

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

**Governors House,**

**Appellant,**

**v.**

**Office of Retailer Operations and  
Compliance,**

**Respondent.**

**Case Number: C0227964**

**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 Governors House (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 on June 10, 2020.

**AUTHORITY**

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

**CASE CHRONOLOGY**

By letter dated March 31, 2020, the Office of Retailer Operations and Compliance charged Appellant with trafficking based on a series of irregular SNAP transaction patterns that occurred in September 2019 through February 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, through the General Manager, initially responded to the charges in a phone call to the Office of Retailer Operations and Compliance staff on April 3, 2020, that requested an extension of time to respond, but did not request a CMP or provide any documentation in support of one. The Office of Retailer Operations and Compliance approved an extension of time until May 13, 2020, to respond to the charges.

Appellant, through the firm's General Manager, responded in an email sent on April 13, 2020, that included a handwritten letter dated April 10, 2020, identifying a store employee as being responsible for the violations. A nearly identical typed version of this letter was received in an email sent on April 21, 2020. These letters stated that the clerk admitted to selling nonfood items in exchange for SNAP benefits, but stated she never trafficked SNAP benefits. The clerk was immediately fired by the manager after he had her write out what she had done in order to cover the store. Appellant, through the manager, sent an undated typed and notarized statement via email on April 26, 2020, that was purportedly signed by the responsible store employee admitting to SNAP violations and stating that she had been fired on February 21, 2020. Appellant subsequently obtained counsel and additional correspondence dated May 13, 2020, May 20, 2020, and May 26, 2020, was received.

The Office of Retailer Operations and Compliance notified Appellant by letter dated June 10, 2020, 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 June 19, 2020, Appellant, through counsel, appealed the Office of Retailer Operations and Compliance's assessment and requested administrative review. The appeal was granted. Subsequent correspondence was received.

## **STANDARD OF REVIEW**

In an appeal of an adverse action, Appellant bears the burden of proving by a preponderance of evidence that the administrative action should be reversed. That means Appellant has the burden of providing relevant evidence that a reasonable mind, considering the record as a whole, would accept as sufficient to support a conclusion that the argument asserted is more likely to be true than untrue.

## **CONTROLLING LAW**

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

7 CFR § 278.6(a) states: “FNS may disqualify any authorized retail food store if the firm fails to comply with the Food and Nutrition Act of 2008, as amended, or this part. Such disqualification shall result from a finding of a violation on the basis of evidence that may include facts established through on-site investigations, inconsistent redemption data, evidence obtained through a transaction report under an electronic benefit transfer system.”

7 CFR § 278.6(e)(1)(i) states: “FNS shall disqualify a firm permanently if personnel of the firm have trafficked as defined in § 271.2.” Trafficking is defined in part as, “The buying, selling, stealing, or otherwise effecting an exchange of SNAP benefits for cash or consideration other than eligible food”. Trafficking includes “Intentionally purchasing products originally purchased with SNAP benefits in exchange for cash or consideration other than eligible food”.

7 CFR §278.6(i) states: “FNS may impose a civil money penalty in lieu of a permanent disqualification for trafficking . . . if the firm timely submits to FNS substantial evidence which demonstrates that the firm had established and implemented an effective compliance policy and program to prevent violations of the Program.”

7 CFR §278.6(b)(2)(ii) states: “Firms that request consideration of a civil money penalty in lieu of a permanent disqualification for trafficking shall have the opportunity to submit to FNS information and evidence that establishes the firm’s eligibility for a civil money penalty in lieu of a permanent disqualification in accordance with the criteria included in §278.6(i). This information and evidence shall be submitted within 10 days, as specified in §278.6(b)(1).” Part 278.6(b)(2)(ii) further states that if a firm fails to request a civil money penalty in lieu of a permanent disqualification for trafficking and submit documentation and evidence of its eligibility within the specified 10 days, the firm shall not be eligible for such a penalty.

