

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

Mega Fuel 11,

Appellant,

v.

Case Number: C0208006

Retailer Operations Division,

Respondent.

FINAL AGENCY DECISION

It is the decision of the U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS), that there is sufficient evidence to support a finding that a permanent disqualification from participation as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP) was properly imposed against Mega Fuel 11 by the Retailer Operations Division of FNS.

ISSUE

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with 7 CFR § 278.6(e)(1)(i) in its administration of the SNAP, when it imposed a permanent disqualification against Mega Fuel 11 on July 16, 2018.

AUTHORITY

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

CASE CHRONOLOGY

In a letter dated May 8, 2018, the Retailer Operations Division informed the Appellant that Mega Fuel 11 was in violation of the terms and conditions of the SNAP regulations, 7 CFR § 270 –282, based on EBT SNAP benefit transactions that "establish clear and repetitive patterns of unusual, irregular, and inexplicable SNAP activity for your type of firm."

In a response to the Retailer Operations Division dated May 18, 2018, the Appellant, through counsel, denied the trafficking charges and stated that the charge of trafficking was based upon mere speculation and conjecture resulting from reviewing computer sales records utilizing the

unreliable ALERT program. In addition, the Appellant's counsel requested information and documents from FNS with regard to the agency's case against Mega Fuel 11 pursuant to the Freedom of Information Act (FOIA). In a letter dated June 26, 2018, FNS informed the Appellant's counsel that due to a lack of response to the agency's requests, dated May 21, 2018 and June 6, 2018, for a FOIA fee payment, FNS administratively closed the FOIA request due to lack of fee payment. FNS received no further communication from the Appellant or counsel with regard to the agency's response to the FOIA request.

After considering the Appellant's reply and the evidence in the case, the Retailer Operations Division issued a Determination Letter dated July 16, 2018, informing the Appellant that Mega Fuel 11 was being permanently disqualified from participation in the SNAP in accordance with 7 CFR § 278.6(e)(1) for trafficking violations.

In a letter postmarked July 27, 2018, the Appellant, through counsel, requested an administrative review of the Retailer Operations Division's decision to permanently disqualify the firm from participation in the SNAP. FNS granted the Appellant's request for administrative review by letter dated August 7, 2018.

STANDARD OF REVIEW

In appeals of adverse actions, the Appellant bears the burden of proving by a preponderance of the evidence, that the administrative actions should be reversed. That means the 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 and Nutrition Act of 2008, amended, 7 U.S.C. § 2021 and 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. There also exist FNS policy memoranda and clarification letters which further explain the conditions necessary in order to permanently disqualify retail stores.

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

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

7 CFR § 278.6(a) states, inter alia:

FNS may disqualify any authorized retail food store ... if the firm fails to comply with the Food 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 ... [Emphasis added].

7 CFR § 278.6(e)(1)(i) states:

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

7 CFR § 271.2 states, inter alia:

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

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

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

7 CFR § 278.6(i) states, inter alia:

FNS may impose a civil money penalty in lieu of a permanent disqualification for trafficking as defined in § 271.2 if the firm timely submits to FNS substantial evidence which demonstrates that the firm had established and implemented an effective compliance policy and program to prevent violations ...

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

(ii) 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 as specified in § 278.6(i), 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). [Emphasis added].

(iii) 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 penalty. [Emphasis added].

SUMMARY OF CHARGES

The Appellant was charged and determined to be trafficking based on an analysis of EBT transaction data from December 2017 through March 2018. This involved the following SNAP transactions patterns which are indicative of trafficking:

- There were an unusual number of transactions ending in a same cents value;
- There were multiple transactions made from individual benefit accounts within a set period of time; and
- There were excessively large purchase transactions made from recipient accounts.

The issue in this review is whether, through a preponderance of evidence, it is more likely true than not true that questionable transactions were the result of trafficking.

APPELLANT'S CONTENTIONS

The following represents a brief summary of the Appellant's contentions in this matter. Please be assured, however, that in reaching a decision, full attention and consideration was given to all contentions presented, including any not specifically recapitulated or specifically referenced herein.

