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

Fern Rock Market,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0199606

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 Fern Rock Market (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 May 22, 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 July through December 2016. 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 28, 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 30, 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 multiple SNAP transactions totaling 5 U.S.C. § 552 (b)(6) & (b)(7)(C) were debited from individual benefit accounts in unusually short time frames (Attachment 1).
- A series of excessively large SNAP transactions totaling 5 U.S.C. § 552 (b)(6) & (b)(7)(C) were debited from recipient accounts (Attachment 2).

APPELLANT'S CONTENTIONS

In Appellant's replies to the Charge Letter, in its written request for review dated June 30, 2017, and in subsequent correspondence, it was argued that:

1. A review of the totality of the circumstances strongly indicates that Appellant did not engage in trafficking; scores of handwritten notes regarding the credit advanced were

provided. Many members of a household will use a SNAP card, often daily. However, Appellant does not contend that each of the purchases made were for items legitimately sold at the time of the purchase; these were credited and thereby swiped in a short period of time in order to "catch up" the account. There are a lot of stores in the area; customers come to the Appellant's store because it extends credit; no other stores extend credit.

2. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). There is no evidence that the prices charged do not directly relate to the appropriate goods purchased in the store. The majority of customers do not have transportation.
3. There is no material evidence that Appellant engaged in trafficking. There is no evidence that there was an undercover investigation or a site visit to the store by the ROD Office.
4. Appellant ceased extending credit upon receipt of the ROD Office's Charge Letter. Appellant has taken several steps to prevent violations.
5. Appellant has participated in the SNAP since 2006 and the store has been in the program for over 30 years.

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 December 7, 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 shopping carts or baskets.
- 2 cash registers.
- 2 card readers.
- Hot food sold. Prices posted for prepared food. Outdoor signage advertised prepared food entrees. Photos: 9 and 11.
- No dining area.
- No meat/seafood specials/bundles or fruit/vegetable boxes.
- Estimated 1200 square feet of store space.
- Not a specialty store, farmers market or delivery route.
- The firm sold tobacco products, cleaning supplies, housewares, paper products, tools, toys, incense, over-the-counter medicines, clothing, health and beauty products and other non-food items.
- Most visible prices were in standard retail variations of $.x9. Photos: 1, 2, 11, 12, 13, 18, 21 and 24.
- Typical convenience store inventory and layout. Photos: 6, 15, 16, 20, 26, 33 and 34.
- Sparsely-stocked shelves/coolers. Photos: 2, 10, 12, 19, 22, 27 and 28.
- Dust covered canned goods. Photos: 2 and 27.
- Check-out counter approximately 1.5 X 2 feet and surrounded by tobacco, candy, over-the-counter medicines, clothing, health and beauty products and other non-food items. Photos: 21 and 31.
- Signage advertised large prepared food packages in the following prices: $52.99, $99.99. Menu also listed a prepared food package at $24.99.

- Signage on cash register: "Food Stamp Customers $2/+ minimum for prqs. Credit Card Customers 50 cents for 'prr' (not legible) fee no limit. $2.50 for cash back $20/+ no more cash back."

The checkout area was set up in convenience store fashion, utilizing a small check-out area (approximately 1.5 by 2 feet of useable space) but was otherwise surrounded by tobacco, candy, over-the-counter medicines, clothing, health and beauty products and other non-food items. There were no shopping carts or baskets with which customers could transport large orders to the small check-out area or to waiting transportation. As noted above, canned goods were dust-covered, typically an indication of low turnover. This documentation reflects that the firm was a typically-stocked convenience store in all relevant respects. It is worth noting that the average SNAP purchase in a convenience store in the state of Pennsylvania during the analysis period was $8.03, reflecting that large purchases are not routinely made in such stores.

In regard to contention 1 above, it should be noted that Appellant must show by a preponderance of evidence that credit account activity, or activity other than SNAP benefit trafficking, accounts for the transaction data detailed in the SNAP Office's Charge Letter. Such a showing is not possible in the absence of substantial documentary evidence in support thereof; further, a successful contention on Appellant's behalf that the acceptance of SNAP payments on credit accounts adequately explains the transactions detailed in the Charge Letter must be accompanied by substantial and detailed documentation such as ledgers, account books or specific sales records, allowing the agency to reconcile *all* transactions in the Charge Letter attachments with Appellant's records.

A few of the ledger entries, copied along with what appears to be rental receipts, matched seven transactions on the Charge Letter. Transactions on the remainder of the ledger entry pages rarely matched a Charge Letter transaction; virtually all did not match and most were undated. Some of the ledger entries were labeled "cash," which is suspect, and many were illegible.

- 5 U.S.C. § 552 (b)(6) & (b)(7)(C) transaction in the Charge Letter, but no dates or incorrect dates were noted on the ledger and no customer name was provided.
- 5 U.S.C. § 552 (b)(6) & (b)(7)(C) transaction in the Charge Letter, but no dates or incorrect dates were noted on the ledger and no customer name was provided.
- 5 U.S.C. § 552 (b)(6) & (b)(7)(C) transaction in the Charge Letter, but no dates or incorrect dates were noted on the ledger and no customer name was provided.
- 5 U.S.C. § 552 (b)(6) & (b)(7)(C) transaction in the Charge Letter, but no dates or incorrect dates were noted on the ledger and no customer name was provided.
- 5 U.S.C. § 552 (b)(6) & (b)(7)(C) transaction in the Charge Letter, but no dates or incorrect dates were noted on the ledger and no customer name was provided.
- 5 U.S.C. § 552 (b)(6) & (b)(7)(C) transaction in the Charge Letter, but no dates or incorrect dates were noted on the ledger.
- 5 U.S.C. § 552 (b)(6) & (b)(7)(C) transaction in the Charge Letter, but no dates/incorrect dates were noted on the ledger and a first or last name only was provided.