### **SUMMARY OF THE CHARGES**

The issue in this review is whether, through a preponderance of evidence, it is more likely true than not true that the questionable transactions were the result of trafficking. The charges on review were based on an analysis of SNAP EBT transaction data during the six month period of September 2019 through February 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’s wife took sick in November 2019 and the General Manager has been running everything at the business since the owner cannot return to work due to health

issues with his family. The firm is an honest business that caters to the community and is very involved in the community and the schools. The owner is a great boss who treats everyone fairly and would not allow anything to go wrong at the business;

- While the owner and manager dispute the charge of trafficking, no invoices or other documentation to support this contention are available at this time. The owner's wife began having health issues in late 2019 and his mother passed away requiring him to return to India. These issues distracted the owner and necessitated that he depend on his employees to manage the store. While these family issues are not an excuse for the SNAP violations, it is requested that they be considered as mitigating factors when judging the owner's lack of oversight of his employment and business;
- A correction is needed in that the owner was unable to return his mother's body to India due to transportation complications and it is buried in Alabama. The owner's wife's health complications began with the birth of their son on August 24, 2019;
- A newly hired clerk was responsible for sales of ineligible items such as cigarettes, tobacco, and alcohol for customers and for herself. The Manager trusted her because she had experience and was a hard worker whose cash drawer always came-out right. He noticed questionable transactions in November and December 2019 on the firm's camera and another employee saw customers putting nonfood items into their own cars as well as the clerk's car. The clerk admitted wrongdoing when confronted by the Manager and was fired on the spot. The Manager had her write down everything she had done, but had no idea he needed to contact USDA since she had been fired already. The clerk admitted to allowing the purchase of ineligible items, but never exchanged cash at any time. She didn't have to pay anything back because she didn't buy or sell SNAP benefits. The manager also already filed a complaint against the clerk in the courthouse;
- The employee responsible for the violations worked at both of the owner's stores that have been disqualified and was responsible for the violations at both stores. Counsel is unsure there was a specific reason for filing the police report in Hayneville rather than in Montgomery. It may be that Hayneville is closer to the employee's home address making it more likely the police department would be able to serve the arrest warrant due to proximity;
- The manager thought he was following the right process and requests a CMP because no wrongdoing of trafficking occurred. The manager has also learned all the program rules and will train all employees at each store from now on. Proper training and compliance policies are being updated and transcribed into a written manual that will be given to each employee. The store's surveillance system overwrites itself every seven days and is no longer available. A new policy for preserving footage and other evidence of crimes or notable incidents is also being added to the written store policy. The store does not have written policies regarding employee training or compliance with SNAP regulations. While the owner understands the store is not likely eligible for a CMP as he cannot offer substantial evidence as proof of the four required criteria, a permanent disqualification will constitute a financial hardship and likely result in the store closing. The owner requests consideration for a temporary disqualification contingent upon appropriate written training and compliance policies; and,
- The owner's opposition is grounded on the extreme and permanent nature of the penalty imposed for trafficking. The owner was never provided a warning of possible violations. Such a warning would have allowed the owner to take preemptive action so as to avoid

permanent disqualification from the SNAP program;

Appellant submitted a notarized statement by the store clerk purportedly responsible for the violations; an Alabama Certificate of Death; an Alabama Certificate of Live Birth; purchase invoices; a Mosses Police Department Incident Report dated May 7, 2020, that was filed by the store manager; and a Hayneville Municipal Court Warrant of Arrest warrant dated May 8, 2020, 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 April 29, 2019, as a convenience store. The record indicates that in reaching a disqualification determination, the Office of Retailer Operations and Compliance considered information obtained during a March 12, 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 transactions. The store visit documented the following store size, description, and characteristics:

