

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

**Neighborhoods Grocery,**

**Appellant,**

**v.**

**Case Number: C0216538**

**Retailer Operations Division,**

**Respondent.**

**FINAL AGENCY DECISION**

The U.S. Department of Agriculture, Food and Nutrition Service (FNS), finds that there is sufficient evidence to support the determination by the Retailer Operations Division to impose a permanent disqualification against Neighborhoods Grocery (hereinafter Appellant) from participating as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP).

**ISSUE**

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with Title 7 of the Code of Federal Regulations (CFR) § 278.6(a), (c) and (e)(1)(i), when it imposed a permanent disqualification against Appellant on May 30, 2019.

**AUTHORITY**

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

**CASE CHRONOLOGY**

By letter dated May 1, 2019, the Retailer Operations Division charged Appellant with trafficking based on a series of irregular SNAP transaction patterns that occurred in August 2018 through January 2019. The letter noted that the penalty for trafficking is permanent disqualification as provided by 7 CFR § 278.6(e)(1). The letter also noted that the Appellant could request a trafficking civil money penalty (CMP) in lieu of a permanent disqualification within ten days of receipt under the conditions specified in 7 CFR § 278.6(i).

Appellant, through counsel, responded to the charges in a letter dated May 13, 2019, that did not contain a request for a CMP or any documentation in support of one. The Retailer Operations

Division notified Appellant by letter dated May 30, 2019, that the firm was permanently disqualified from participation as a SNAP retailer in accordance with 7 CFR § 278.6(c) and 278.6(e)(1) for trafficking violations. This letter also stated that Appellant was not eligible for the CMP because insufficient evidence was submitted to demonstrate that it had established and implemented an effective compliance policy and program to prevent SNAP violations.

By letter dated June 13, 2019, Appellant, through counsel, appealed the Retailer Operations Division's assessment and requested administrative review. The appeal was granted. No subsequent correspondence was received.

## **STANDARD OF REVIEW**

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

## **CONTROLLING LAW**

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

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

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

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

7 CFR §278.6(b)(2)(ii) states: "Firms that request consideration of a civil money penalty in lieu of a permanent disqualification for trafficking shall have the opportunity to submit to FNS information and evidence that establishes the firm's eligibility for a civil money penalty in lieu of

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

### **SUMMARY OF THE CHARGES**

The issue in this review is whether, through a preponderance of evidence, it is more likely true than not true that the questionable transactions were the result of trafficking. The charges on review were based on an analysis of SNAP EBT transaction data during the six month period of August 2018 through January 2019. This involved two patterns of EBT transaction characteristics indicative of trafficking:

1. Multiple transactions were made from individual benefit accounts in unusually short time frames.
2. Excessively large purchase transactions were made from recipient accounts.

### **APPELLANT’S CONTENTIONS**

The following may represent a summary of Appellant’s contentions in this matter; however, in reaching a decision, full attention and consideration has been given to all contentions presented, including any not specifically recapitulated or specifically referenced herein:

- The mere amount of purchases does not in and of itself indicate trafficking. The owners cannot protect their rights without the data analytics about the basis for the trafficking allegation. Additionally, the allegations were vague and provided no specifics as to what acts on the owner’s part were considered trafficking. The owners sell only SNAP approved foods and do not sell any items under SNAP that have not been approved. The owners are the employees of the store and follow the regulations for approved food items. The owners are unable to respond without specific examples of what is considered trafficking because they have never traded SNAP benefits for cash;
- The letter of charges makes no indication of any eyewitnesses to trafficking and the owners deny they have ever trafficked. Every transaction listed is legitimate. There appears to be an assumption of trafficking;
- The owners provided evidence of selling a significant amount of pizza and other items that would add up to these receipts and provided documentation of all the pizza the firm was purchasing on a monthly basis. The owners would not be purchasing such large amounts unless they were selling these items. The owners sell a significant number of pizzas as indicated by the attached invoices;
- The customers in the neighborhood tend to do shopping within walking distance of their home due to limited transportation and the owners have no control over the shopping patterns of their customers; and,
- The decision to disqualify the firm based on sales receipts without any evidence of fraud or trafficking or any program violation should be reversed. The Agency has failed to enumerate any activities that necessarily give rise to a finding of trafficking. The

decision was arbitrary and capricious and should be reversed.