In the reply to the Charge Letter and in the administrative review request postmarked July 27, 2018, the Appellant, through counsel, stated the following summarized contentions, in relevant part:

- The Appellant vehemently denies that trafficking of SNAP benefits occurred at Mega Fuel 11. The Appellant has not been provided any reliable, credible evidence of any SNAP violations that it would be responsible for, including the administrative record, thereby precluding it from fully responding to the charges against it. The Appellant claims that it has been denied due process of law. The Appellant cited case law in support thereof. USDA erroneously concluded that the Appellant has trafficked SNAP benefits based upon mere speculation and conjecture resulting from reviewing computer sales records utilizing the unreliable ALERT program with nothing more. The agency's conclusions are not based upon any reliable data or confirmation by any actual transactions conducted by undercover informants.
- The Appellant appears to be making the argument that the legislative process underpinning the SNAP statute and regulations does not adequately represent foreign-born persons such as the store owner in the present case. Moreover, the store owner, being foreign born, does not understand the technical legislation being applied against it but has nonetheless worked hard to meet SNAP participation requirements. Lastly, there are no reasonable grounds for upholding the permanent disqualification when it involves a foreign born store owner. The Appellant cited case law in support thereof.
- The Appellant argues that the statute and regulations relied upon by the Retailer Operations Division violate the Contracts Clause of the U.S. Constitution, is arbitrary, capricious, done in bad faith and serves no legitimate public purpose. The Appellant cited case law in support thereof.
- The Appellant argues that the statute and regulations relied upon by the Retailer Operations Division violate the Takings Clause of the U.S. Constitution. The Appellant cited case law in support thereof.
- The penalty imposed upon Mega Fuel 11 is extremely severe based upon the allegations and is unconstitutional; therefore, the permanent disqualification assessed against the Appellant should be set aside.

ANALYSIS AND FINDINGS

Store Characteristics

FNS authorized Mega Fuel 11 as a convenience store on September 15, 2016. The case file indicates that in reaching a disqualification determination, the Retailer Operations Division considered information obtained during a February 28, 2018 store visit conducted by a FNS contractor to observe the nature and scope of the firm's operation, stock, and facilities. This information obtained from the store visit was also used to ascertain if there were justifiable explanations for the firm's irregular SNAP transactions. The store visit report and photographs documented the following store size, description, and characteristics:

- Approximately 3,200 square feet in size and has additional food storage outside of public view that is approximately 150 square feet in size which stocks predominantly drinks;
- No shopping carts or hand-held baskets available for customer use;
- Two cash registers and one EBT point-of-sale (POS) device for use in ringing-up SNAP transactions;
- Has optical scanners;
- The available checkout area space was limited and it is surrounded by a Plexiglas barrier;
- No signs posted or flyers available advertising the availability of bulk foods offered at a discounted rate to include meats in bulk, foods sold by the case, and grocery package deals;
- No meat/seafood specials or bundles or fruit/vegetable boxes that might sell for high prices;
- No evidence of a wholesale business such as posted prices or separate entrances for wholesale customers;
- No indication from the store visit report that the firm has a special pricing structure, such as prices ending in \$x.x9, \$x.00, or \$x.50;
- At the time of the store visit, Mega Fuel 11 did not meet the requirements for participation in the SNAP under Criterion A as it was deficient in both the dairy and the meats, poultry, fish staple food categories;
- The four most expensive (costing \$5.00 and above) staple foods in stock were Apple Jacks cereal at \$5.99 per 12.2 ounces; Ozarka at \$5.99 per 24 pack; soda at \$5.69 per 12 pack; and Nescafe at \$5.49 per 3.5 ounces;
- Telephone orders are not taken and delivery is not available to customers;
- There were no fresh or frozen unprocessed meats, poultry, or seafood;
- Frozen foods included a few units of single-serve hamburgers, pizza, and burritos;
- No deli area in which deli meats and cheeses were sold by the pound;
- No hot and/or cold prepared, ready-to-eat foods were prepared and sold other than a few units of pre-packed deli sandwiches;
- There were units of canned/potted meat, meat jerky, and eggs;
- Dairy included milk;
- No infant foods;
- No fresh produce;
- Other staple foods available for purchase included such items as juice, flour, pasta, rice, bread, cereal, corn meal, and canned goods;

- Much of the remaining food stock consisted of accessory foods such as candy, carbonated and non-carbonated drinks, sugar, vegetable oil, and condiments; and
- Ineligible nonfood items included tobacco products, health and beauty items, paper products, household cleaning supplies, automotive supplies, pet food, cell phone accessories, jewelry, gasoline, alcohol, lottery tickets, electronic gaming machines, and clothing.

