

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

Jubilee Market,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0206683

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 Jubilee 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 February 27, 2018, 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 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 May 2, 2018,

Appellant was informed that it was permanently disqualified from participation as a retail store in the SNAP, effective upon Appellant's receipt of said letter; the letter further instructed

Appellant that it may request an administrative review of the decision. On April 9, 2018, Appellant requested an administrative review of the ROD Office's decision; the request was granted. In a letter dated September 12, 2018, Appellant provided a substantial amount of additional information and documentation that had not previously been provided to the ROD Office that made the disqualification decision; accordingly, this new information was provided to the ROD Office to ascertain if it would alter its decision. After examining the additional materials provided by Appellant, the ROD Office reaffirmed its disqualification determination.

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, in part:

...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, in part:

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, in part:

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, in part:

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, in part:

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, in part:

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 5 U.S.C. § 552 (b)(6) & (b)(7)(C) were debited from the accounts of individual SNAP households within a set time period (Attachment 2).
- A series of excessively large SNAP transactions 5 U.S.C. § 552 (b)(6) & (b)(7)(C) were debited from recipient accounts (Attachment 2).

APPELLANT'S CONTENTIONS

In Appellant's reply to the Charge Letter, in its written request for review dated April 9, 2018, and in subsequent correspondence, it was argued that:

1. The firm serves as a grocery store, not a convenience store; this explains most of the transactions. The firm is misclassified as a convenience store; if classified as a small grocery store, the transactions at issue would not appear suspicious. The firm operates in a food desert with no other stores within a one-mile radius in all directions. In particular, the area east and southeast of the store has no SNAP-authorized firms. One of the firms within a one-mile radius is an Asian specialty store, at which Appellant's customers would not likely shop. Another is a small grocery, which is incorrect, as the firm is a wholesaler and carries few SNAP-eligible products. Another is a traditional

grocery store but is too far away from many customers that shop at the Appellant store. Two other stores are likewise too far away, leaving the Appellant firm as the sole option for many of its customers. Appellant provides photographs showing the firm's inventory of non-food items and of food items.

Appellant provides two Affidavits, referenced herein as Affiant A and Affiant B. Affiant A claims the store is a grocery store. This affidavit is from a customer that shops at the store and buys all of his/her groceries at the store. The Affiant is a typical customer at the store. Bigger stores such as Wal-Mart are not available to Affiant A. Other nearby convenience stores do not have the selection that Jubilee does.

Affiant B affidavit also claims the store is a grocery store; there are no traditional grocery stores nearby any more. The nearest is a 30-minute drive. The firm has a wide variety of food and non-food for sale. There are four housing projects nearby, many of whom shop at the store. The store is the busiest when SNAP benefits are issued at the beginning of the month. Appellant provides 236 letters of support from its customers that support that the firm is a grocery store and not a convenience store. All customers attest that they have never heard of any wrongful acts related to EBT recipients at the Appellant store.

2. Regarding Attachment 1. Affiant A notes that family members shop at the store up to three times per day. Affiant B has seen customers come in multiple times per day and members of the same family come in to the store on the same day. Affiant B states that except for the two transactions in Attachment 1 dated 7/22/2017, none of the transactions are unusual. The first two transactions sets in Attachment 1 are anomalies and should be excluded.
3. Attachment 2 to the Charge Letter reflects a consistent amount of large SNAP transactions throughout the analysis period; such indicates customers making the same or similar purchases throughout this period. Additionally, the monthly totals of these transactions are small compared to overall sales; monthly average large transactions are very consistent also. Such is inconsistent with a trafficking firm. Appellant notes that the transactions, for three of the households whose data appears in Attachment 2, were consistent and thus not reflective of SNAP benefit trafficking. All of Attachment 2 should be excluded because they are normal for the store. Affiant A recalls spending up **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** at the store and shops at the store twice per month. Appellant notes that this household spent **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** in SNAP benefits on February 13, 2018 at the Appellant store. Appellant cites several other large SNAP transactions that occurred during February and March 2018. This shows that such transactions are normal at the store. **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. People purchase entire hams, blocks of cheese, cases of water and 10 frozen pizzas (for \$9.99 each). The firm sells non-carbonated sports drinks two for \$5.00; Affiant B recalls selling 10 of these for \$50.00. The store sells formula for \$24.99; thus two cans of formula could total \$49.98. Transactions **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** are possible via virtually an infinite number of item purchases. Appellant does not maintain individual receipts detailing items sold. The registers total general categories only. Each register has a scanner to determine an item's SNAP- eligibility. The firm has obtained video-tape evidence of sales of repetitive and large transactions, showing that such

