

**U.S. Department of Agriculture  
Food and Nutrition Service  
Administrative Review Branch  
Alexandria, VA 22302**

**Smily's,**

**Appellant,**

**v.**

**Retailer Operations Division,**

**Respondent.**

**Case Number: C0192005**

**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 Smily's (hereinafter "Appellant") by the ROD (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 August 31, 2016, 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 February through July 2016. 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 October 26, 2016, 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 7, 2016, 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. **5 U.S.C. § 552 (b)(7)(E).**

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 & 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, (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)(iii) states, *inter alia*:

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 7, 2016, and in subsequent correspondence, it was argued that:

1. The vast majority of the business is dedicated to the operation of a retail food market and would be properly qualified as a small grocer. Nearly all inventory is SNAP eligible.

Appellant provides copies of photographs in support thereof. The store's physical description fits squarely within the medium grocery store category but the business functions more as a primary (large) grocery store as a result of the inventory maintained. Appellant provides photographs in support thereof. The store carries a variety of fresh vegetables and fruits which appear in the store visit photos.

2. An investigation was conducted by the Retailer Investigation Branch prior to the analysis period cited in the Charge Letter. The report is dated October 15, 2015 and outlines three separate visits to the store from September 2 through October 8, 2015. An attempt to purchase ineligible items was made and refused on two of the three visits. The firm also refused to exchange cash for SNAP benefits. The investigation lends credence to Appellant's position that trafficking was not occurring nor were the sale of minor or major ineligible items.
3. Appellant notes that there are limitations to the ALERT system and that its overutilization by the Department has created an internal belief that the system is wildly accurate. Appellant contends that the agency's use of the ALERT system is unjustified. The department doesn't have case studies which indicate that the transaction types cited are indicative of wrongdoing with the SNAP regulations. The Review Division has been under the errant belief that the ALERT system has been proven to be accurate in finding fraud. The ALERT system cannot distinguish between transactions that result from one kind of violation from another. The system does not account for special business practices, differences in demographics and geographic areas. This evaluation is supposed to be picked up by the analyst but the analyst doesn't understand the system's capabilities and leans too heavily upon the system. FNS depends too heavily upon assumptions based around the average consumer and person and too little on who the SNAP clientele actually are: the customers of the Appellant store are not well organized and do very little planning ahead. This is the struggle that the Division needs to consider: how much of FNS position is sheer conjecture? They posit that participants are more likely to shop a particular way, or utilize an application or toll free number, but where is the statistical analysis to prove this? Additionally, ALERT has not been updated to reflect research results from the Benefit Redemption Patterns in the SNAP (2009) or any other study for the last 20 years. Neither the thresholds nor the patterns have been changed in two decades. Appellant denies the allegation of trafficking. The only evidence provided by the ROD Office is a list of transactions. Not one customer, police officer, or undercover officer claims to have received anything other than eligible items for benefits. What is wrong with the transactions is that the ALERT system flagged them. ALERT has never had an adjustment for the increase in the cost of living or any other circumstances that are not uniform. This means that despite a 40% increase in the cost of living since the early 2000's, the threshold number for ALERT to find a transaction suspicious has not changed; so a transaction that was below the threshold 17 years ago is now above the threshold, despite no change in the transaction itself.
4. The firm is located in the Riverdale neighborhood, which has a population of almost 8500 people with a median household income of \$28,500. Most people rent and the median rent is \$405. The store is the only competing store within walking distance of the surrounding neighborhood. There is a supermarket nearby by customer affidavits reflect that customers prefer the Appellant firm due to store pricing. Appellant has crafted the firm's offerings to cover all of the grocery needs of the average local family. The median

income of Appellant's geographic area is \$20,797.00. Additionally, in the present case, there is only one store within three quarters of a mile that could be distantly compared to the Appellant firm; this other store's selection of meat and its location is fundamentally different; thus there are no meaningful stores to compare the Appellant to. Appellant cites case law in support thereof. The current Owner took over the store in 2012, cleaned it up, focused on customer service and created personal bonds with customers. The firm is one of two stores that serve the neighborhood. The store has a loyal customer base with revenues 5 U.S.C. § 552 (b)(6) & (b)(7)(C) per month. Most revenues are used to purchase inventory to sell the next month. Appellant provides copies of bank statements in support thereof.