The available inventory of SNAP eligible food at the time of the store visit showed food stock that would be typical of a convenience store, where households normally purchase a limited number of items. There was little indication that SNAP households would be inclined to regularly visit the store to purchase large quantities of groceries. Given the available inventory and the store's characteristics, this review could find no reason why Mega Fuel 11's SNAP redemption patterns differed so significantly from those of similar sized competitors.

Charge Letter Attachments

On review, the investigative materials provided by the Retailer Operations Division, including computer printouts of transaction data available from Federal records, store visit observations, information regarding area competitor firms, and household shopping patterns, were analyzed.

Government analyses of stores caught in trafficking violations during on-site investigations have found that transactions involving trafficking consistently display particular characteristics or patterns. These patterns include, in part, those cited in the letter of charges. Based on this empirical data, and in the absence of any reasonable explanations for such transaction patterns, a conclusion can be drawn through a preponderance of evidence that the most likely explanation for "unusual, irregular, and inexplicable" transactions and patterns cited in the letter of charges is trafficking. Transactions having such characteristics sometimes do have valid explanations that support that they were the result of legitimate purchases of eligible food items. This is why opportunities are afforded to charged retailers to explain the questionable transactions cited. In this case, the Retailer Operations Division determined that the Appellant's contentions did not outweigh the evidence. The issue in this review is whether, through a preponderance of evidence, it is more likely true than not true that questionable transactions were the result of trafficking. As patterns of unusual transactions appear across multiple Attachments, the case of trafficking becomes more convincing.

Same Cents Transactions (Charge Letter Attachment 1)

This Charge Letter Attachment documents transactions ending in same cents values. A review of the store visit record indicates that the store did not promote any specials that could explain the pattern of large numbers of transactions ending in these values. This Attachment includes 53 transactions **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**.

Mega Fuel 11 conducted 1,958 SNAP transactions during the review period. There were a total of 196 SNAP transactions that met the parameters of this Attachment. Of the total SNAP transactions conducted during the review period, a total of 53, or 27%, ended in "89" cents.

A number of households whose transactions were cited in other Attachments to the Charge Letter also consistently made transactions that ended in same cents values. Transactions appearing in more than one Attachment to the Charge Letter are more suspicious as they display multiple patterns common to trafficking transactions.

The Appellant provided no specific arguments with regard to the unusual number of transactions ending in a same cents value other than it denies the trafficking allegations.

The SNAP regulations do not prohibit SNAP transactions that end in a same cents number value. However, an interesting characteristic of questionable transactions is that many of them end in a same cents value. Sets of repeating digits are highly unorthodox and do not regularly occur in legitimate transactions; such transaction structuring is a common hallmark of trafficking activity. In the absence of any compelling rationale to the contrary, these patterns strongly indicate that the firm is trafficking in SNAP benefits.

Attachment 1 to the Charge Letter documents transactions ending in a same cents value. A review of the store visit record indicates that Mega Fuel 11 did not promote any specials nor did it have a special pricing structure, such as prices ending in \$.x9, that could explain the pattern of large numbers of transactions ending in these values. This Attachment includes 53 same cents transactions **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**.

Patterns of transactions ending in same cents amounts indicate that SNAP transaction amounts are contrived. Random data, which legitimate transaction activity approximates, is extremely difficult to produce intentionally; it is very difficult to avoid repetitive patterns when attempting to create the appearance of normal, near-random transactions. That various customers each repeatedly had totals with identical cents values during the review period strains the credibility of the Appellant's declaration that this activity reflected the acceptance of SNAP benefits in exchange for eligible food items. As the Appellant has offered no rational explanation for why such patterns might exist, it is reasonable to conclude that these same cents transactions are the result of trafficking.

Repeat Transactions by the Same Household (Charge Letter Attachment 2)

This Charge Letter Attachment documents 16 sets of transactions (49 total transactions) **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** in SNAP benefits to meet the parameters of this scan. Multiple transactions conducted by the same household account within a short period of time is a method which violating stores use to avoid single high dollar transactions that cannot be supported by a retailer's inventory and structure.