The ROD Office notes that payments on credit accounts would not likely result in repetitive transactions (Attachment 1) and would more likely produce just one or two transactions in short timeframes. Attachment 1 contains several sets of 3, 4 or 5 transactions by one household in

short timeframes. The ROD Office analyzed a sample of customers named in the ledgers and attempted, unsuccessfully, to match ledger transactions to Charge Letter transactions. Credit entries were added to see if, combined, they matched a Charge Letter transaction, but none did. That very few of the ledger entries match any Charge Letter transaction tends to support the ROD Office's assessment the credit activity does not explain Attachment 1.

Likewise, the prepared-food menu provided by Appellant does not provide support for the credit account rationale. The expensive Party Packages listed on the menu might conceivably explain some of the large transactions in Attachment 2, though it is noted that no Charge Letter transaction matches a package price; moreover, Appellant does not contend that the sale of such packages accounted for the Charge Letter data.

Moreover, while there are legitimate reasons why a SNAP recipient or household member might return to a convenience 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 1 indicate a series of repetitive purchases that total large amounts. Customers spending such substantial amounts of SNAP allotments in a typically-stocked convenience store, when there are other larger food stores nearby which carry substantially larger varieties of food at lower costs, is implausible. Lastly, large transactions for the purchase of legitimate food items (which at this store would have been a substantial number of lower priced items), using no shopping carts and very little checkout-counter space, is additionally implausible. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). The record reflects, as noted above, that the Appellant firm was a typically-stocked convenience store in all relevant respects and provides no plausible bases for customers' unusual attraction to the firm and unorthodox transaction patterns.

Regarding contention 2 above, as noted, the credit account rationale is unsupported by the record; though there appears to have been some credit account activity, the ledger documentation provided appears largely unrelated to the Charge Letter data. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). All Attachment 2 transactions were multiple times that amount.

The ROD Office conducted an analysis of the SNAP shopping activity a sample of households whose transaction data appeared in the Charge Letter; all of these households shopped at super stores, supermarkets and/or grocery stores on or about the same day as conducting implausible transactions at the Appellant firm, calling into question what these households were able to obtain at Appellant's typically-stocked convenience store that they could not obtain at the better-stocked and quite likely more competitively-priced stores. Super stores and supermarkets are typically the most competitively-priced firms in a given area. This information further demonstrates that customers conducting implausible transactions at the Appellant firm did in fact have access to transportation.

The ROD Office notes that, at the time of the sanction determination, there were 32 SNAP-authorized firms within a one-mile radius of the Appellant firm, including one super store, one large grocery store, two medium grocery stores, 10 small grocery stores, five combination grocery/other stores and 14 other convenience stores. The Appellant store was clearly not the only store in the immediate area offering food 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.

5 U.S.C. § 552 (b)(6) & (b)(7)(C). It is reiterated that the firm provided no shopping carts or baskets with which customers could transport large orders to the small check-out area or to waiting transportation. As noted, the firm was a typically-stocked convenience store in all relevant respects; there exists in the record no legitimate basis for the nature and level of the firm's transaction and redemption activity.

With regard to contention 3 above, 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 (convenience stores, in this case) in the state of Pennsylvania. 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 December 7, 2016. These documents reflect the firm to have been a typically-stocked convenience store. The firm also maintained a substantial proportion of its in inventory in prepared, ready-to-eat food and accessory food items (candy, beverages, etc.), which is typical of convenience stores.

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.

Furthermore, 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. Also, as noted, a store visit was in fact conducted and comprehensive documentation thereof exists in the record. 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.

It should be noted as well that while the ROD Office is required to consider and evaluate all evidence and responses that are provided by the Appellant in accordance with 7 CFR § 278.6(c), the agency is under no obligation in the determination letter to expound, point-by-point, on every contention or piece of evidence presented. The determination letter clearly states that consideration was given to the information and evidence available to the ROD Office and to the replies made by the Appellant. After an evaluation of all information, the ROD Office determined that the violations cited in the charge letter 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 would prefer, this review finds that due process was appropriately provided and that there was no negligence on the part of the ROD Office with regard to the manner in which it explained its disqualification decision.

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 4 above, it is important to clarify for the record that there is no provision in the statute or regulations for waiver or reduction of an administrative penalty on the basis of corrective action implemented subsequent to findings of program violations. The purpose of this review is to determine if the earlier decision of the ROD Office was proper and in compliance with pertinent laws and regulations. Accordingly, this review is limited to considerations relevant at the time such decision was made. It is beyond the scope of this review to consider what subsequent remedial actions, such as changes in store management, procedures, internal controls, employee discipline/training or facility and/or inventory changes and improvements Appellant may propose to take or may have taken in order to comply with program requirements. Therefore, to the extent Appellant implies that it will, or has, implement(ed) corrective and/or remedial actions, though this would likely have been valuable in preventing program violations at an earlier time, such cannot now apply retroactively and does not provide a valid basis for dismissing the charges or for mitigating the serious impact of the violations upon which they are based.

Regarding contention 5 above, Appellant may imply that this case represents the firm's first and only SNAP violation (or series of same); however, 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."

Lastly, once trafficking is established, there is no latitude to impose a lesser sanction, with the exception of a trafficking civil money penalty. 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 May 22, 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 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
Administrative Review Officer

February 14, 2018