5. Regarding Attachment 1: Illinois SNAP benefits are issued on the 1<sup>st</sup>, 3<sup>rd</sup> through 10<sup>th</sup>, 13<sup>th</sup>, 17<sup>th</sup> and the 20<sup>th</sup> of the month.
  - a) As noted, the Department has conducted research into the standard practices of participants for food purchases, and purchases within the first seven days after receiving benefits is not unusual. The firm's customers typically conform to the typical transaction patterns of other SNAP participants in that they expend more than half of their benefits within 7 days of receiving them. Furthermore, as noted by the agency's report, Benefit Redemption Patterns in the SNAP (2011) a large portion of households redeem nearly all of their benefits in the first two weeks of the month. Such is the case in this instance, where the Appellant supplies a large portion of the participants' needs.
  - b) SNAP participants do not always know what their remaining SNAP balance is; accordingly, they will sort food into two groups: that which is necessary (affordable) and that which is optional (possibly affordable). They make the first purchase of necessary items (which they believe is less than the remaining balance), and then request the second purchase to "test" the balance to see if they have enough SNAP benefits to purchase the remainder of the food. The food amounts are pre-calculated at the register and then transacted consecutively based upon the authorization of the original amount.
  - c) A substantial portion of the firm's SNAP clientele lack transportation; as such they are limited in the amount of food that they can transport in a single trip. What would be a single large grocery purchase for a household with a vehicle is instead broken up into several smaller purchases separated by a number of hours. These separate trips can be accompanied by other transaction types listed above, but are often in similar amounts. There are a number of other such transactions separated by the workday (purchases prior to work hours, then subsequent purchases after regular work hours), where the participant lacked the time to make both shopping trips back to back. These are not indicative of any wrongdoing on the part of the store. . 5 U.S.C. § 552 (b)(6) & (b)(7)(C). These are the transactions of households who walk their food home and return for a subsequent shopping trip. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). There is one cash register and sometimes customers bring many items to the register; in order to move the line along, sometimes the cashier splits up payment for these items. Some of the items will be rung up which are then taken home by customers; other customers will be taken care of and then the first customer will have the rest of their order rung up. Appellant's customers conform to typical transaction patterns in making large and

frequent purchases within a week of receiving benefits. Appellant cites the Analysis of EBT Redemptions Patterns: Methods and Detailed Tables (USDA, February 2011) and Benefit Redemption Patterns in the SNAP (2011).

- d) Some SNAP recipients portion monthly benefits between different household members. In order to more easily track such spending, transactions are broken apart by household member. For example, two household members shop at the store at the same time; frequently these purchases include frozen food and bulk food purchases, relatively few items for higher dollar amounts. They appear at the register together and one household member uses the card to pay for a purchase followed by the other household member doing the same.
  - e) The ROD Office lists a total of 51 transactions that occurred between February and July 2016; all occurred on the dates the benefits were received or within four days of receipt of same. These patterns are supported by the Benefit Redemption Patterns in the SNAP Final Report (2009) which found that in an average month a SNAP household spent more than half its benefits during the first week, and more than three-quarters by the second week. Thus, SNAP participants are going to spend their benefits quickly.
6. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). The firm does not retain receipts and is not required to do so, so the absence of receipts should not be construed against the retailer; if the Department is going to hold the absence of receipts against a store, it needs to be part of a regulation, otherwise the absence of a non-necessary document doesn't indicate anything. However, Appellant provides a handful of receipts in support of its case. The question is whether or not the transactions found in the data could be supported by the firm's traditional inventory. Appellant provides copies of invoices and photographs in support thereof, which supports transactions greater than the highest amount listed in Attachment 2. When coupled with the invoices it is clear that a single shopping trip 5 U.S.C. § 552 (b)(6) & (b)(7)(C) is reasonable. Further, given that Appellant is a medium-sized grocery store, an average family would be expected to spend more than what the transaction lists. 5 U.S.C. § 552 (b)(6) & (b)(7)(C).
- a) 5 U.S.C. § 552 (b)(6) & (b)(7)(C). That there are 22 transactions over a five month period is not proof that benefits were exchanged for ineligible items. The list of transactions provided by the ROD Office represents a small fraction of the total number of SNAP transactions that take place at the store. There are several items for sale such as ground beef and Italian beef, which sell for \$40.00 each. French rolls and frozen pizza are close to \$10.00 each. A package of French rolls and ground beef would amount to about \$48.00. Six boxes of cereal is \$20.00. Some customers do most of their month's shopping in one visit.
  - b) Appellant provides photographs and product purchase invoices/receipts to demonstrate that the firm obtained an adequate volume of food to support the transaction activity.
  - c) Appellant provides affidavits that identify specific households and transactions (though not necessarily all falling during the analysis period) which support the contention that large transactions were a business reality.
  - d) Appellant provides bank statements in support of sales volume.
7. Prior Counsel for Appellant requested consideration of a civil money penalty in lieu of a permanent disqualification in the amount of \$20,000.00; Appellant cites Section

