensive case in support of its sanction determination, as is discussed in further detail herein. Appellant asserts that the substance of the ROD Office's case against the firm is derived from data only and implies that there were no independent witnesses to affirm the trafficking allegations. 7 CFR §278.6(a), noted above, establishes the authority upon which FNS may disqualify any authorized retail food store on the basis of evidence obtained through a transaction report under an electronic benefit transfer system. Such cases are developed with the standard in mind that a *prima facie* preponderance of evidence is sufficient in order to charge a firm with SNAP-benefit trafficking. Various statistical tools and graphical reports are utilized, as well as store visit documentation reflecting the firm's nature and extent of inventory and the firm's logistical wherewithal. Compliance history and household data are evaluated. The record reflects that Appellant's firm was chosen for analytical investigation based upon numerous detailed and rigorous mathematical algorithms applied not only to Appellant's firm but to all SNAP-authorized firms, including all firms of a like type (small grocery stores, in this case) in the state of Tennessee. As noted, the record contains documentation, including photographs of the firm's interior and exterior, an inventory survey and a layout diagram, of a visit to Appellant's firm conducted on September 4, 2017. These documents reflect the firm to have been a typically-stocked small grocery store carrying ethnic items also available at several SNAP-authorized firms in the area.

This and other data presented the ROD Office with a statistically valid prima facie indication of highly unusual transaction activity; the activity therein identified is not marginally aberrant, but markedly so. Properly analyzed and interpreted, the ROD Office does not contend that the EBT (electronic benefits transfer) transactions detailed in its Charge Letter are overtly suspicious when they occur on an occasional or intermittent basis, but when such transactions form repetitive patterns on a consistent and comparative basis over substantial periods of time such activity is identified for further analysis. Only after a careful, comprehensive and complete analysis, from which appropriate conclusions are logically derived, will the firm be issued a Charge Letter. The firm is then given the opportunity to reply to those charges and provide any information it deems appropriate in justifying as legitimate the transaction activity detailed in the Charge Letter. In the present case, these procedures are shown by the record to have been duly performed in all relevant and appropriate detail. Moreover, as noted above, the regulations at 7 CFR § 278.6(a) state that FNS may disqualify any authorized retail food store *on the basis of evidence obtained through a transaction report under an electronic benefit transfer system*;

consequently, transaction data as a basis for the charges at issue is as valid as evidence obtained through an undercover investigation. ROD Offices are not required to apply any other standard, including an evaluation of case law, than that described herein. Accordingly, the case against the firm is not reflected by the record to lack evidentiary value or to fail to adhere to established investigative methodology, but rather to be comprehensive, analytic, logically derived and specific in its charges of SNAP benefit trafficking, an egregious violation of the Act and the regulations, as noted above (pages 2–3).

As noted, the case presented by the ROD Office does not rest solely upon transaction data and printouts thereof and was indeed obtained through a formal investigative process. As summarized herein, the record contains a comprehensive array of documentation and analytical work well beyond the data presented in the Charge Letter. The transaction data is indeed factual and specific, the existence and accuracy of which is not in dispute; redundant systems confirm numerous data points for each transaction including the date, time, store authorization number, terminal ID, amount transacted, prior balance and other particulars. It is worthwhile to restate as well that, as noted above, in appeals of adverse actions an appellant bears the burden of demonstrating by a preponderance of the evidence that the administrative actions should be reversed; Appellant must provide a preponderance of evidence that the transactions detailed in the charge letter were more likely than not due to the legitimate sale of eligible food in exchange for SNAP benefits. In the absence of compelling information/documentation weighed in comparison to that provided by the ROD Office, the evidence preponderates in favor of the ROD Office's determination that SNAP-benefit trafficking substantially produced the transaction activity at issue in the present case.