transactions are not due to SNAP-benefit trafficking. The firm also provides copies of sales receipts, along with the videos, which corroborate the statements of Customers A and B. These transactions occurred outside the analysis period (during early spring and winter 2018, such as February and March). However, more people would have shopped during the summer months (such as July to December 2017, the period noted in the Charge Letter).

4. The ROD Office may have viewed July transactions ending in 00 with suspicion; however, baby formula is usually sold at \$25.99 each but occasionally offers same at a discount of two for \$50.00. Frozen pizza is \$9.99, but occasionally offered 11 pizzas for \$100.00. These are just two examples of occasional deals offered to customers. In the future such deals will be advertised. Affiant B provided a valid explanation for such transactions also; however, these transactions total 5 U.S.C. § 552 (b)(6) & (b)(7)(C), while the firm sold approximately 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in food during July 2017, of which approximately 5 U.S.C. § 552 (b)(6) & (b)(7)(C) was for SNAP sales. The remaining suspect transactions comprise less than 1 percent of total SNAP sales and approximately 1/2 of 1 percent of total food sales. Such is not adequate proof of trafficking. Appellant provides an invoice showing that the firm went from ordering over 5 U.S.C. § 552 (b)(6) & (b)(7)(C) per week in food products from a specific vendor to nearly \$0 (Appellant's Exhibit O).
5. A store employee was terminated when caught stealing and Affiant B would not be surprised if this employee was careless with a transaction or two. Affiant B has never seen the store engage in trafficking or sell ineligible items, though other stores in the area sell things they should not. Affiant A has never been offered and has never seen anyone trying to buy SNAP benefits or otherwise break the rules. Appellant provided customer statements in support thereof.
6. Appellant notes that two undercover investigations revealed no violations by the firm. Both show that the firm provided shopping baskets and also offered grocery items and a hot food deli.
7. A permanent disqualification is unduly harsh; a warning letter is more appropriate. Additionally, the agency can impose a less severe sanction, no greater than a six-month suspension, in accordance with Section 279.5(c).
8. The firm will implement any suggestions provided by FNS on how to avoid being similarly charged with violations in the future. The firm will also ensure that itemized receipts are kept with SNAP transactions.

The above represents a summary of Appellant's numerous contentions; while not every assertion made is reproduced above, all arguments made and evidence provided by Appellant were considered and weighed in comparison to the arguments and evidence provided by the ROD Office.

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 February 6, 2018, 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:

- Estimated 3100 square feet of store space.
- Optical scanners used.
- Shopping baskets present (8).
- No shopping carts.
- No night window.
- No evidence of wholesale business.
- Prices in standard retail variations of \$.x9.
- One check-out area, two cash registers, two card readers.
- Estimated 600 square feet of food storage space and storage coolers/freezers. Appeared to contain primarily soft drinks. Photograph: 17.
- No food stored offsite.
- Not a specialty food store.
- No telephone, online or other orders taken.
- No delivery offered.
- No transaction total rounding at check-out.
- Four most expensive SNAP-eligible items \$5.00 or more:
 - Baby formula - \$25.99 for 22.5-ounce can. (One large can, three medium-sized cans and four small cans present on the day of the store visit.)
 - Frozen pizza - \$9.99.
 - Roast beef - \$8.99 per pound.
 - Pastrami - \$7.99 per pound.
- All above questions were answered in collaboration with store personnel.
- The firm also carried tobacco products, alcohol, lottery tickets, automotive products, health and beauty products, clothing, paper goods, cleaning products and other non-food items. The firm also operated as a gas station.
- Empty/sparsely-stocked shelves/coolers noted. Photographs: 2, 5, 10, 20, 22, 25, 26, 27, 29, 32, 34 and 42.
- Kitchen/food preparation area present.
- Hot food sold.
- No meat/seafood bundles/specials or fruit/vegetable boxes.
- One small chest freezer held what appeared to be four or five large bags of chicken nuggets, perhaps a half dozen frozen pizzas and what appears to be three bags of frozen pepperoni. One medium-sized chest freezer contained approximately one dozen frozen pizzas. Photographs: 1 and 6.
- One small upright freezer held what appeared to be one bag of chicken nuggets, two bags of raw hamburger, one bag of what appeared to be grated cheese and five bags of unidentifiable products. The freezer appeared to be located in a non-public area of the store.
- The firm appeared to be a typical convenience store/gas station in all relevant respects. Outdoor signage/advertising focused almost exclusively on alcoholic products. Photographs: 2, 24, 28, 30, 33 and 36.