Although it is not uncommon for customers to have more than one transaction per day, it is not common that such multiple transactions are for large dollar amounts. The SNAP transactions noted in the Charge Letter are questionable not because they exceed any limits for use, but rather because they display characteristics of use inconsistent with the nature and extent of the Appellant's stock and facilities and are therefore indicative of trafficking. The photographs from the store visit offer no explanation as to why SNAP customers would routinely shop at

Mega Fuel 11 multiple times during a short period or purchase such a large volume of items, there being no great variety of products, price advantage, profusion of large packages, or significant bulk items or food cases for sale. The second, third, fourth, fifth, and sixth transactions in each set are too large to consist of forgotten items.

The Appellant provided no specific arguments with regard to the multiple transactions made from individual benefit accounts within a set period of time other than it denies the trafficking allegations.

A review of client shopping data for the review period shows that clients shopping at Mega Fuel 11 are also shopping at other area grocery stores, as well as full-line supermarkets and super stores that most likely offer customers a much larger quantity and variety of eligible food items for better prices. Based on these shopping patterns, transportation to other stores is not an issue for these SNAP customers. Yet, these customers continue to shop and spend suspicious high dollar amounts in short timeframes at Mega Fuel 11, where the eligible staple food stock is limited, 5 U.S.C. § 552 (b)(6) & (b)(7)(C) of their purchases at better stocked stores. This is a strong indicator of trafficking.

Sometimes a firm may have unusual transaction patterns due to a recipient's lack of access to other SNAP authorized stores. However, agency mapping systems indicate that there are 16 SNAP authorized retailers located within a 1.0 mile radius of Mega Fuel 11 that can meet the nutritional needs of SNAP customers including 1 small grocery store, 4 medium grocery stores, and 3 supermarkets. Many of these area SNAP stores are of a comparable size or larger than Mega Fuel 11 and offer a comparable or greater quantity and variety of food products at comparable or better prices as compared to the subject store. As mentioned above, SNAP customers that shopped at Mega Fuel 11 during the review period also shopped at other area grocery stores and, therefore, transportation to other stores is not an issue for these customers. Therefore, lack of access to other authorized stores does not appear to be an explanation for Mega Fuel 11's abnormally high SNAP transaction amounts conducted within a short timeframe of each other.

The Appellant did not provide any compelling justification as to why SNAP households are conducting multiple transactions at Mega Fuel 11 or evidence that all of the irregular transactions cited in the Charge Letter were for eligible food items only. Based on the analysis above and in the absence of any other reasonable explanation, the irregular transaction patterns are more likely than not to be a result of trafficking in SNAP benefits.

Excessively Large Purchase Transactions (Charge Letter Attachment 3)

This Charge Letter Attachment documents 89 transactions 5 U.S.C. § 552 (b)(6) & (b)(7)(C). These large transactions are not consistent with a convenience store in Harris County. During the review period, the average transaction amount for a convenience store in Harris County, Texas was \$8.24. The average transaction in Attachment 3 is more than 5.5 times larger than the average purchase amount for this store type. There is no evidence that the firm would be likely to have SNAP redemption patterns that differ considerably from similar-sized competitors. These large transaction amounts are also not consistent with the store's inventory. There were no fresh or frozen meats, poultry, or seafood in stock. Most of the food products in Mega Fuel

11 consisted of accessory food items such as candy and soda and inexpensive staple foods such as canned and packaged goods. The frequency of high dollar purchases in the review period calls into question the legitimacy of these transactions.

The Appellant provided no specific arguments with regard to the excessively large purchase transactions other than it denies the trafficking allegations.

The food stock and facilities of the Appellant as reported in the store visit documentation do not appear sufficient to provide for all of one's food needs. People generally do not spend large sums at such stores. They usually stop at convenience stores to pick up a few staple food items, such as bread, milk, or a can or two of food that they may consider are not worth a trip to the supermarket to purchase. The Appellant contends that the large transactions are not the result of trafficking of SNAP benefits. However, it is rare for a convenience store such as Mega Fuel 11 to have purchases like those included in Attachment 3 to the Charge Letter. This Attachment cites 89 EBT transactions during the four month period of investigation **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**.

The FNS store visit report and photos of February 28, 2018 show that Mega Fuel 11 offers a minimal stock of SNAP eligible foods with no fresh or frozen meats, poultry, or seafood, a limited amount and variety of canned fruits and vegetables, no fresh produce, and no frozen fruits or vegetables. The inventory report and photos also show only a few expensive eligible foods in stock that would account for these large amounts as well as showing the store has limited checkout counter space and no shopping carts or hand-held baskets in which to transport the large number of items required to make up these large transaction amounts. Without these, it is unlikely that such large dollar value transactions could be for actual food purchases and more likely they are trafficking.