Lastly, SNAP authorization is an administrative privilege, granted upon initial and continued proof of eligibility and compliance with the governing rules and regulations, and not an unencumbered right or entitlement, and does not extend said privilege in perpetuity when a firm is at least once granted a license to participate. USDA has the obligation to safeguard the public's trust and financial interest and labors to do so by operating the program in accord with the statute enacted by Congress and the regulations promulgated by USDA to implement the provisions thereof. Within this context, while due process is honored, the agency is not burdened with proving to Appellant's satisfaction that FNS has correctly imposed the sanction at issue, but rather it is Appellant's burden to demonstrate that it has not engaged in SNAP-benefit trafficking by presenting a preponderance of evidence of same. As such, contentions that the agency hasn't proven its case are a largely irrelevant and ineffective means by which to demonstrate that Appellant has not engaged in violative activity. While errors on the agency's behalf are indeed relevant and must be addressed, corrected and can indeed result in a reversal during administrative review, an Appellant must focus a substantial amount of its probative efforts on explaining why the transaction activity at issue is in fact not due to SNAP-benefit trafficking. In regard to contention 7 above, frequent and large transactions conducted rapidly in order to purchase eligible foods at Appellant's store are highly unlikely given Appellant's logistical wherewithal and store stock. The firm does not maintain the logistical wherewithal required to rapidly process these transactions. In light of the above, consider the time required to process a legitimate purchase and the steps involved: 1) unloading items from a cart or basket), 2) separating eligible from ineligible items, 3) the cashier's handling of individual items to determine the price, which in this case involved manual keying of amounts, 4) weighing

individual items if sold by weight, 5) entering prices into a register or adding machine, once for eligible foods and once for ineligible items, which is typical for larger purchases, 6) handling manufacturers cents-off coupons, if applicable, 7) bagging the items for carry out, 8) informing the customer of the totals (one for eligible foods and one for non-eligible items, if applicable, which for large purchases includes most transactions), 9) pressing the "SNAP transaction key" on the point-of-sale device, 10) swiping the card, 11) customer entry of the required PIN, 12) cashier entry of the purchase amount, 13) confirming customer has a sufficient benefit balance, 14) the transaction being processed by the system and receiving approval, 15) printing out receipts, 16) accepting an alternate form of payment for nonfoods and possibly handling cash change and 17) the customer removing products from the checkout area so the next customer in line can begin the next transaction. While such transactions may well be done in succession, one will readily surmise that performing these processes on large transactions is not done rapidly. The amount of time required is generally proportional to the dollar amount of the transaction; typically, the larger the dollar amount transacted the longer the time period between transactions. Limited counter space as well as manually key-entering 19-digit card numbers adds additional time to transactions. The Appellant firm processed orders in excess 5 U.S.C. § 552 (b)(6) & (b)(7)(C), considerably faster than supermarkets typically process them, yet the firm has only one small checkout counter, no optical scanner and none of the logistical tools such as conveyor belts, rotating bagging platforms or order separators that are routinely used in rapid throughput operations. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Frequent and large transactions conducted rapidly in order to purchase eligible foods at Appellant's store are highly unlikely given Appellant's logistical wherewithal and store stock. Lastly, large transactions for the purchase of legitimate food items, with very little checkout-counter space and processed rapidly is implausible. Appellant's rationale regarding how it may conduct such transactions rapidly is not compelling.

Appellant's assertion that Attachment 2 is unsupported by any evidence has been discussed in the foregoing.

Regarding contention 8 above, the ROD Office notes that secondary purchases in Attachment 3 are too large to represent last minute purchases. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). This same observation is likewise damaging to Appellant's contention that clerks find items left over in the cart or basket that customers overlooked; these items and numbers of items would seem quite likely to inexpensive and few.

While there are legitimate reasons why a SNAP recipient or household member might return to a small grocery store during a short period of time, such purchases are more typically in small amounts and for obtaining just a few items. The examples in Attachment 3 indicate a series of repetitive purchases that total large amounts. Customers spending such substantial amounts of SNAP allotments in a typ[ically-stocked small grocery store, when there are other larger food stores nearby which carry substantially larger varieties of food at lower costs, is implausible. Multiple transactions over a short period of time, especially of high dollar value, are very suspicious because they are typical of stores and SNAP customers which are attempting to diminish attention to signs of SNAP-benefit trafficking. Frequent and large transactions conducted in order to purchase eligible foods at Appellant's store are highly unlikely given Appellant's logistical wherewithal and store stock. The record reflects, as noted above, that the

Appellant firm was a typically-stocked small grocery store in all relevant respects and provides no plausible bases for customers' unusual attraction to the firm and unorthodox transaction patterns.

The ROD Office points out that 21 of the 27 sets of transactions have elapsed times 5 U.S.C. § 552 (b)(6) & (b)(7)(C), which is very unlikely to involve last minute additions to primary purchases. This same observation is likewise damaging to the rationale that customers are waiting on bread/meat orders. It is also unclear what further preparation would be required of the typically-sized frozen meat items Appellant offered for sale on the day of the store visit; additionally, the store representative present on the day of the store visit noted to the reviewer that bread items were sold cold. Moreover, the walk-in freezer appeared be non-operational on the day of the store visit and was being used as storage for non-food items. Furthermore, the store visit documentation did not reflect the presence of meat processing equipment or storage other than retail cooler space.