- The firm was a small Chevron gas station convenience store of about 555 square feet 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 there were little or no ethnic or specialty food items.
- The store visit report and photos showed no shopping carts or handheld 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 packages, fish specials, or fruit and vegetable boxes for sale.
- The checkout area was approximately 1.5 feet wide and 1.5 feet deep with displays on both sides leaving a very limited area for customers to place their purchases. The very small checkout area would make it problematic to process large orders. The checkout area had one cash register, one POS terminal, and an optical scanner as confirmed by the store clerk.
- The firm had an extremely limited stock of 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 failed to meet minimum stocking requirements in the dairy staple food category making it ineligible for continued SNAP retailer authorization.
- The firm had no fresh or frozen unprocessed meat, no fresh or frozen unprocessed seafood, an extremely limited quantity and variety of processed meats and seafood (canned meat/poultry/fish and jerky), no bacon, no hot dogs, no sausages, no packaged lunch meats, no deli meats, no frozen dinners, no frozen entrees, no eggs, no fresh fruit or vegetables, no frozen fruit or vegetables, no dried beans or lentils, many single serving packaged nuts, many single serving 100 percent fruit juices, no 100 percent vegetable juices, several packaged fruit cups, three canned soups, almost no canned and packaged staple food items, no deli cheese, no packaged cheese, no single serving cheese, no yogurt, no single serving yogurt, no single serving yogurt drinks, no butter, no margarine, no sour cream, no large units of fresh milk, several single serving units of fresh milk, no canned milk, no soy milk, no Lactaid milk, no single serving milk drinks, no cottage cheese, no cream cheese, one single serving cheese chip dip, no fresh bread, no frozen bread, no rolls, no tortillas, no pitas, no tostadas, no corn meal, one small package of flour, no multigrain flour, no sugar, no brown sugar, one small package of rice, no cold cereal, no single serving cold cereal, no hot cereal, many single serving Ramen noodle soups, no canned pasta, several single serving pasta, no dry pasta, no dry noodles, no pancake mixes, no baking mixes, no mac&cheese, no single serving mac&cheese, no single serving heat & eat foods (pizza, pot pies, burgers, breakfast biscuits, Jamaican patties, burritos, etc.), many single serving cereal bars, no Lunchables, three small containers of cooking oil, no coffee, no tea, no cocoa, no baby cereal, no baby foods, no infant formula, and little or no expensive staple food items.
- Ineligible items included: gasoline, tobacco, smoking accessories, alcohol, household products, paper products, auto products, health and beauty items, hot drinks, ATM, hats, video CDs, newspapers, charcoal, lighter fluid, and propane canisters while accessory foods included: candy, spices, condiments, snacks, baked goods, two containers of cooking oil, single serving ice cream, and un/carbonated drinks.
- The firm's hours of operation were open 5:00 AM-10:00 PM Sunday-Thursday and 5:00 AM-11:00 PM Friday-Saturday per the store clerk. The clerk also stated that the firm did not take phone or online grocery orders, did not deliver groceries, and did not round price totals up or down.
- Signage was in English and there were no SNAP posters (anti-fraud, eligible items, reporting trafficking, etc.) visible in the store.
- Most food items were individually priced and comments on the FNS store visit report, completed in conjunction with the store clerk, showed that most food prices end in .x9

cents. A price ending in .x9 cents is a common pricing structure for smaller stores. The FNS store visit report listed the four most expensive food items costing more than \$5.00 for sale in the store as being a four pack of Red Bull priced at \$7.99. This listing of the most expensive items was provided by the store clerk during the store visit. According to the store clerk, there were no other items costing more than \$5.00 for sale in the store.

- The firm was not a WIC vendor.
- The store visit report and photos noted dusty cans and packages as well as some marginally stocked shelves.
- It is also noted that the quantity and variety of the store's staple food inventory was significantly less than that seen during the previous FNS store visit on April 4, 2019.

### **Multiple transactions in unusually short time frames**

This Attachment documents 70 individual transactions in 28 sets of two or more transactions conducted by 18 different households in a short period of time.

5 U.S.C. § 552 (b)(6) & (b)(7)(C). There were an unusually large number of individual transactions ending in the same cents such as nine transactions ending in .98 cents and six transactions each ending in .89 cents and .88 cents that are not supported by the firm's pricing structure and which account for 30.0 percent of the individual transactions in this Attachment.