The record shows that there are 16 SNAP authorized retailers located within a 1.0 mile radius of Mega Fuel 11 that can meet the nutritional needs of SNAP customers. Many of these area SNAP stores are of a comparable size or larger than Mega Fuel 11 and offer a comparable or greater quantity and variety of food products at comparable or better prices as compared to the subject store. An analysis of the shopping patterns for all of the SNAP households listed in this Attachment shows that the majority of the households shopping at Mega Fuel 11 have access to transportation and that all are regularly shopping at a variety of larger stores, including super stores and/or supermarkets, located nearby and at several miles distance from the Appellant's location. While Mega Fuel 11 does offer some staple food items, SNAP recipients are already shopping at other larger SNAP retailers located in proximity to the Appellant's business offering a greater quantity and variety of products, including fresh meats/seafood and produce, at lower prices. Therefore, the store has nothing to attract SNAP customers as there are no special or custom services offered.

The record shows that the Retailer Operations Division compared the Appellant firm, a convenience store, to other convenience stores located in Harris County, Texas. During the review period, Mega Fuel 11's average transaction amount, total dollar volume, and total purchase transaction count were considerably higher as compared to other conveniences stores in Harris County.

The Retailer Operations Division also compared the SNAP transaction activity of Mega Fuel 11 to that of the three SNAP authorized convenience stores located nearest/closest to the subject firm. Mega Fuel 11 had a higher ALERT rank for the review period than any of the nearby noted convenience stores. Mega Fuel 11 had a higher number of transactions ending in a same cents value, multiple transactions made from individual benefit accounts within a set period of time, and excessively large purchase transactions as compared to these three area convenience stores. These are all indicators that trafficking is more likely than not occurring at Mega Fuel 11.

Lastly, the case record documents that the Retailer Operations Division conducted a detailed analysis of four SNAP households identified in the Charge Letter to analyze their shopping patterns at Mega Fuel 11 compared to their shopping patterns at other SNAP authorized stores. Each of these households had access to, and shopped at larger stores including super stores and/or supermarkets. It is obvious that these SNAP households had transportation available to them to reach these other authorized stores. However, despite this access to better stocked stores, these sampled households conducted excessively large transactions at Mega Fuel 11 often **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** of shopping at the larger stores where they conducted much smaller SNAP purchases. It is highly unlikely that a convenience store with limited staple foods would have legitimate SNAP transactions greater than these larger and better stocked stores.

In summary, the store's layout, infrastructure, and food inventory do not support a high percentage of transactions markedly exceeding those of similar type stores. In addition to the statistical irregularity of such high dollar transactions, the limited availability of counter space for checking out and the lack of shopping carts and hand-held baskets support the Retailer Operations Division's determination. It is not plausible that the store's customers are carrying large amounts of food around the store without the benefit of shopping carts and/or hand-held baskets. Customers purchasing such large quantities of food items would have to hold them in their arms, or enlist the help of others while shopping. Based on the preponderance of the evidence, the irregular transaction patterns cited in Charge Letter Attachment 3 are more likely than not the result of trafficking in SNAP benefits.

Denial of Violations, ALERT, and Due Process

The Appellant argues that it vehemently denies that trafficking of SNAP benefits occurred at Mega Fuel 11. The Appellant has not been provided any reliable, credible evidence of any SNAP violations that it would be responsible for, including the administrative record, thereby precluding it from fully responding to the charges against it. The Appellant claims that it has been denied due process of law. The Appellant cited case law in support thereof. USDA erroneously concluded that the Appellant has trafficked SNAP benefits based upon mere speculation and conjecture resulting from reviewing computer sales records utilizing the unreliable ALERT program with nothing more. The agency's conclusions are not based upon any reliable data or confirmation by any actual transactions conducted by undercover informants.

Regarding the Appellant's argument that it denies the trafficking allegations, this review encompasses and documents the examination of the primary and relevant information in this case, the purpose of which is, as noted above, to determine whether the Appellant demonstrates by a preponderance of the evidence that the permanent disqualification should be reversed. In

this case, therefore, if the Appellant demonstrates by a preponderance of the evidence that trafficking did not occur in the Appellant's firm, then trafficking will be considered not to have occurred and the disqualification reversed. If this is not demonstrated the case is to be sustained. 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.