- Check-out counter had approximately 2 X 2 feet of useable counter space and was surrounded by candy, clothing, tobacco and alcohol products. Photographs: 33, 36, 37 and 38.

The documentation presents no indication of advertised specials, promotions, 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 with approximately 2 X 2 feet of useable counter space and surrounded by candy, clothing, tobacco, alcohol products and other non-food items. There were no shopping carts with which customers could transport large orders to the small check-out area or to waiting transportation. 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 Missouri during the analysis period was \$6.53, reflecting that large purchases are not routinely made in such stores.

In regard to contention 1 above, the record reflects that the ROD Office correctly categorized the firm as a convenience store, in accordance with agency rules and protocols. Moreover, as noted, the store visit referenced above reflected the firm to be a typical convenience store in all relevant respects. The record reflects that at the time of the ROD Office sanction decision there were 51 SNAP-authorized firms within a two-mile radius of the Appellant firm, including two super stores, five supermarkets, two large grocery stores, one medium grocery store, 12 combination grocery/other stores and 29 other convenience stores (three from under one-third mile to just over one-half mile). The assertion that there were no traditional stores in the area is not corroborated by agency data. That the firm was stocked and correctly categorized as a convenience store has been noted above. While there may have been housing projects in the area, as noted, there were also other convenience stores, grocery stores, supermarkets and super stores in the area; as noted, the record strongly indicates that the firm carried no unique inventory and was not without substantial retail competition from other SNAP-authorized firms. Moreover, the ROD Office found that customers conducting implausible transactions at the Appellant firm were shopping at much better-stocked super stores and supermarket on or about the same day, calling into question what these customers could 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). The record thus reflects that regardless of the stores Appellant believes it has identified in the area, ample options were present for customers during the analysis period and customers did in fact routinely avail themselves of these other shopping options. Photographs provided by Appellant largely corroborate those provided by the ROD Office obtained during the store visit referenced above, with the exception that Appellant's photos do not show the numerous empty shelves seen and photographed on February 6, 2018 by the store visit contractor. Empty/sparsely stocked shelves/coolers are typically indicative of low turnover.

With regard to the two Affidavits provided by Appellant, referenced herein as Affiant A and Affiant B, the ROD Office identified Affiant A as household 8699 in the Charge Letter attachments. This household conducted 20 transactions at the Appellant firm during the analysis period, 1 of which appeared in Attachment 1 and 11 of which appeared in Attachment 2. The shopping history for this household indicates that it shopped at four different super stores and

four different supermarkets, located from 1.5 to 10.1 miles from its residence and thus had adequate transportation and access to much better-stocked and very likely more competitively-priced stores. In fact the household shopped more frequently at the super stores and supermarkets than at the Appellant firm, even though the household states that it cannot easily access these stores. Moreover, the ROD Office reiterates that the store visit documentation, as well as the photos provided by Appellant, reflect inventory to consist primarily of inexpensive canned and packaged foods, deli meat and cheese, a small quantity of infant formula and a substantial inventory of accessory and snack food items, typical convenience store inventory. The record provides no indication that the firm stocked or sold any substantial amount of fresh meat, seafood, poultry or fresh fruits and vegetables or other bulk or packaged staple food items commonly found at grocery stores. Not only was it unlikely that most households would be able to meet all of their grocery needs at Appellant's store, but the affiant at issue clearly was likewise shopping elsewhere on a regular basis. Thus the affidavit lacks credibility and the contentions contained therein are not compelling.