Appellant submitted invoices for pizza and wing inventory purchases and four photos of frozen pizza and chicken wings inside of a chest freezer in support of these contentions.

## **ANALYSIS AND FINDINGS**

Stores caught in trafficking violations consistently display particular, characteristic transaction patterns including those cited in the charge letter. Nevertheless, transactions having such characteristics are sometimes valid and sufficient evidence that support that they were the result of legitimate purchases of eligible food items is provided. This is why opportunities are afforded to charged retailers to explain the questionable transactions cited and to provide evidence that they are legitimate. Without supporting evidence and rationale, assertions that the firm has not violated program rules do not constitute valid grounds for overturning the determination.

In the absence of evidence for the legitimacy of such transaction patterns, a conclusion can be drawn through a preponderance of evidence that the unusual, irregular, and inexplicable transactions and patterns evidence trafficking as the most likely explanation. Each Attachment furnished with the charge letter represents the questionable and unusual patterns of SNAP transactions indicative of trafficking which were conducted at the Appellant firm during the review period. As patterns of unusual transactions appear across multiple Attachments, the case of trafficking becomes more convincing.

### **Store Background and FNS Store Visit**

FNS initially authorized the firm on May 12, 2017. The record indicates that in reaching a disqualification determination, the Retailer Operations Division considered information obtained during a March 18, 2019, store visit conducted by a FNS contractor to observe the nature and scope of the firm's operation, stock, and facilities. This information was then used to ascertain if there were justifiable explanations for the firm's suspicious SNAP transactions. The store visit documented the following store size, description, and characteristics:

- The firm was a convenience store offering an extremely limited quantity and variety of staple foods and carrying no other unique items or offering any distinctive services.
- The store stocked traditional American brands and there were little or no ethnic or specialty food items.
- The store visit report and photos showed no shopping carts or hand baskets for customer use thus severely limiting the amounts of food that could be moved to the checkout.
- No food packages, bundles, case sales, bulk items, or other sales were evident that would explain the unusual transactions and no cased items were available for purchase except for beverages.
- The store visit report specifically noted that the firm was not a specialty store and that there were no meat packages, fish specials, or fruit and vegetable boxes for sale.
- The only checkout area was an opening approximately 1.5 feet wide and 1.5 feet deep set into a plastic security wall leaving a very limited area for customers to place their purchases. The very small checkout area would make it problematic to process large

orders. The checkout area had one cash register, a POS terminal, and no optical scanner as confirmed by the store owner.

