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

Moh's Market,

Appellant,

v.

Case Number: C0202985

Retailer Operations Division,

Respondent.

FINAL AGENCY DECISION

It is the decision of the U.S. Department of Agriculture, Food and Nutrition Service (FNS) that the permanent disqualification from the Supplemental Nutrition Assistance Program (SNAP) imposed upon Moh's 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 October 5, 2017, the Retailer Operations Division charged the Appellant with trafficking, as defined in Section 271.2 of the SNAP regulations, based on a series of irregular SNAP transaction patterns that occurred during the months of March through August 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 November 15, 2017, Appellant was informed that it was permanently disqualified from participation as a retail store

in the SNAP and was ordered upon receipt of the letter to cease accepting SNAP benefits; consequently, Appellant ceased to accept said benefits. On November 27, 2017, Appellant requested an administrative review of the SNAP Office's decision; the request was granted.

STANDARD OF REVIEW

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

CONTROLLING LAW

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

7 U.S.C. § 2021(b)(3)(B) states, 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 individual benefit accounts in unusually short time frames (Attachment 1).
- 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 November 27, 2017, and in subsequent correspondence, it was argued that:

1. Appellant requests to continue to participate in the SNAP pending the administrative review and shall not be required to pay the civil money penalty pending appeal.
2. A disqualification will work a hardship upon SNAP households, and thus the firm qualifies for a hardship civil money penalty.
3. Appellant has formally and timely requested consideration of a civil money penalty in lieu of a permanent disqualification. Appellant has established and implemented an effective compliance policy and program to prevent violations of the SNAP; Appellant provides documentation in support thereof, including a "SNAP Training Guide" and employee certification statements attached thereto. Appellant cites case law in support thereof.
4. Additional future training shall include not permitting high dollar purchases of large food quantities. The acceptance of SNAP benefits as payment on credit accounts was ceased when Appellant was notified that the practice was counter to rules/regulations.
5. Appellant has not been shown to have committed trafficking under the definition provided at 7 CFR § 271.2. Merely stating that trafficking was occurring is not proof of same. There is no evidence of trafficking in this investigation.
6. An employee of the former owner and a current employee received credit which was paid off with SNAP benefits; this explains some of the Charge Letter transactions. When

credit accounts were paid off, the receipts were destroyed, thus Appellant does not have documentation of the activity. Appellant provides the affidavit of a customer which states that said customer was extended credit for food purchases which was later paid off with SNAP benefits.

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 September 5, 2017, as a result of which documentation was obtained including photographs of the interior and exterior of the store, a store layout diagram and a store inventory survey. This documentation reflected the following:

- No shopping carts, no shopping baskets.
- One checkout area/counter, one cash register and one card reader.
- No food stored outside public view.
- No storage freezers or coolers.
- No food stored offsite.
- Not a specialty food store.
- No telephone, online or other orders taken.
- No delivery offered.
- No transaction rounding.
- Most expensive items:
    - Red Baron frozen pizza - $6.99 for 17.89-ounce product.
    - Banquet fried chicken - $9.99 for 29-ounce product.
    - On-Cor chicken strips - $6.99 for 26-ounce product.
    - Pepsi 12-pack cans - $5.99.
- All above questions were completed in collaboration with store personnel.
- The firm also sold tobacco and tobacco-related products, lottery tickets, health and beauty products, paper goods, cleaning products, clothing and other non-food items.
- Ice crystals on frozen food noted.
- The firm sold made-to-order sandwiches.
- No meat/seafood bundles/specials or fruit/vegetable boxes.
- The firm was a typically to marginally-stocked convenience store in all relevant respects. Photos: 2, 4, 7, 10, 12, 16, 23, 27, 29, 32 and 33.
- Sparsely stocked shelves/cooler/freezer/display case. Photos: 3, 5, 12, 17, 18, 22, 26 and 29.
- Checkout counter space approximately 1 X 1.5 feet and surrounded by candy, snack foods, tobacco products and other non-food items. Photos: 3, 4, 12 and 17.