The ROD Office further calls attention to transactions 144 and 145 and transactions 148 and 149, which reflect extremely large but identical transactions, which are highly unorthodox and unexplained by any of Appellant's rationales. The ROD Office conducted an analysis of SNAP customers conducting Attachment 3 transactions and found that households traveled up to 35 miles to visit the Appellant store; moreover, the ROD Office's analysis reflects that these households rarely conducted such transactions at other similarly stocked-stores (those carrying food products, including Halal and meat items, marketed to Arabic customers).

Appellant's assertion that Attachment 3 is unsupported by any evidence has been discussed in the foregoing.

With regard to contention 9 above, Attachment 4 contains instances in which SNAP customers substantially depleted SNAP account balances in short timeframes. A government report on SNAP shopping patterns[1] indicates that after the first day of benefit issuance, on average, 79 percent of a household's allotment remains unspent. After seven days 41 percent of benefits remain unspent. Typically two weeks elapse prior to the average household's depletion of 79 percent of its SNAP benefits while three weeks elapse prior to depleting 90 percent. Depleting one's entire allotment in one or two days during the first week following benefit issuance, in a single large transaction or in a series of high cumulative transactions in a short period of time, especially in a typically-stocked small store, leaving no benefits for the remainder of the month, is inconsistent with the normal shopping behavior of SNAP households. Rather, large single transactions, or multiple and high cumulative transactions which diminish balances over a short period of time soon after benefit issuance, are indicative of SNAP benefit trafficking and attempts to divert attention to signs of same.

Moreover, the ROD Office notes that households conducting Attachment 4 transactions at the Appellant firm rarely conducted such transactions at similarly stocked stores in the area. ROD compared the number of Appellant's Attachment 4 transactions during the analysis period to six similarly or better-stocked stores selling Middle-Eastern food products, including Halal foods

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[1] Benefit Redemption Patterns in the Supplemental Nutrition Assistance Program, Final Report. Prepared by Mathematica Policy Research for the Food and Nutrition Service, USDA, February 2011.

(including meat items), and found that Appellant conducted from over four and one-half to 33 times the number of such transactions as the other six stores (all within a five-mile radius of the Appellant firm).

The SNAP Office notes that, at the time of the sanction decision, there were 28 SNAP-authorized stores within a two mile radius of the Appellant firm, including four super stores, two supermarkets, six large grocery stores and 15 medium grocery stores. As noted, household analysis conducted by the ROD indicate customers clearly have access to and routinely shop at better-stocked super stores, supermarkets, and grocery stores (including those selling Arabic and Halal products, including meat) and in the immediate area, calling into question what customers were able to obtain at Appellant's typically-stocked small grocery store that they were not able to obtain at much better-stocked and more competitively-priced stores. This information further indicates that these customers were conducting implausible transactions only at or primarily at the Appellant firm. The Appellant store was clearly not the only store in the immediate area offering food items (including ethnic Middle Eastern items) to SNAP customers; as noted above, it was clearly not the best-stocked firm in the area and it was clearly not the only store being visited by Appellant's customers.

The data contained in the Charge Letter, as well as the ROD Office's case reasoning, some of which is explained in the foregoing, indicates that customer shopping behavior does not explain the transaction activity at issue; customer shopping behavior tends to be consistent from one store type to another, yet Appellant's transaction data is highly anomalous, indicating that customer shopping behavior cannot be the only explanation. The transaction activity seen at Appellant's firm is occurring at a very high level compared to similarly or better-stocked SNAP-authorized firms in the area.

It is acknowledged that demonstrating that trafficking did *not* occur does indeed place a considerable burden upon Appellant; however, that the burden is considerable does not render invalid the evidence of SNAP benefit trafficking existing in the record or the actions taken by the SNAP Office on the basis of that evidence.

Appellant's assertion that Attachment 4 is unsupported by any evidence has been discussed in the foregoing.

In regard to contention 10 above, the ROD Office notes that Appellant's checkout area is not conducive to large purchases but is more typical of a convenience store. Similar to the other Attachments, the ROD Office compared Appellant's number of excessively large purchases during the analysis period to six comparable or better-stocked small grocery stores within a five-mile radius and found that Appellant conducts from 2.74 to 6 times the number of such transactions as that of the other stores. Moreover, these households were routinely shopping both at super stores and other grocery stores carrying Arabic food products (including Halal meat). The store visit referenced above did not reflect the presence of any signage, flyers or other advertisements promoting package or bulk items; Appellant provides no inventory, sales or pricing information supporting its contentions.