- The firm had an extremely limited stock of staple foods that also included many single serving and pre-packaged items with a significant portion of inventory in soda, candy, snacks, and other drinks as well as many ineligible items.
- The firm had a kitchen/food prep area that included two ovens/cooktop grills, two deep fat fryers, a pizza oven, commercial slicer, commercial scale, commercial exhaust hood, stainless steel storage shelving, stainless steel prep tables, three chest freezers, two refrigerators, and a heated pizza display case. There was a large interior menu board advertising Hunt Brothers pizza and chicken wings and exterior signage advertising cheeseburgers. The store visit report noted that store stock was not being used in the preparation of the hot and/or cold prepared foods.
- The firm had no fresh or frozen unprocessed meat, no fresh or frozen unprocessed seafood, a very limited quantity and variety of processed meats and seafood (canned poultry and fish, sausages, three or four types of deli meats, and three jerky), no packaged lunch meat, no canned meat, no hot dogs, no bacon, no frozen entrees, no frozen dinners, no eggs, no fresh fruit or vegetables, no frozen fruit or vegetables, no dried fruit or vegetables, no packaged nuts, a limited stock of single serving nuts, 100 percent fruit juices, single serving 100 percent fruit juices, 100 percent vegetable juices, 17 canned soups, a very limited quantity and variety of canned and packaged staple food items, two types of deli cheese, no packaged cheese, no yogurt, no single serving yogurt, no butter, only two margarine, no sour cream, fresh milk, single serving milk, no single serving milk drinks, no canned milk, no coconut milk, no soy milk, no Lactaid milk, no powdered milk, no cream cheese, bread, no rolls, no tortillas, no pitas, no tostadas, five corn meal, no flour, sugar, rice, cold cereal, no single serving cold cereal, no hot cereal, many single serving Ramen noodle soups, five canned pasta, no single serving pasta, no dry pasta, two dry noodles, no pancake mixes, no mac&cheese, no single serving size mac&cheese, no cooking oil, no coffee, no tea, no cocoa, no baby foods/cereals, no infant formula, and no expensive staple food items.
- The firm was found to be deficient in the dairy staple food category and therefore would not be eligible for authorization as a SNAP retail store.
- Ineligible items included: tobacco, lottery, alcohol, hot foods, household products, paper products, auto products, pet products, health and beauty items, ATM, and charcoal while accessory foods included: candy, condiments, snacks, baked goods, sugar, single serving ice cream, spices, baking mixes, and many un/carbonated drinks.
- The firm's hours of operation, as confirmed by the store owner, were open 8:00 AM-10:00 PM Monday-Saturday and closed Sundays. The owner also stated that the firm did not take phone or online orders, did not deliver groceries, and did not round transaction totals up or down.
- Signage was in English and there were no SNAP posters (anti-fraud, eligible items, reporting trafficking, etc.) visible in the store.
- Most food items were not priced and comments on the FNS store visit report, completed in conjunction with the store owner, specifically stated that most food prices end in .x9 cents. A price ending in .x9 cents is the most common pricing structure for stores of this type.

- The FNS store visit report listed the three most expensive food items costing more than \$5.00 for sale in the store as being: a Hunt Brothers 12 inch pizza priced at \$9.99, a case of 12 Faygo soft drinks priced at \$5.99, and a pound of Hormel lunch meats priced at \$5.99. Normally the four most expensive items are listed, but in this case there were only three items priced for \$5.00 or higher. The report also noted that there were only four cases of Faygo in stock. This listing of the most expensive items was provided by the store owner during the store visit.
- The firm was not a WIC vendor.
- The store visit report and photos showed many empty or minimally stocked shelves and display racks as well as dust on the tops of canned goods indicating a slow turnover of stock. Poor lighting, particularly at the checkout area, was also noted in the report.
- The quantity and variety of the store's staple food inventory was considerably less than that seen during the previous FNS store visit two years earlier on April 28, 2017.

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

This Attachment documents 26 individual transactions in 10 sets of two or more transactions conducted by seven different households in a short period of time.

**5 U.S.C. § 552 (b)(6) & (b)(7)(C).** The dollar amounts of subsequent transactions in each set are substantial and nearly equal or exceed the dollar amount of the initial transaction in eight of the 10 sets. **5 U.S.C. § 552 (b)(6) & (b)(7)(C).** Two sets are comprised of four individual transactions and two sets are comprised of three individual transactions while the remaining six sets are comprised of two individual transactions. It is not a usual shopping pattern to see so many purchases, in a short period of time, by the same recipients as documented in this Attachment. Multiple transactions conducted by the same household within a short period of time is a method which violating stores use to avoid single high dollar transactions that cannot be supported by store inventory and structure. These sets of transactions appear to be in amounts which are indicative of trafficking.

Appellant does not offer any specific evidence or rationales to support the legitimacy of the listed transactions in this Attachment, but does state that the customers in the neighborhood tend to shop within walking distance of their home due to limited transportation and the owners have no control over the shopping patterns of their customers. Appellant also contends that the charge letter transactions are because the owners sell a significant number of pizzas.