The documentation presents no indication of advertised specials, promotions, bulk or expensive food items. The checkout area was set up in convenience store fashion, utilizing a small check-out area (approximately 1 by 1.5 feet of useable space) but was otherwise cluttered/surrounded by snack items, candy, tobacco products and other non-food items. There were no shopping carts or baskets with which customers could transport large orders to the

small check-out area or to waiting transportation. This documentation reflects that the firm was a marginally-stocked convenience store in all relevant respects. It is worth noting that the average SNAP purchase in a convenience store in the state of Pennsylvania during the analysis period was $8.11, reflecting that large purchases are not routinely made in such stores.

In regard to contention 1 above, the statute and regulations prevent a firm, which has been disqualified for SNAP benefit trafficking, from participating pending an administrative review. This review affirms that Appellant did not qualify for a civil money penalty in lieu of a permanent disqualification, as discussed in greater detail in the following.

Regarding contention 2 above, the issue of hardship worked upon retailers or SNAP clients is not a consideration under the statute or regulations in decisions to disqualify firms due to SNAP-benefit trafficking. The only alternative to permanent disqualification, once trafficking is established, is to impose a trafficking civil money penalty in lieu of permanent disqualification. In order for this alternate penalty to be considered, a retailer must provide sufficient evidence demonstrating that the firm had established and implemented an effective compliance policy and program to prevent violations prior to said violations, as stipulated in § 278.6(i). As noted in the following, Appellant did not timely request consideration for same and did not provide such evidence and, accordingly, this alternate penalty was correctly withheld.

With regard to contention 3 above, 7 CFR §278.6(i) provides for the imposition of a civil money penalty in lieu of permanent disqualification for trafficking; Appellant was advised of the requirement regarding civil money penalties in lieu of permanent disqualification in the SNAP Office's October 5, 2017 Charge Letter, which further advised that documentation of eligibility for this sanction was to be provided within a given time limit. The SNAP regulations are specific at 7 CFR §278.6(b)(2)(iii) 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, the firm shall not be eligible for such a penalty." The regulations provide no discretion to extend the time within which documentation and evidence in support of a civil money penalty may be submitted. In its replies to the Charge Letter, Appellant did not request consideration of said sanction and provided no evidence/information in support thereof. Thus the SNAP Office decision not to impose a civil money penalty is found to have been in accordance with 7 CFR §278.6(b)(1), §278.6(b)(2)(ii), §278.6(b)(2)(iii) and §278.6(i). Appellant presented a request for consideration of a trafficking civil money penalty (TCMP) in its December 22, 2017 letter in support of its review request, which was dated 77 days following the firm's receipt of the Charge Letter and far beyond the 10-day timeframe. Though the request cannot therefore be considered, the documentation and evidence provided by Appellant clearly fall short of the standard detailed at § 278.6(i), as noted in the following:

<u>Criterion 1:</u>

- Appellant provided insufficient written and dated documentation to reflect a commitment to ensure that the firm was operated in a manner consistent with SNAP regulations:
    - Documentation of the development and/or operation of a policy to terminate violating employees (not provided).

- Documentation of the development and/or operation of procedures/policy to implement corrective action in response to complaints of violations (not provided).
- Documentation of the development and/or operation of procedures providing for internal review of employees' compliance (not provided).
- Documentation must establish that the policy statements were provided to violating employees prior to the commission of the violation(s) (training certification statements are signed in December 2017, after the firm's receipt of both the Charge and Determination Letters).

Criterion 2:

- Appellant did not provide documentary evidence which establishes that the firm's compliance policy and program were in operation prior to the occurrence of the violations at issue (training certification statements are signed in December 2017, after the firm's receipt of both the Charge and Determination Letters).