3.91(b)(3)(ii), noting that the maximum penalty for a single trafficking instance is \$32,000 and for a trafficking investigation is \$59,000. \$20,000 is well within the statutory structure and at the same time provides a strong deterrent. Appellant provides “Smily’s SNAP Policy (Link)” signed by two employees on January 3, 2016. This document sets out the eligible items, the excluded items, the fact that tax is not charged and that items are not to be purchased on credit. The policy was also verbally explained at the time the policy document was given to the two employees. Employees were told what customers could buy and what they could not buy with SNAP benefits. Employees were taught how to use the card reader. They were told that some customers may ask for cash in exchange for SNAP benefits; employees were told that they could accept SNAP benefits for eligible food items only. USDA and Link signage was also posted in the store. Thus the Appellant firm 1) had an effective compliance policy and program as specified in 278.6(i)(1); 2) the compliance policy and program were in operation prior to the alleged occurrence of violations; 3) Smily’s had developed and instituted an effective personnel training program as specified in 278.6(i)(2). The Owner was not aware of, did not approve, and did not benefit from any alleged trafficking and was not in any way involved or in any way allowed SNAP benefits to be used for anything other than eligible items. In addition, this is the first time the firm has been charged with trafficking.

8. Appellant further petitions for the imposition of a civil money penalty in lieu of a permanent disqualification for trafficking. The firm’s training program has been in effect since the store began accepting SNAP benefits and every employee has been trained in the program. In addition to documents provided by Appellant’s prior counsel, Appellant now provides its’ SNAP Policy records regarding training of each employee. Appellant provides the following documentation:
  - a) Criterion 1: Appellant provides a copy of the cover and of the full training manual.
  - b) Criterion 2: the policy was in existence prior to the firm’s receipt of the Charge Letter. Appellant provides signed records in support thereof.
  - c) Criterion 3: the training program is the same as developed by USDA.
  - d) Criterion 4: the ROD Office has not alleged that Ownership of the Appellant firm was aware of, approved of or benefitted from (or be in any involved with) the trafficking of SNAP benefits. Appellant affirms that its ownership in fact was not involved in, benefiting from, approving or otherwise aware of any trafficking. Moreover, no trafficking occurred at the store.

## **ANALYSIS AND FINDINGS**

At the outset it should be noted that Appellant provided information and documentation of a substantive nature in support of its review request that had not been provided to the ROD Office in reply to the Charge Letter; in such cases, if the information could potentially result in a final agency decision other than the initial sanction imposed, the ROD Office is presented with the new information to allow it to determine if it would have altered its sanction decision. This new information was provided to the ROD Office, which, upon evaluating the information, determined that it would not have altered its initial determination.

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 July 15, 2016, 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 optical scanners.
- No shopping carts or baskets.
- One cash register.
- Hot food sold.
- No dining area.
- Deli section present.
- No meat/seafood specials/bundles or fruit/veggie boxes.
- Approximately 900 square feet of retail space.
- No night window.
- The store sold tobacco and tobacco-related products, paper products, phone supplies, household items, tools, cleaning products, clothing, laundry detergent, infant supplies, pet supplies, automotive supplies and other non-food items.
- Comments: "per mgr, store sells meat/cheese by pound, no price list available, store tel# 973 482-2028"
- Check-out counter approximately one by one-and-one-half feet of useable space; register is behind a Plexiglas barrier surrounded by snack items, candy, health and beauty products and over-the-counter medicines. Ice cream freezer in front of check-out window.
- Many visible prices were in standard retail variations of \$.x9: photos 8, 10, 12, 23, 25, 26, 28, 30, 32 and 35.

The documentation presents no indication of advertised specials, promotions or bulk or expensive food items. As noted above, photographs reflect that several visible prices of food and other items were in standard retail variations of \$.x9. The checkout area was set up in convenience store fashion, utilizing a small check-out area (approximately one by one-and-one-half feet of useable space) but was otherwise cluttered/surrounded by snack items, candy, health and beauty products, over the counter medicines and other non-food items. There were no shopping carts with which customers could transport large orders to the small check-out area or to waiting transportation. This documentation reflects that the firm was a typically-stocked convenience store in all relevant respects. It is worth noting that the average SNAP purchase in a convenience store in the state of Illinois during the analysis period was \$6.52, reflecting that large purchases are not routinely made in such stores.