SNAP households have no limit on the number of times they may use their benefits or the dollar value of eligible food they may purchase. The SNAP transactions listed in this Attachment are questionable not because they exceed any limits for use, but rather because they display characteristics of use inconsistent with the nature and extent of a convenience store's stock and facilities and are thus indicative of trafficking. These transaction sets do not contain the characteristics associated with a household purchasing a forgotten item right after checking-out, of household members/friends shopping together and making separate purchases, or of households making a separate purchase to check their balance followed by another transaction as eight of the 10 transaction sets **5 U.S.C. § 552 (b)(6) & (b)(7)(C).** The transaction sets also do not contain the characteristics of a household returning later in the day to purchase a forgotten item or two as all of the sets have subsequent transactions **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** with

eight of the 10 sets having subsequent transactions 5 U.S.C. § 552 (b)(6) & (b)(7)(C), far more than the cost of a forgotten item or two. Appellant also offers no explanation as to why households would conduct up to four sizeable transactions at a very poorly stocked store within a short period of time when there are 15 comparably sized or larger retail food stores located nearby that include a supermarket located 0.51 miles from Appellant's location as well as another convenience store only two blocks away. The availability of other nearby SNAP retail stores combined with the extremely limited quantity and variety of staple foods and the deficiency in the dairy staple food category make it unlikely that any SNAP recipient would consider the Appellant firm as their primary source for groceries.

It is certainly not unusual for a small number of SNAP households to conduct multiple transactions in a short period of time. However, it is unusual that subsequent transaction dollar amounts are substantial in these transaction sets and that all of the sets in this Attachment 5 U.S.C. § 552 (b)(6) & (b)(7)(C) when the comparable average convenience store SNAP transaction amount in Crittenden County during the review period was \$7.73. These multiple transactions indicate that the amounts were contrived in an attempt to avoid suspiciously high transactions that would be indicative of trafficking by breaking them into multiple, smaller amounts. FNS transaction data shows that this same pattern of multiple transactions in unusually short time frames is not evident at other nearby like type grocery stores further supporting that trafficking was occurring at the Appellant firm during the period under review.

Contrary to Appellant's claim, the Retailer Operation Division's analysis of shopping patterns for the seven households listed in this Attachment shows that each one has ready access to transportation as evidenced by their regularly shopping at a variety of comparably sized or larger food stores located nearby and at a distance from Appellant's location, including a wide variety of super stores and supermarkets. Their analysis also showed numerous households that shopped at the Appellant firm and at a super store and/or supermarket 5 U.S.C. § 552 (b)(6) & (b)(7)(C) often inexplicably spent more at Appellant's convenience store than they did at the super stores and/or supermarkets. Appellant failed to offer any explanation or rationale as to why households who are regularly shopping and spending large dollar amounts at many larger and better stocked stores would conduct multiple purchases often totaling to comparable or higher dollar amounts at an extremely poorly stocked store. There is no legitimate reason why households would spend so much of their SNAP allotment at the Appellant firm when they clearly had access to and frequently shopped at supermarkets and super stores. Common sense dictates that it is improbable that households would choose to spend large dollar amounts at the Appellant firm if their purchases consisted solely of eligible food items that could be purchased at any of the super stores and/or supermarkets they were already regularly shopping at and therefore the more plausible explanation is that these households were trafficking SNAP benefits at the Appellant firm.

5 U.S.C. § 552 (b)(6) & (b)(7)(C). A review of this household's shopping pattern shows it shopped at a total of 19 other stores, including 50 transactions at two super stores and four supermarkets, during the review period and that 12 of these 19 stores were located more than 1.06 miles away from Appellant's location indicating that this household likely does not reside within walking distance of the Appellant firm, yet travelled miles out of its way to shop there. There is no legitimate reason why this household would spend so much of its SNAP allotment at

an extremely minimally stocked convenience store when it clearly had access to and frequently shopped at supermarkets and super stores located nearby and at a distance. The more plausible explanation is that this household was trafficking at the firm. Other households analyzed exhibited similar shopping patterns indicative of trafficking.