Regarding contention 2 above, the credibility of Affiant A has been discussed in the foregoing. 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. 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. Moreover, the record further reflects that Appellant's number of repetitive transactions during the analysis period was multiple times that of three nearby SNAP-authorized stores (all convenience stores from just under one-third of a mile to just under a one mile from the Appellant firm). 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. There is no compelling rationale to explain why only, or primarily, Appellant's customers made repetitive visits spending large amounts in short timeframes. 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.

The rationale for transactions 1 and 2, on July 22, 2017 - that they were simply back-to-back purchases by the same customer, but were otherwise anomalous, is not compelling; Appellant's own videos do not reflect that 5 U.S.C. § 552 (b)(6) & (b)(7)(C) transactions for legitimate purchases could be completed back-to-back 5 U.S.C. § 552 (b)(6) & (b)(7)(C). The videos provided by Appellant will be discussed in greater detail below. It is noted for the record that transactions 37 through 39 similarly involve large purchases in short timeframes and, moreover, arrive at exact even-dollar amounts and, furthermore are duplicative (5 U.S.C. § 552 (b)(6) & (b)(7)(C)).

With regard to the transaction referenced by Appellant 5 U.S.C. § 552 (b)(6) & (b)(7)(C) on 2/13/2018, this was conducted by Affiant A noted above; the household had already shopped at a supermarket and/or a super store 5 U.S.C. § 552 (b)(6) & (b)(7)(C) earlier. It is questionable what particular grocery item, or combination of grocery items 5 U.S.C. § 552 (b)(6) & (b)(7)(C), was/were available at the Appellant firm that was/were not available at the supermarket/super store that the household had visited 5 U.S.C. § 552 (b)(6) & (b)(7)(C) earlier. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). This transaction activity does not demonstrate that the firm exchanged eligible food items for SNAP benefits but further calls into question why such large transactions were occurring at the firm.

With regard to contention 3 above, that the value of Attachment 2 transactions is consistent from one month to the next during the analysis period does not constitute evidence that the transactions were wholly legitimate; there is no apparent reason why violative activity cannot or would not likewise be consistent from month to month. Similarly, that households consistently conduct implausible transactions does not make those transactions more plausible.

Additionally, no compelling documentation has been provided to support the contention that households purchased whole hams, whole blocks of cheese, large numbers of pizzas or up to 20 bottles of sports drinks in single purchases. It is noted as well that these are items that grocery stores, supermarkets and super stores would also carry and would very likely offer at more competitive prices (such stores are typically the most competitively-priced in a given area). It is acknowledged that two cans of formula priced at \$24.99 would total \$49.98, although Appellant also states the price for formula was \$25.99; the rationale further fails to explain transactions 5 U.S.C. § 552 (b)(6) & (b)(7)(C). As noted, the store visit documented the price at \$25.99, which would total \$51.98 for two. Moreover, the ROD Office points out that SNAP customers typically use WIC benefits, for which most SNAP households with infants and children are eligible, to buy formula and would not routinely expend SNAP benefits on products for which WIC benefits could instead be used.

While the videos reflect in certain instances that some level of multiple and large dollar purchases were logistically possible at the store, these are not videos of the actual Charge Letter transactions, but of transactions conducted at a much later date and in response to the Charge and Determination Letters. Several of the transactions reflected in the videos would not have resulted in flagged repetitive transactions (Attachment 1) and thus do not provide support to those that do appear in the Charge Letter.

The videos furthermore do not reveal why several transactions cluster at certain amounts in Attachment 2, 5 U.S.C. § 552 (b)(6) & (b)(7)(C). This is a highly unorthodox set of occurrences, given that no packaged or bulk products are priced at these levels; they are indicative that the total amounts conducted were contrived. The firm's most expensive items, infant formula, was stocked in small quantities and, moreover, as noted, are not commonly purchased using SNAP benefits, as most SNAP households use WIC benefits to purchase formula. No compelling rationale has been provided for large transactions, as the firm's inventory, as noted, is that of a typically-stocked convenience store. Moreover, as noted, household SNAP transaction analysis provided by the ROD Office reflects that Appellant's SNAP customers clearly have access to and

regular shop at much better-stocked super stores and supermarkets, calling into question what customers could obtain at Appellant's typically-stocked convenience store that they could not obtain at the better-stocked stores. ROD Office analysis also indicates that the firm conducted many more excessively large transactions than comparable stores in the area.