The ROD Office further notes that the Appellant's SNAP redemptions were substantially higher, in some case multiple times, that of the six similar stocked firms located within a five-mile radius of the firm; Appellant's average SNAP transaction was higher than that of the state-wide super store (almost two times higher), supermarket (over two times higher), large grocery (nearly 2.5 times higher), medium grocery store (over three times higher) and small grocery store average (over 3.5 times higher) during the same period. Additionally, the ROD Office notes that Appellant's numbers of transactions in several total-amount bands were multiple times that of the six referenced better-stocked or similarly stocked stores in the area, particularly in those bands 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

Appellant's assertion that Attachment 5 is unsupported by any evidence has been discussed in the foregoing.

Regarding contention 11 above, the issue of hardship worked upon retailers or SNAP clients is not a consideration under the statute or regulations in decisions to disqualify firms due to SNAP-benefit trafficking. The only alternative to permanent disqualification, once trafficking is established, is to impose a trafficking civil money penalty in lieu of permanent disqualification. In order for this alternate penalty to be considered, a retailer must provide sufficient evidence demonstrating that the firm had established and implemented an effective compliance policy and program to prevent violations prior to said violations, as stipulated in § 278.6(i). Appellant did not timely request consideration for same and did not provide such evidence and, accordingly, this alternate penalty was correctly withheld.

With regard to contention 12 above, as noted in the foregoing, a warning is not prerequisite to a permanent disqualification for SNAP-benefit trafficking. Nonetheless, as noted, the firm did in fact receive a prior warning dated June 12, 2016.

In regard to contention 13 above, the statute and regulations allow for no sanctioning discretion in trafficking cases, other than a civil money penalty, as noted above; such provisions are prescriptive in that sufficient evidence of trafficking always warrants permanent disqualification unless a firm qualifies for a civil money penalty. No minimum amount of benefits trafficked or a minimum proportion of cash to SNAP benefits exchanged is required; any amount of cash exchanged for any amount of SNAP benefits is considered SNAP benefit trafficking. The regulations at 7 CFR § 278.6(e) provide for a continuum of sanctions, beginning with permanent disqualification for trafficking, term disqualifications from several years to six months for lesser violations and warning letters for firms committing violations less severe than those warranting six-month disqualifications. 7 CFR § 278.6(e)(1)(i) states that FNS shall disqualify a firm permanently if personnel of the firm have trafficked as defined in §271.2. In the present case, the violations at issue include SNAP benefit trafficking; the imposition of a warning letter or lesser sanction for SNAP-benefit trafficking is counter to said statute and regulations and is therefore incorrect. Accordingly, the record reflects that the ROD Office correctly imposed the sanction required by the statute and regulations.

Regarding contention 14 above, once trafficking is established, there is no latitude to impose a lesser sanction, with the exception of a trafficking civil money penalty. As noted, there is provision at 7 CFR §278.6(i) for the imposition of a civil money penalty in lieu of permanent

disqualification for trafficking. Appellant was advised of this provision in the SNAP Office's Charge Letter dated April 26, 2017, which also advised that documentation of eligibility for that alternative sanction was to have been provided within a specific time limit. In the absence of any such documentation, a civil money penalty was not imposed in lieu of permanent disqualification by the SNAP Office. The SNAP regulations are specific at 7 CFR §278.6(b)(2)(iii) in that "if a firm fails to request consideration for a civil money penalty in lieu of a permanent disqualification for trafficking and submit documentation and evidence of its eligibility within the 10 days specified (within 10 days of receiving the letter of charges), the firm shall not be eligible for such a penalty." As noted, as Appellant did not request such consideration and provided no evidence or information in support thereof, the SNAP Office's decision not to impose a civil money penalty is sustained as appropriate pursuant to 7 CFR §278.6(b)(1); §278.6(b)(2)(ii), §278.6(b)(2)(iii) and §278.6(i).

CONCLUSION

In view of the above, the decision of the ROD Office to permanently disqualify Appellant from participation in the SNAP is hereby sustained. The decision will become final upon the 30th day following Appellant's receipt of this document.

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 provisions of the Freedom of Information Act (FOIA), FNS is 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.

DANIEL S. LAY — January 17, 2018
ADMINISTRATIVE REVIEW OFFICER