Criterion 3:

- Appellant did not provide the following:
  - Records of dates of employment of all firm personnel.
  - Contemporaneous documentation of participation of violating personnel in initial *and* follow-up training prior to violations. Moreover, it is unclear if the violating personnel were the same as those signing the training certification statements, albeit after the firm's receipt of the Charge and Determination Letters.
- Appellant provided insufficient documentation to demonstrate that its training program meets or is otherwise equivalent to the following standards:
  - Training shall be designed to establish a level of competence that assures compliance with program requirements as included in part 278.
  - Training materials shall clearly state that that the following acts are prohibited and are in violation of the statute and regulations:
    - The exchange of SNAP benefits for firearms, ammunition, explosives or controlled substances.
  - Training for all who work in the store within one month of implementing the compliance policy documented in Criterion 1.
  - Any subsequently hired employees are trained within one month of hiring and trained periodically thereafter.

Criterion 4:

- Appellant provided insufficient evidence in support of the following:
  - Ownership/Management was not aware of, did not approve, did not benefit from or was not involved in trafficking. Appellant has provided no records or documentation demonstrating that SNAP benefits used in the transactions noted in the Charge Letter were in fact not deposited into its bank account. Conversely, as noted above, transaction data and other evidence confirms that the transactions did in fact result in monetary deposits into the firm's bank account in the exact amounts noted in the Charge Letter. It is noted for the record that the regulations allow an exception to the Criterion 4 language if it is ownership/management's first involvement in SNAP-benefit trafficking.

The statute and regulations do not limit the scope of the required compliance policy and program to the prevention of violations other than those caused by error, inadvertence, oversight or lack of management supervision, but rather direct that the policy and program are structured to prevent all violations, regardless of cause. The standard of substantial evidence employed above is difficult to meet, indeed impossible if such policy and program are not implemented and documented prior to the violations, but such is the standard required by the regulations, as noted above, and to which Appellant is held during the course of this review. Additionally, neither the size of an organization nor the number of its personnel is a consideration in determining the eligibility of a firm for a civil money penalty in lieu of permanent disqualification for trafficking. Moreover, while significant effort may be required to develop and maintain a compliance policy and program, if such fails to meet the requirements, that level of effort, even if substantial, does not mitigate the insufficiency. Lastly, the criteria for eligibility for a civil money penalty in lieu of permanent disqualification are clearly stated as *minimum* standards below which eligibility is precluded. The regulations at 7 C.F.R § 278.6(i) are purposely prescriptive and require an unequivocal and well-documented commitment to compliance and training.

With regard to case law cited by Appellant, it is beyond the scope and authority of this review to determine the applicability of same. This review is limited to consideration of whether or not the ROD Office duly adhered to the **Food and Nutrition Act of 2008**, as amended, and the implementing regulations, and whether or not the action taken is sustainable by a preponderance of the evidence. Therefore, the application of any judicial precedent is better addressed via judicial review. Accordingly, no further findings or conclusions are rendered in this regard.

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

Regarding contention 5 above, Charge Letters are not required by regulation or agency policy to provide investigative techniques/case analysis standards or even to provide a totality of the evidence contained in the case file, but rather to present a firm with transactions the ROD Office has found to be implausible given various considerations and to provide the firm the opportunity to explain how such transactions may be legitimate. The record reflects that the ROD Office has provided a lengthy and comprehensive case in support of its sanction determination, as is discussed in further detail herein. Appellant asserts that there is no evidence to support the trafficking allegations. 7 CFR §278.6(a), noted above, establishes the authority upon which FNS

may disqualify any authorized retail food store on the basis of evidence obtained through a transaction report under an electronic benefit transfer system. Such cases are developed with the standard in mind that a *prima facie* preponderance of evidence is sufficient in order to charge a firm with SNAP-benefit trafficking. Various statistical tools and graphical reports are utilized, as well as store visit documentation reflecting the firm's nature and extent of inventory and the firm's logistical wherewithal. Compliance history and household data are evaluated. The record reflects that Appellant's firm was chosen for analytical investigation based upon numerous detailed and rigorous mathematical algorithms applied not only to Appellant's firm but to all SNAP-authorized firms, including all firms of a like type (convenience stores, in this case) in the state of Pennsylvania. As noted, the record contains documentation, including photographs of the firm's interior and exterior, an inventory survey and a layout diagram, of a visit to Appellant's firm conducted on September 5, 2017. These documents reflect the firm to have been a marginally-stocked convenience store.