There may be legitimate reasons why a SNAP household might return to a store during a short period of time, but the examples in this Attachment indicate a series of SNAP purchases that total to large dollar amounts. Multiple transactions over a short period of time, especially those of high dollar values, are indicative of attempts to obscure trafficking by dividing a large dollar value transaction into a series of smaller dollar value transactions and are a method which violating stores use to avoid high dollar transactions that cannot be supported.

### **High Dollar Value Transactions**

This Attachment lists 241 individual EBT transactions 5 U.S.C. § 552 (b)(6) & (b)(7)(C). The substantial number of high dollar transactions is uncharacteristic for a store offering an extremely limited stock of staple foods and calls into question the legitimacy of these transactions. 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

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

While households residing in areas with extremely limited grocery store options may conduct high dollar transactions at convenience stores out of necessity, this is not the case when they have better alternatives. FNS records show there are 15 comparably sized or larger SNAP retailers located within a 1.0 mile radius of the Appellant firm that includes one supermarket and two additional supermarkets located within 1.87 miles. These larger stores would offer greater quantities and varieties of staple food items at lower prices than would be found at an extremely minimally stocked convenience store offering no fresh or frozen unprocessed meats or seafood and no fresh or frozen fruit and vegetables. These stores would also carry frozen pizzas for less than the \$9.99 charged for the Hunt Brothers frozen pizzas that are the most expensive item sold at the Appellant firm.

The difference in the average SNAP transaction amount, the total SNAP transaction dollar volume, and the total SNAP transaction count for Crittenden County convenience stores during the review months and at the Appellant firm is significant. Appellant's average SNAP transaction amount is 76.46 percent larger than that of Crittenden County convenience stores while its average SNAP transaction dollar volume is 5 U.S.C. § 552 (b)(7)(E) larger and its total SNAP transaction count is 72.88 percent larger than the County average. The high number of

SNAP transactions and dollar volume is an indication the firm may be dividing larger transactions into multiple smaller transactions in an effort to circumvent detection as previously discussed. A comparison of Appellant's SNAP redemptions to that of nearby like type stores having redemptions for the review period shows that none exhibit the same suspicious transaction patterns listed in the charge letter for the Appellant firm even though all are located in proximity to Appellant's location and would therefore be expected to share the same SNAP customer base and shopping patterns. This is further indication that the transactions in this Attachment and the previous do not represent legitimate food purchases. The Retailer Operations Division considered all of these to be indicators of unusual and suspicious activity.

The firm also had irregular SNAP transaction data compared to like type stores in Crittenden County. A comparison of Appellant's redemption data to the average for County convenience stores using ten dollar increments shows that Appellant's transaction count and dollar volume significantly exceeds that of like type stores in all ranges 5 U.S.C. § 552 (b)(6) & (b)(7)(C). 5 U.S.C. § 552 (b)(6) & (b)(7)(C). This transaction pattern does not appear in the transaction patterns for other like type stores. These large dollar transactions are considered to be irregular and suspicious based on the firm's food inventory. The Retailer Operations Division determined there was no credible reason for the firm to have transactions at these dollar levels given the extremely minimal stock of staple foods and the lack of any specialty, bulk, or ethnic foods that might sell for large dollar amounts and also considered this to be a strong indication of trafficking. None of Appellant's contentions explain these unusual and suspicious differences. Appellant contends that store ownership provided evidence of selling a significant amount of pizza and other items that would add up to these receipts and provided documentation of all the pizza the firm was purchasing on a monthly basis. The owners would not be purchasing such large amounts unless they were selling these items. The owners sell a significant number of pizzas as indicated by the attached invoices.