In regard to contention 4 above, the store visit reflected no advertising, flyers or other signage stating discounts or specials; likewise, none appear in Appellant's photos. As noted in the foregoing, the rationale for transactions 1 and 2, on July 22, 2017 - that they were simply back-to-back purchases by the same customer - is not compelling and continues to beg the question of why two large transactions for the exact same amount were conducted

5 U.S.C. § 552 (b)(6) & (b)(7)(C) by the same customer. That the firm conducted a substantial amount of business and/or SNAP transactions does not provide a rationale for the questionable transactions detailed in the ROD Office's Charge Letter. It is moreover quite common for trafficking firms to conduct a significant amount of legitimate business. The Charge Letter includes transactions ROD viewed as implausible, given the information in the record; as such, the Charge Letter did not include all SNAP transactions conducted during the analysis period. Moreover, Appellant's figures showing a decline in sales following the Determination Letter do little to provide a rationale for the transactions noted in the Charge Letter. The ROD Office further points out that the 22 transactions **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** above the state store-type average SNAP transaction; however, the storage room was stocked with inexpensive soft drinks, only 9 units of infant formula were present on the day of the store visit and, moreover, as noted, SNAP customers are typically eligible for WIC benefits and thus tend to use such benefits instead of SNAP benefits to purchase WIC formula. As noted, Appellant's photographs do not reflect a large inventory of formula, of expensive items, of fresh meat, poultry or seafood or of fresh fruit or vegetables, which are typically found in grocery stores. General sales data provides only an oblique perspective on specific transaction activity, and does not provide particularly compelling evidence demonstrating that the patterns detailed in the ROD Office's Charge Letter resulted from legitimate SNAP sales.

Regarding contention 5 above, Affiant B suggests that violative transactions may have been committed by a store employee (who was later terminated), which tends to support the ROD Office's case. Customer statements provided were signed form letters that appear to have been written by the Appellant itself; Appellant's letter of customer support was in form-letter format and signed by 235 customers attesting that they had not witnessed, taken part in and were not aware of illegal activities at the store. The letter provides no further detail/information about the transactions at issue nor explains their unorthodox nature. It does not indicate whether the customers were SNAP customers or not. The ROD Office was able to identify 130 letter signers; only four had conducted Charge Letter transactions and only 20 had conducted any transactions at the store. 62 households conducted no SNAP transactions at the store during the analysis period. 41 were unknown to the Missouri SNAP client system. Several signatures were illegible. Of the four that had conducted Charge Letter transactions, none provided any further detail about the nature of those transactions. As such, the information is not viewed as compelling.

With regard to contention 6 above, while the prior investigations do not reflect violative activity at the time they were conducted, they do not disprove violative activity at a different or later time.

In regard to contention 7 above, there is little evidence in the present case that the scope or scale of the violations at issue were overestimated or minimal; Attachment 3 transactions alone total 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Nonetheless, the statute and regulations do not specify a minimum number of trafficking transactions, or a minimum dollar value thereof, in order to warrant a sanction; the statute at 7 U.S.C. § 2021(b)(3)(B) is specific in noting that the disqualification shall be permanent upon the first finding of SNAP-benefit trafficking. Likewise, the regulations at 7 CFR § 278.6(e)(1) provide that the agency shall (emphasis added) disqualify a firm permanently if personnel have engaged in SNAP-benefit trafficking. Thus, any amount of SNAP-benefit trafficking warrants a permanent disqualification or a civil money penalty in lieu thereof; the scope or scale of trafficking violations is not critical in warranting a permanent disqualification.

Regarding contention 8 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.

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 ROD Office's Charge Letter dated February 27, 2018, 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

November 19, 2018