5 U.S.C. § 552 (b)(6) & (b)(7)(C). The dollar amounts of subsequent transactions in each set are substantial and nearly equal or exceed the dollar amount of the initial transaction in 22 of the 28 sets. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). One transaction set is comprised of five individual transactions, one set of four, and nine sets are comprised of three while the remaining 17 sets are comprised of two individual transactions. It is not a usual shopping pattern to see so many purchases, in a short period of time, by the same recipients as documented in this Attachment. Multiple transactions conducted by the same household within a short period of time is a method which violating stores use to avoid single high dollar transactions that cannot be supported by store inventory and structure. These sets of transactions appear to be in amounts which are indicative of trafficking.

Appellant offered no documentation or explanation to support the legitimacy of the listed transactions in this Attachment.

SNAP households have no limit on the number of times they may use their benefits or the dollar value of eligible food they may purchase. The SNAP transactions listed in this Attachment are questionable not because they exceed any limits for use, but rather because they display characteristics of use inconsistent with the nature and extent of a convenience store's stock and facilities and are thus indicative of trafficking. These transaction sets do not contain the characteristics associated with a household purchasing a forgotten item right after checking-out, of household members/friends shopping together and making separate purchases, of a household dividing its purchases, or of households making a separate purchase to check their balance followed by another transaction as 23 of the 28 transaction sets

5 U.S.C. § 552 (b)(6) & (b)(7)(C). The transaction sets also do not contain the characteristics of a household returning later in the day to purchase a forgotten item or two as all of the sets have subsequent transactions 5 U.S.C. § 552 (b)(6) & (b)(7)(C), far more than the cost of a forgotten item or two. Appellant offers no explanation as to why households would conduct up to five

sizeable transactions at an extremely poorly stocked convenience store within a short period of time when there are many larger retail food stores where these households are regularly shopping that includes two super stores and a medium grocery store located within a 1.0 mile radius of Appellant's location with the medium grocery store located approximately two blocks away. These larger stores would offer a much greater quantity and variety of foods at lower prices than the Appellant firm and their proximity would make it unlikely that any SNAP recipient would consider the Appellant firm to be their primary source for groceries.

It is certainly not unusual for a small number of SNAP households to conduct multiple transactions in a short period of time. However, it is unusual that subsequent transaction dollar amounts are substantial in these transaction sets and that all of the sets in this Attachment total 5 U.S.C. § 552 (b)(6) & (b)(7)(C) when the comparable average convenience store SNAP transaction amount in Montgomery County during the review period was \$7.26. These multiple transactions indicate that the amounts were contrived in an attempt to avoid suspiciously high transactions that would be indicative of trafficking by breaking them into multiple, smaller amounts. FNS transaction data shows that this same pattern of multiple transactions in unusually short time frames is not evident at other nearby like type grocery stores further supporting that trafficking was occurring at the Appellant firm during the period under review.

The 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 comparably sized or larger food stores located nearby and at a distance from Appellant's location, including super stores and supermarkets. Their analysis also showed numerous households that shopped at the Appellant firm and at a super store or supermarket 5 U.S.C. § 552 (b)(6) & (b)(7)(C) and inexplicably spent more at Appellant's store than they did at the much larger stores. Appellant failed to offer any explanation or rationale as to why households who are regularly shopping and spending large dollar amounts at many larger and better stocked stores would conduct multiple purchases often totaling to comparable or higher dollar amounts at a very poorly stocked convenience store. There is no legitimate reason why households would spend so much of their SNAP allotment at the Appellant firm when they clearly had access to and frequently shopped at super stores and supermarkets. 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 or supermarkets they were already regularly shopping at for less money and therefore the more plausible explanation is that these households were trafficking SNAP benefits at the Appellant firm.