The Appellant argues that USDA erroneously concluded that the Appellant has trafficked SNAP benefits based upon mere speculation and conjecture resulting from reviewing computer sales records utilizing the unreliable ALERT program with nothing more. Government analysis of stores caught in trafficking violations during on-site investigations found that transactions involving trafficking consistently display particular characteristic or patterns. These patterns include those cited in the letter of charges. The Appellant is correct that FNS employs a computerized fraud detection tool called ALERT to identify these patterns; however, the Appellant is incorrect in its contention that the Retailer Operations Division overly relied on the results of the ALERT system when using a charge of trafficking. This tool does not determine that trafficking has occurred. The Retailer Operations Division must still analyze the transaction patterns along with other information such as store visit observations, customer shopping patterns, and comparative data from nearby stores. Only then does the Retailer Operations Division conclude whether questionable transactions were, more likely than not, the result of trafficking.

Nevertheless, transactions with these patterns sometimes have valid explanations that support the idea that they were the result of legitimate purchases of eligible food items, which is why opportunities are afforded to charged retailers to explain the questionable transactions cited. In this case, based on the empirical data of past trafficking investigations, the number of suspicious patterns displayed, the other evidence in the file, and in the absence of any reasonable explanations for such transaction patterns, the preponderance of evidence supports that the "unusual, irregular, and inexplicable" transactions and patterns cited in the letter of charges are the result of trafficking.

With regard to the Appellant's claim that its due process rights were violated, the Appellant, through counsel, replied to the charges in writing, denying the charge of trafficking. After considering the evidence of the case and the Appellant's reply, the Retailer Operations Division determined that a permanent disqualification was warranted. The action was not arbitrary or capricious as it followed the agency's due process procedures which are two-fold in nature. First, the retailer is afforded an opportunity to reply to the charges as specified by the Retailer Operations Division; the Appellant has availed itself of this first aspect of the due process procedures in the form of a written reply to the Retailer Operations Division. The second level of due process involves an administrative review, of which the Appellant has likewise availed itself and in the process of which the Appellant was granted an additional three weeks within which additional information may be provided in support of the request for review.

The purpose of the administrative review process is to ensure that firms aggrieved by FNS' adverse actions have the opportunity to have their position fairly considered by an impartial reviewing authority prior to that adverse action becoming final. The Appellant has been duly

given, and has taken, the opportunity to present to USDA through the administrative review process whatever evidence and information it deems as pertinent in support of its position that the Retailer Operations Division's adverse action should be reversed. In the instant case the Appellant did not provide additional materials to the agency as provided three weeks following delivery of the letter acknowledging acceptance of the appeal. Therefore, any evidence and information that the Appellant presented to the Retailer Operations Division, as well as any such information submitted subsequently, have now been considered in this administrative review in rendering the final agency administrative decision in this case.

The record does not indicate any departure from established policy or procedures with regard to the Appellant's right to a fair and thorough review. The Appellant has exercised its opportunity to reply to the Charge Letter and its administrative review rights, and by doing so has availed itself of the full complement of the agency's statutory obligations with regard to due process.

In regard to the case laws cited by the Appellant, considerations of relevant legal precedent through case laws, or the lack thereof in relation to the present case, are beyond the scope of this review. This review relies upon the statute and regulations governing the SNAP and evaluates whether the decision of the Retailer Operations Division to impose a disqualification upon the Appellant was in accordance with same and sustainable by a preponderance of the evidence. The Appellant's case law references are acknowledged in this context only.

Foreign-Born Store Owners

The Appellant appears to be making the argument that the legislative process underpinning the SNAP statute and regulations does not adequately represent foreign-born persons such as the store owner in the present case. Moreover, the store owner, being foreign born, does not understand the technical legislation being applied against it but has nonetheless worked hard to meet SNAP participation requirements. Lastly, there are no reasonable grounds for upholding the permanent disqualification when it involves a foreign born store owner. The Appellant cited case law in support thereof.

Whether or not the statute and regulations governing the SNAP adequately represent foreign-born persons is beyond the scope of this review and more appropriately within the purview of judicial review. For the record, the firm was authorized to participate in the SNAP on or about September 15, 2016 and thus had been participating in the program for over 1.5 years at the time the Charge Letter was issued. That the owner of the Appellant firm may be foreign born cannot be accepted as a valid basis for dismissing any of the charges or for mitigating the impact of the violations upon which they are based. By means of the certification and signature statement (the last page of the application for participation in the SNAP) which the Appellant signed on August 25, 2016, the Appellant acknowledged that it understood and agreed with the conditions of participation (specifically noting that trafficking SNAP benefits is not permitted and disqualification can result from engaging in same) and accepted responsibility to understand program rules, to follow them and to ensure that any/all personnel handling transactions on behalf of the firm likewise understands and follows program rules.