The SNAP transactions noted in this Attachment are not presumed to be trafficking because they exceed a set dollar amount; they are questionable because they are inconsistent for this type of store and store stock. A shopping pattern analysis by the Retailer Operations Division shows that households in this Attachment are regularly shopping at much larger stores, and conducting high dollar transactions, yet are conducting comparable or higher dollar transactions at the Appellant firm. It makes no sense for a household that regularly shops at larger stores and apparently has no transportation limitations to spend large dollar amounts at the Appellant firm since its cost of goods is higher than that of larger stores such as supermarkets or super stores.

Information obtained during the FNS store visit on March 18, 2019, shows that the Appellant firm offers an extremely limited quantity and variety of SNAP eligible staple food items, many accessory foods, and many ineligible items. Much of the inventory for sale consists of inexpensive snacks, candy, drinks, and various single serving foods as well as many ineligible items. The fact that tobacco, lottery, alcohol, hot foods, household products, paper products, auto products, pet products, health and beauty items, ATM, and charcoal are not eligible for purchase with SNAP benefits also provides no justification for the high transaction amounts.

Higher food prices make it even more unlikely that SNAP recipients, with very limited food benefits, would want to spend a considerable part of their benefits in a store that does not address

all of their food needs when they are already shopping at larger, fully-stocked stores that would offer a greater variety of foods at lower prices. Many of these stores also offer store brand products at lower prices, weekly specials, and have shopping carts and checkouts with built-in scanners and conveyor belts to facilitate processing purchases quickly. Additionally, Appellant furnished no itemized cash register and EBT receipts for the period under review to document the legitimacy of these excessively large transactions. The firm also has a very small checkout area and no shopping carts or handbaskets thereby making it extremely difficult to facilitate the great quantities of eligible food items required to make up these large dollar transactions. The fact that the firm carries an extremely limited stock of staple food items also makes it improbable that the high dollar transactions in this Attachment were for the purchase of eligible food items and more likely that the amounts were contrived.

A detailed analysis of the invoices submitted for Hunts Brothers inventory purchases was conducted by the Retailer Operations Division and the dollar amount of eligible food purchases plus markup compared to the firm's SNAP redemptions for the review period. Many of the invoices were dated prior to or after the review period and were therefore excluded from the analysis. No documentation was received from Appellant showing how many pizzas were purchased using SNAP so the Retailer Operations Division applied a standard 40 percent markup to the totals for those invoices occurring within the review period to arrive at a potential sales amount. Their analysis determined that the firm had insufficient stock to support SNAP redemptions during the six months in the review period as the potential sales amount was significantly less than the firm's SNAP redemptions over the same period. This Review Officer also compared the numbers of pizzas ordered on the review period invoices multiplied by \$9.99 (the posted pizza sales price) and similarly arrived at a potential sales figure that was significantly less than the firm's SNAP redemptions for the review period. Insufficient inventory is an indication of trafficking.

It is further noted that SNAP redemptions at the Appellant firm fluctuated unusually following the store visit on March 18, 2019. The volume of SNAP redemptions at the Appellant firm decreased 15.62 percent from December 2018 to April 2019 while the average SNAP transaction amount decreased 15.62 percent for the same period. A pronounced fluctuation in SNAP redemptions following the store visit is a clear indication of trafficking since, if trafficking were not occurring, there would be no abnormal fluctuations in redemption amounts.