5 U.S.C. § 552 (b)(6) & (b)(7)(C). These two sets of three transactions each were the only purchases made by this household at the Appellant firm during the entire six month review period. Alabama SNAP records show this household has a reported residence that is 35.0 miles away from the Appellant firm's location raising the questions of why would a household travel more than 70 miles round trip away from its primary shopping area to shop at Appellant's convenience store with its extremely limited stock of staple foods and why would it need to conduct three transactions to do so. This pattern is indicative of trafficking as is the fact that this household was spending comparable amounts or more at the Appellant firm than it was spending at supermarkets located nearer to its reported residence. This is further supported by FNS

records showing that this household conducted 27 transactions at 11 stores located 21.52-63.47 miles from Appellant's location.

5 U.S.C. § 552 (b)(6) & (b)(7)(C). The two manually keyed transactions at the Appellant firm and at Appellant's other store were the only manually keyed transactions conducted by this household during the entire review period. Manually keyed transactions are those in which the magnetic strip on the household's EBT card is not being read by the store's POS device when the card is swiped and the clerk must manually key enter the lengthy EBT card number. A review of other EBT transactions at both the Appellant firm and at Appellant's other store on the date of the manual transactions show that both store's POS devices were functioning properly as there were swipe transactions immediately before and after the manual transactions. When the magnetic strip on an EBT card fails, it can no longer be swiped and replacement EBT cards contain different identification numbers. It is an indication of trafficking when the same card is used for both manual and swipe transactions. In cases of trafficking, the manual transactions occur when a household gives a retail store its EBT card number as well as the PIN so that store employees can manually key enter the card number and then enter the PIN without needing to have the actual EBT card. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Approximately 5 U.S.C. § 552 (b)(6) & (b)(7)(C) later the household spent 5 U.S.C. § 552 (b)(6) & (b)(7)(C) at a supermarket located 3.6 miles away. This unusual pattern of multiple transactions at the Appellant firm followed by purchases at supermarkets and super stores was repeated during other months of the review period by this household indicating a continuing pattern of trafficking at the Appellant firm. It makes no sense for a household to shop at Appellant's convenience store with its extremely limited stock of staple foods and spend 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in four separate transactions when it was shopping at super stores and supermarkets that would have offered a much greater quantity and variety of staple foods at better prices just after the transactions at the Appellant firm. This shopping pattern is indicative of trafficking as Appellant's very poorly stocked store is unlikely to offer any eligible food items that could not have been purchased at the far better stocked super stores and supermarkets for less.

The Office of Retailer Operations and Compliance's analysis of shopping patterns noted that this same pattern of multiple transactions at the Appellant firm totaling to large dollar amounts with often smaller amounts being spent at super stores and supermarkets before, after, or in between the transactions at the Appellant firm was noted in additional households. Their analysis also noted that the Alabama SNAP database shows that several households responsible for many of the transaction sets in this Attachment have reported their residence as being located 30 or more miles away from the Appellant firm's location. It would be unrealistic to expect that these households would travel dozens of miles out of their way to shop at a very poorly stocked convenience store and therefore more likely than not that these households were traveling to the Appellant firm in order to traffick their SNAP benefits.

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 the households in this Attachment 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 convenience store with an extremely limited stock of staple foods. The more plausible explanation is that these households were trafficking at the firm. Other households analyzed exhibited similar

shopping patterns indicative of trafficking. There is no legitimate reason why these households would spend so much of their SNAP allotments at a very poorly stocked convenience store when they clearly had access to and frequently shopped at nearby and distant larger grocery stores.

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 161 individual EBT transactions 5 U.S.C. § 552 (b)(6) & (b)(7)(C). The substantial number of high dollar transactions is uncharacteristic for a very small convenience 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 \$7.26 for this store type in Montgomery County. This is unusual and indicative of trafficking.

The evidence under review shows that SNAP households shopping at the Appellant firm are also shopping at many full-line super stores and supermarkets that offer a greater quantity and variety of SNAP eligible food items for better prices than customers can find at the Appellant firm. These high dollar value transactions remain questionable when considering the proximity of the other stores that would be better shopping options for consumers. Based on their shopping patterns, transportation does not appear to be an issue for these households. Yet, they continue to shop and spend suspicious high dollar amounts at the Appellant firm, where the eligible food stock is extremely limited, 5 U.S.C. § 552 (b)(6) & (b)(7)(C) of purchases at larger food stores.