Contracts Clause and Takings Clause

The Appellant argues that the statute and regulations relied upon by the Retailer Operations Division violate the Contracts Clause of the U.S. Constitution, is arbitrary, capricious, done in bad faith and serves no legitimate public purpose. The Appellant also argues that the statute and regulations relied upon by the Retailer Operations Division violate the Takings Clause of the U.S. Constitution. The Appellant cited case law in support thereof.

The Appellant has contended that the agency's actions do not meet the requirements of the United States Constitution. This review finds that the Retailer Operations Division properly implemented the sanction at issue in accordance with the statute and regulations. The administrative review process cannot properly include an assessment of the constitutionality of the statute and regulations under which the agency imposed adverse actions, but rather assesses whether the agency actions undertaken were proper pursuant to those laws and regulations and sustainable by a preponderance of the evidence. As such, this office does not have the authority to determine whether the United States Congress, in its enactment of legislation, has conformed to constitutional mandates or whether the regulations issued pursuant to those mandates conform thereto. Additionally, charges to the laws and regulations governing the SNAP are more appropriately within the scope of judicial review. Accordingly, no further findings or conclusions are rendered in this regard.

Reconsideration of Penalty

The Appellant argues that the penalty imposed upon Mega Fuel 11 is extremely severe based upon the allegations and is unconstitutional; therefore, the permanent disqualification assessed against the Appellant should be set aside. However, the Food and Nutrition Act of 2008, at § 2021, does not allow for discretion in determining sanctions for trafficking and is specific in its requirement that "... a disqualification . . . 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 ...". In keeping with this legislative mandate, 7 CFR § 278.6(e)(1)(i) of the SNAP regulations states that FNS shall disqualify a firm permanently if personnel of the firm have trafficked.

CIVIL MONEY PENALTY

As previously indicated, the July 16, 2018 Determination Letter advised the Appellant of the ineligibility for consideration for a trafficking civil money penalty according to the terms of Section 278.6(i) of the SNAP regulations. The letter of charges dated May 8, 2018 advised the Appellant that documentation of eligibility for that alternative sanction was to be provided within 10 days. The regulations specify that such documentation must, in part, establish that there was an effective compliance policy and training program and that both were in effect and implemented prior to the occurrence of violations. The letter indicates that no information was provided by the Appellant for consideration; therefore, on review the Retailer Operations Division's determination that the Appellant firm is ineligible for the imposition of civil money penalties in lieu of disqualification is affirmed.

CONCLUSION

The Retailer Operations Division's analysis of the Appellant's EBT transaction record, upon which charges of violations are based, together with observations made during the store visit and an analysis of customer shopping behaviors, provide substantial evidence that questionable transactions during the focus period have characteristics and display patterns that are not consistent with legitimate sales of eligible food to SNAP benefit customers at a store of this type, size and makeup. Rather, the characteristics are indicative of illegal trafficking in program benefits. The Appellant's contentions do not outweigh this evidence.

The record has yielded no indication of error or discrepancy in the reported findings by the Retailer Operations Division that program benefits were accepted in exchange for cash or consideration other than eligible food. Therefore, based on a review of the evidence in this case, it is more likely true than not true that program violations did, in fact, occur as charged. Therefore, the decision to impose a permanent disqualification from participation in the SNAP against Mega Fuel 11 is sustained.

RIGHTS AND REMEDIES

Your attention is called to Section 14 of the Food and Nutrition Act of 2008 (7 U.S.C. 2023) and to Section 279.7 of the Regulations (7 CFR § 279.7) with respect to your right to a judicial review of this determination. Please note that if a judicial review is desired, the Complaint, naming the United States as the defendant, must be filed in the U.S. District Court for the district in which you reside or are engaged in business, or in any court of record of the State having competent jurisdiction. If any Complaint is filed, it must be filed within thirty (30) days of receipt of this Decision.

Under the Freedom of Information Act, 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.

LORIE L. CONNEEN
Administrative Review Officer

February 5, 2019