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

Furthermore, the case presented by the ROD Office does not rest solely upon transaction data and printouts thereof and was indeed obtained through a formal investigative process. As summarized herein, the record contains a comprehensive array of documentation and analytical work well beyond the data presented in the Charge Letter. The transaction data is indeed factual and specific, the existence and accuracy of which is not in dispute; redundant systems confirm numerous data points for each transaction including the date, time, store authorization number, terminal ID, amount transacted, prior balance and other particulars. It is worthwhile to restate as well that, as noted above, in appeals of adverse actions an appellant bears the burden of demonstrating by a preponderance of the evidence that the administrative actions should be reversed; Appellant must provide a preponderance of evidence that the transactions detailed in

the charge letter were more likely than not due to the legitimate sale of eligible food in exchange for SNAP benefits. In the absence of compelling information/documentation weighed in comparison to that provided by the ROD Office, the evidence preponderates in favor of the ROD Office's determination that SNAP-benefit trafficking substantially produced the transaction activity at issue in the present case.

It should be noted as well that while the ROD Office is required to consider and evaluate all evidence and responses that are provided by the retailer in accordance with 7 CFR § 278.6(c), the agency is under no obligation in the determination letter to expound, point-by-point, on every contention or piece of evidence in the record. The Determination Letter clearly states that consideration was given to the information and evidence available to the ROD Office and to the replies made by the Appellant. After an evaluation of all information, the ROD Office determined that the violations cited in the charge letter had occurred at the firm. Implied in the letter is the determination that the evidence or response by the Appellant was either not credible or was insufficient to prove that trafficking had not occurred. While the determination letter may not have been as comprehensive as the Appellant would prefer, this review finds that due process was appropriately provided and that there was no negligence on the part of the ROD Office with regard to the manner in which it explained its disqualification decision.

Lastly, SNAP authorization is an administrative privilege, granted upon initial and continued proof of eligibility and compliance with the governing rules and regulations, and not an unencumbered right or entitlement, and does not extend said privilege in perpetuity when a firm is at least once granted a license to participate. USDA has the obligation to safeguard the public's trust and financial interest and labors to do so by operating the program in accord with the statute enacted by Congress and the regulations promulgated by USDA to implement the provisions thereof. Within this context, while due process is honored, the agency is not burdened with proving to Appellant's satisfaction that FNS has correctly imposed the sanction at issue, but rather it is Appellant's burden to demonstrate that it has not engaged in SNAP-benefit trafficking by presenting a preponderance of evidence of same. As such, contentions that the agency hasn't proven its case are a largely irrelevant and ineffective means by which to demonstrate that Appellant has not engaged in violative activity. While errors on the agency's behalf are indeed relevant and must be addressed, corrected and can result in a reversal during administrative review, an Appellant must focus a substantial amount of its probative efforts on explaining why the transaction activity at issue is in fact not due to SNAP-benefit trafficking.

With regard to contention 6 above, the ROD Office notes that the household numbers reflected in the Charge Letter do not correspond with the household names identified by Appellant but instead correspond to four other individuals. None of the five sample receipts representing charge account activity match any Charge Letter transactions. Appellant provides an affidavit corresponding to one of these names. Given that the Charge Letter contains the transactions of 19 different households, Appellant's documentation, in support of the contention that the transactions in the Charge Letter were the result of credit account activity, is not compelling.

The ROD Office further notes that households conducting implausible transactions during the analysis period at the Appellant firm were also shopping at much better-stocked and very likely more competitively-priced super stores and supermarkets on or about the same day, calling into question what the households could obtain at Appellant's marginally-stocked convenience store

that they could not obtain at the full-line stores. ROD moreover indicates that 17 of the 19 households comprising the Charge Letter transactions shopped at such better-stocked stores within 48 hours of conducting implausible transactions at the Appellant firm.

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 marginally-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. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). 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 marginally-stocked convenience store in all relevant respects and provides no plausible bases for customers' unusual attraction to the firm and unorthodox transaction patterns.

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 July 10, 2018
Administrative Review Officer