While households residing in areas with extremely limited grocery store options may conduct high dollar transactions at convenience stores out of necessity, this is not the case when they have better alternatives. FNS records show there are two super stores, one medium grocery store, four convenience stores, and six combination grocery stores located within a 1.0 mile radius of Appellant's location with the medium grocery store located only two blocks away. There are also other super stores and supermarkets located further away. These larger stores would offer greater quantities and varieties of staple food items at lower prices than would be found at a very poorly stocked convenience store.

The difference in the average SNAP transaction amount, the total SNAP transaction dollar volume, and the total SNAP transaction count for Montgomery County convenience stores during the review months and at the Appellant firm is significant. Appellant's average SNAP transaction dollar volume is 87.31 percent larger than Montgomery County convenience stores while its average SNAP transaction dollar amount is 45.04 percent larger and its total SNAP transaction count is 29.17 percent larger. 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 one 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 Montgomery County stores. A comparison of Appellant's redemption data to the County convenience store average using ten dollar increments shows that Appellant's transaction count and dollar volume was significantly higher than that of like type stores in all ranges 5 U.S.C. § 552 (b)(6) & (b)(7)(C). It is unusual that County convenience stores begin averaging less than one transaction in each range 5 U.S.C. § 552 (b)(6) & (b)(7)(C) while the Appellant firm's transactions do not stop until the 5 U.S.C. § 552 (b)(6) & (b)(7)(C) range nearly triple that of County stores. The Appellant firm also has unusual spikes in the number and dollar volume of transactions 5 U.S.C. § 552 (b)(6) & (b)(7)(C) ranges over the same period. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). This transaction pattern and the unusual spikes in both transaction numbers and dollar volume do 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.

Appellant offered no explanation to support the legitimacy of the listed transactions in this Attachment.

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 Appellant firm since its cost of goods is higher than that of larger stores such as super stores or supermarkets.

Information obtained during the March 12, 2020, FNS store visit on shows that the Appellant firm offered an extremely limited quantity and variety of SNAP eligible staple food items, many accessory foods, and ineligible items. Much of the inventory for sale consisted of inexpensive snacks, candy, drinks, and various single serving foods as well as ineligible items. It is specifically noted that the firm had no fresh or frozen unprocessed meat or seafood, an extremely limited quantity and variety of processed meat and seafood, no fresh or frozen fruit or vegetables, and did not meet minimum FNS stocking requirements in the dairy staple food category. The fact that gasoline, tobacco, smoking accessories, alcohol, household products, paper products, auto products, health and beauty items, hot drinks, ATM, hats, video CDs,

newspapers, charcoal, lighter fluid, and propane canisters are not eligible for purchase with SNAP benefits also provides no justification for the large transaction amounts. It is also noted that the quantity and variety of the store's staple food inventory was significantly less than that seen during the previous FNS store visit on April 4, 2019.

Higher food prices make it even more unlikely that SNAP recipients, with very limited food benefits, would want to spend a considerable part of their benefits in a store that does not address all of their food needs when they are already shopping at larger, fully stocked stores that would offer a greater variety of foods at lower prices. Many of these stores also offer store brand products at lower prices, weekly specials, and have shopping carts and checkouts with built-in scanners and conveyor belts to facilitate processing purchases quickly. Additionally, Appellant furnished no itemized cash register and EBT receipts for the period under review to document the legitimacy of these excessively large transactions. The firm also has a very small checkout area and no shopping carts or handbaskets thereby making it extremely difficult to facilitate the great quantities of eligible food items required to make up these large dollar transactions. The fact that the firm carries 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.