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

### **Other Contentions**

Regarding Appellant's denial of trafficking, the purpose of this review is to either validate or to invalidate the earlier decision of the Retailer Operations Division and is limited to what circumstances were at the basis of the action at the time such action was made. In an appeal of an adverse action, the Appellant bears the burden of proving by a preponderance of evidence that the administrative action should be reversed. That means the Appellant has the burden of providing relevant evidence that a reasonable mind, considering the record as a whole, would accept as sufficient to support a conclusion that the argument asserted is more likely to be true

than untrue. Assertions that the firm has not violated program rules, by themselves and without supporting evidence and rationale, do not constitute valid grounds for dismissal of the current charges of violations or for mitigating their impact. When store ownership signed the certification page of the SNAP retailer authorization application to become a SNAP retailer, it confirmed it understood and agreed to abide by program rules and regulatory provisions. It also agreed to accept responsibility on behalf of the firm for violations of the SNAP including those committed by any of the firm's employees, paid or unpaid, new, full-time or part-time. The certification is clear that store ownership understood by signing the document that violations of program rules can result in administrative actions such as fines, sanctions, withdrawal, or disqualification from the SNAP.

“A sanction is not arbitrary and capricious if the Agency properly adheres to its own regulations and guidelines in imposing a sanction” per *Castillo v. United States*, 989 F. Supp. 413, 417 (D. Conn. 1997). A review of the Retailer Operations Division's administrative actions regarding this matter indicates full compliance with all applicable SNAP regulations, policies, and procedures therefore there are no grounds for reversal of the administrative action. Furthermore, as provided by 7 USC § 2021(b)(3)(B) and by 7 CFR §278(e)(1)(i), the Agency must permanently disqualify a store upon the “first occasion” of trafficking. Only if a store qualifies for a CMP may the Agency consider an alternate penalty. The Appellant's eligibility for a trafficking CMP is addressed later in this decision.

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

The issue under review involves a charge of trafficking SNAP benefits based on EBT transaction data. EBT transaction data is covered in SNAP regulations at 7 CFR § 278.6(a) and is addressed below. Trafficking is always considered to be the most serious violation even if it is a first offense therefore a temporary suspension or lesser penalty would not be applicable. SNAP regulations at 278.6(e)(1) clearly state that, “FNS shall disqualify a firm permanently if personnel of the firm have trafficked as defined in § 271.2.” SNAP regulations at 7 CFR § 271.2, define trafficking as, “The buying, selling, stealing, or otherwise effecting an exchange of SNAP benefits for cash or consideration other than eligible food”. SNAP regulations at 7 CFR § 278.6(a) clearly state that “FNS may disqualify any authorized retail food store if the firm fails to comply with the Food and Nutrition Act of 2008, as amended, or this part. Such disqualification shall result from a finding of a violation on the basis of evidence that may include facts established through on-site investigations, inconsistent redemption data, evidence obtained through a transaction report under an electronic benefit transfer system”. In the present case, the data presented in the Attachments is solely based on the SNAP EBT transactions conducted at the Appellant firm during the review period. This firm was selected as a result of a series of complex algorithms that make numerous data comparisons with other like type firms

during the review period. All of the transactions were then reviewed and analyzed by the Retailer Operations Division staff before the decision was made to issue a charge letter. This investigative process included a detailed examination of information obtained from various sources, including, but not limited to the inventory report and photos from the FNS store visit, a transaction comparison and analysis of like type and larger stores, and analysis of shopping patterns for recipient households conducting transactions at the Appellant firm during the review period. This analysis also included a review of the firm to ensure its store classification was correct and the data comparisons with like type firms valid. Additionally, there are nearby like type stores whose transaction data does not form these suspicious patterns and are therefore not at risk of disqualification for trafficking. There is also no regulatory requirement that trafficking disqualifications be based solely on on-site undercover operations.

Based on this empirical data, and in the absence of sufficient evidence for the legitimacy of such transaction patterns, a conclusion can be drawn, through a preponderance of evidence that the “unusual, irregular, and inexplicable” transactions and patterns cited in the charge letter evidence trafficking as the most likely explanation for the questionable transactions listed. It is herein determined that Appellant did not provide a preponderance of evidence demonstrating that the transactions contained in the charge letter were more likely due to eligible food sales than not. Under review, the evidence more substantially supports a conclusion that the transaction activity in the charge letter Attachments is due primarily to trafficking in SNAP benefits.