A detailed analysis of the six invoices provided by Appellant was conducted by the Office of Retailer Operations and Compliance in order to compare the potential dollar amount of eligible food purchases plus markup to the firm's SNAP redemptions for the review period. It is noted that the six invoices were from the same supplier and primarily contain snack foods, beverages, and ineligible items with few staple foods included and corroborates the information in the FNS store visit report. The invoices documented 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in SNAP eligible food item inventory purchased during the review period. Even allowing a 5 U.S.C. § 552 (b)(6) & (b)(7)(C) percent markup, much greater than typical convenience store markup percentages, would result in potential sales far below the firm's SNAP redemptions during the review period. Accordingly, the invoice analysis determined the firm did not have sufficient stock to support SNAP redemptions during the review period.

SNAP redemptions fluctuated unusually following the FNS store visit on March 12, 2020, and receipt of the FNS charge letter on April 2, 2020. The volume of SNAP redemptions at the Appellant firm decreased 55.01 percent from February 2020 to April 2020 while the average dollar amount of SNAP transactions decreased 23.06 percent and the number of SNAP transactions decreased 21.05 percent during the same period. A pronounced fluctuation in SNAP redemptions following the store visit and receipt of the charge letter is a clear indication of trafficking since, if trafficking were not occurring, there would be no abnormal fluctuations in redemption amounts.

Based on this discussion, Appellant did not provide adequate evidence to support the legitimacy of the excessively large transactions in this Attachment.

## Other Contentions

Regarding Appellant's denial of trafficking, the purpose of this review is to either validate or to invalidate the earlier decision of the 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, the Appellant bears the burden of proving by a preponderance of evidence that the administrative action should be reversed. That means the Appellant has the burden of providing relevant evidence that a reasonable mind, considering the record as a whole, would accept as sufficient to support a conclusion that the argument asserted is more likely to be true than untrue. Assertions that the firm has not violated program rules, by themselves and without supporting evidence and rationale, do not constitute valid grounds for dismissal of the current charges of violations or for mitigating their impact. When store ownership signed the certification page of the SNAP retailer authorization application to become a SNAP retailer, it confirmed it understood and agreed to abide by program rules and regulatory provisions. It also agreed to accept responsibility on behalf of the firm for 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.

Regarding a warning letter, there are no requirements in existing FNS regulations that require stores suspected of trafficking SNAP benefits be provided with a written or verbal notification that violations of SNAP regulations may be occurring and the potential penalties. Warning letters are issued in those situations where the SNAP violations are of a limited nature that would not warrant a disqualification and therefore would not have been appropriate in this situation. Additionally, as previously discussed, the SNAP retailer application contains a certification page whereby applicants must confirm their understanding of and agreement with SNAP retailer requirements in order to complete the application or reauthorization process. This includes the responsibilities of the owner as well as the administrative sanctions for SNAP violations.

Appellant claims that the pattern of unusual, irregular, and inexplicable transactions contained in the charge letter Attachments were conducted by a single clerk and that this same clerk was also responsible for similar SNAP violations at another store also owned by the Appellant. A review of charge letter transactions for both stores conducted by the Office of Retailer Operations and Compliance found that given the preponderance of transactions at similar times and the 26.54 mile distance between store locations it was unlikely the clerk was responsible for all of the transactions. The findings also noted that the review period for the other store included March 2020 transactions that occurred well after the clerk's firing. The initial reply to the charges dated April 10, 2020, states that the Appellant firm's General Manager fired the responsible clerk in February 2020 after she admitted to selling nonfood items at the Appellant firm while denying trafficking SNAP benefits for cash in a written statement. The reply also stated that the General Manager had already filed a complaint against the clerk at the courthouse. In response to a request by the Office of Retailer Operations and Compliance for a copy of the complaint, Appellant, through counsel, submitted the clerk's statement, a Mosses Police Department