The Food and Nutrition Act of 2008, as amended, and the regulations issued pursuant thereto do not cite any minimum dollar amount of cash or SNAP benefits, or number of occurrences, for such exchanges to be defined as trafficking. Nor do they cite any degrees of seriousness pertaining to trafficking of SNAP benefits. Trafficking is always considered to be the most serious violation, even when the exchange of SNAP benefits for cash is dollar-for-dollar or is conducted by a non-managerial store clerk. This is reflected in the Food and Nutrition Act, which reads, in part, that disqualification “shall be permanent upon the first occasion of a disqualification based on trafficking by a retail food store.” In keeping with this legislative mandate, Section 278.6(e)(1)(i) of the SNAP regulations states that FNS shall disqualify a firm permanently if personnel of the firm have trafficked. There is no agency discretion in the matter of what sanction is to be imposed when trafficking is involved and second chances are not an authorized option under existing regulations.

### **CIVIL MONEY PENALTY**

A CMP for hardship to SNAP households may not be imposed in lieu of a permanent disqualification as specified in SNAP regulations at 7 CFR § 278.6(f). Trafficking is a permanent disqualification so Appellant is not eligible for a hardship CMP.

The Retailer Operations Division determined that the Appellant was not eligible for a trafficking CMP in lieu of a disqualification under 7 CFR 278.6(i) because Appellant failed to submit sufficient evidence to demonstrate that the firm had established and implemented an effective compliance policy and program to prevent SNAP violations within the specified timeframe. As such, the Retailer Operations Division determined that Appellant was not eligible for a trafficking CMP in lieu of permanent disqualification.

Based on the above discussion and the evidence under review, Appellant failed to meet the regulatory standard for a trafficking CMP as it did not request or provide substantial evidence that it met all four criteria required by 7 CFR §278.6(i). Based on the above, the Retailer Operations Division's decision not to impose a CMP in lieu of disqualification is sustained as appropriate pursuant to 7 CFR §278.6(i).

## **CONCLUSION**

The Retailer Operations Division presented a case that Appellant has likely trafficked in SNAP benefits. Their analysis of Appellant's EBT transaction record was the primary basis for its determination to permanently disqualify Appellant. This data provided substantial evidence that the questionable transactions during the review period had characteristics consistent with trafficking violations in SNAP benefits. This is evidenced by: the suspicious patterns in two Attachments of EBT transaction data, the inadequacy of the store's staple food stock as observed during the store visit to support large transactions in short time frames, the lack of adequate evidence for customer spending habits given that there are other SNAP authorized stores located within proximity to Appellant that likely offer a greater selection of eligible food items at competitive prices, and the irregular SNAP transaction data of Appellant as compared to other like type and larger stores in the county and state.

The retailer has not provided sufficient evidence to rebut the case that Appellant most likely trafficked in SNAP benefits. Therefore, based on a review of all of the evidence in this case, it is more likely true than not true that program violations did, in fact, occur as charged. Based on the discussion above, the determination to impose a permanent disqualification against Appellant is sustained. Furthermore, the Retailer Operations Division properly determined that Appellant was not eligible for a trafficking CMP according to Section 278.6(i) of the SNAP regulations.

## **RIGHTS AND REMEDIES**

Applicable rights to a judicial review of this decision are set forth in 7 U.S.C. § 2023 and 7 CFR § 279.7. If a judicial review is desired, the complaint must be filed in the U.S. District Court for the district in which Appellant's owner resides, is engaged in business, or in any court of record of the State having competent jurisdiction. This complaint, naming the United States as the defendant, must be filed within thirty (30) days of receipt of this decision.

Under the Freedom of Information Act, we are releasing this information in a redacted format as appropriate. FNS will protect, to the extent provided by law, personal information that could constitute an unwarranted invasion of privacy.

ROBERT T. DEEGAN  
ADMINISTRATIVE REVIEW OFFICER

October 10, 2019