Incident Report dated May 7, 2020, that was filed by the manager; and a Hayneville Municipal Court Warrant of Arrest dated May 8, 2020. The General Manager's statement regarding a complaint having been filed is contradicted by both the police report and the arrest report. These documents are dated May 7, 2020, and May 8, 2020, respectively, approximately three months after the clerk was fired in February 2020, and the courthouse complaint supposedly filed. Additionally, both documents only reference the clerk's alleged theft at Appellant's other store and make no mention of any theft occurring at the Appellant firm. The legitimacy of the clerk's statement is also suspect as it is typed and notarized, but not dated. Furthermore, the information provided by the notary public does not match that on file with the Alabama Secretary of State's Office, the notary signature does not match the name on the notary seal, and there is no dated jurat statement as specified in the *Alabama Secretary of State's Handbook for Notaries Public, First Edition 2019*. Appellant also submitted a birth certificate and a death certificate in support of the claim that family matters such as the death of the owner's mother and health issues of the owner's spouse following the birth of their child contributed to the owner's lack of oversight of his store and employees. The claim that the owner had to accompany his mother's remains back to India was subsequently withdrawn. No documentation of any ongoing health concerns for the owner's spouse was advanced by Appellant. Additionally, a review of the owner's SNAP authorized holdings that shows he purchased and received SNAP authorization for at least four other retail stores after his purchase of the Appellant firm and is therefore likely to have been a significant factor in the owner's lack of oversight. This is further supported by Appellant's statement that the store does not have any written policies regarding employee training or compliance with SNAP regulations as required by FNS and that proper training and compliance policies are now being updated into a written manual that will then be given to each employee. In spite of whatever demands were present during the review period, the owner knowingly and freely agreed to accept responsibility on behalf of the firm for SNAP violations including those committed by any of the firm's employees when he applied for SNAP retailer authorization.

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

The issue under review involves a charge of trafficking SNAP benefits based on EBT transaction data. EBT transaction data is covered in SNAP regulations at 7 CFR § 278.6(a) and is addressed below. Trafficking is always considered to be the most serious violation even if it is a first offense therefore a temporary suspension or lesser penalty would not be applicable. SNAP regulations at 278.6(e)(1) clearly state that, "FNS shall disqualify a firm permanently if personnel of the firm have trafficked as defined in § 271.2." SNAP regulations at 7 CFR § 271.2, define trafficking as, "The buying, selling, stealing, or otherwise effecting an exchange of SNAP benefits for cash or consideration other than eligible food". SNAP regulations at 7 CFR § 278.6(a) clearly state that "FNS may disqualify any authorized retail food store if the firm fails to comply with the Food and Nutrition Act of 2008, as amended, or this part. Such disqualification

shall result from a finding of a violation on the basis of evidence that may include facts established through on-site investigations, inconsistent redemption data, evidence obtained through a transaction report under an electronic benefit transfer system”. In the present case, the data presented in the Attachments is solely based on the SNAP EBT transactions conducted at the Appellant firm during the review period. This firm was selected as a result of a series of complex algorithms that make numerous data comparisons with other like type firms during the review period. All of the transactions were then reviewed and analyzed by the 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.

It is recognized that some degree of economic hardship is a likely consequence whenever a store is disqualified from participation in SNAP. However, there is no provision in the SNAP regulations for waiver or reduction of an administrative penalty assessment on the basis of possible economic hardship to the firm or to ownership resulting from imposition of such penalty. To allow ownership to be excused from an assessed administrative penalty based on purported economic hardship to the firm would render virtually meaningless the enforcement

provisions of the Food and Nutrition Act of 2008, as amended, and the enforcement efforts of the USDA. Furthermore, giving special consideration to economic hardship to the firm would forsake fairness and equity, not only to competing stores and other participating retailers who are complying fully with program regulations, but also to those retailers who have been disqualified from the program in the past for similar violations. Therefore, ownership's contention that the firm may incur economic hardship based on the assessment of an administrative penalty does not provide any valid basis for dismissing the charges or for mitigating the penalty imposed.

### **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 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 or provide substantial evidence that it met all four criteria required by 7 CFR §278.6(i) within the specified timeframe. Based on the above, the Office of Retailer Operations and Compliance 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

August 6, 2020