In regard to contention 1 above, the firm does not meet the store type criteria to be categorized as a large, medium or even a small grocery store; the firm does clearly meet the criteria to be categorized as a convenience store. As noted, the store visit further corroborated that the firm was in fact a typically-stocked convenience store. The photographs provided by Appellant are undated and not viewed as a reliable indication of inventory held at an earlier time; nonetheless, the photos tend to reflect that the firm was in fact a typically-stocked convenience store.

Regarding contention 2 above, a record of program participation with no previously or subsequently documented violations does not constitute valid grounds for dismissing the present serious charges or for mitigating the impact of the violations upon which they are based.

**5 U.S.C. § 552 (b)(7)(E).** Moreover, prior sanctions may precipitate an increase in the severity of a later sanction (see §278.6(e)(6)). Further, as noted above, the Food & Nutrition Act of 2008 provides that a store's disqualification "*shall be* (emphasis added) permanent upon ... the first occasion of... trafficking."

With regard to contention 3 above, Appellant asserts that the agency's practices with regard to compliance-based sanctions based upon system data is flawed and puts forth several contentions in support of that general argument.

**5 U.S.C. § 552 (b)(7)(E).** 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 the substance of the ROD Office's case against the firm is derived from data only and implies that there were no independent witnesses to affirm 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 Illinois. 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 July 15, 2016. These documents reflect the firm to have been a typically-stocked convenience store. The firm also maintained a substantial inventory of prepared, ready-to-eat food and accessory food items (candy, beverages, etc.), which is typical of convenience store stock.

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 (pages 2–3).

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 Appellant 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 presented. 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 indeed 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.

This review has found that the ROD Office properly implemented the disqualification in accordance with the statute and regulations. The administrative review process cannot properly include an assessment 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 evidence. Additionally, challenges to the laws and regulations governing the SNAP are more appropriately within the province of judicial review.

In regard to contention 4 above, the ROD Office notes that, at the time of the sanction decision, there were 13 SNAP-authorized stores within a one mile radius of the Appellant firm, including one supermarket, one medium grocery store, two small grocery stores and nine other convenience stores. The ROD Office points out that the supermarket referenced above is next door to the Appellant firm, at just over approximately 150 feet. The ROD Office moreover provides numerous examples of Appellant's customers shopping at super stores and supermarkets on or about the same day as conducting implausible transactions at the Appellant firm, calling into question what customers are able to obtain at Appellant's typically-stocked convenience store that they cannot obtain at the better-stocked and quite likely more competitively-priced super stores and supermarkets. Also clear from this data is that most of Appellant's customers do not appear to rely upon the Appellant firm for their food needs, as nearly all household's analyzed also shop at supermarkets and super stores.

5 U.S.C. § 552 (b)(6) & (b)(7)(C).

The ROD Office adds that the numbers of Appellant's SNAP transactions in many transaction bands during the analysis period were multiple times that of the store-type average in the state of Illinois: 5 U.S.C. § 552 (b)(6) & (b)(7)(C). As noted, the firm is a typically-stocked convenience store in all relevant respects; there exists in the record no legitimate basis for the nature and level of the firm's transaction and redemption activity.

The bank statements provided by Appellant provide very general information about the firm's cash flow but offer no detailed view of how income is obtained or what specifically comprises expenditures.

Regarding contention 5(a) above, while this contention may well be true, it does not address the transaction activity detailed in the Charge Letter and, moreover, ignores the fact that most households do not spend most of their benefits in convenience stores and most have access to much better-stocked super stores and supermarkets.

With regard to contention 5(b) above, SNAP recipients are not required to make a purchase to check available SNAP balances; there are several ways a household may conduct balance inquiries: balance inquiries can often be completed directly on the card reader, customers can call a toll-free number to get the balance, the card reader produces a receipt stating the remaining balance and most states provide an internet means by which customers can check balances.

**5 U.S.C. § 552 (b)(6) & (b)(7)(C)**

In regard to contention 5(c) above, while there are legitimate reasons why a SNAP recipient or household member might return to a small grocery store during a short period of time, such purchases are more typically in small amounts and for obtaining just a few items. The examples in Attachment 1 indicate a series of repetitive purchases that total large amounts. Customers spending such substantial amounts of SNAP allotments in a typically-stocked convenience store, when there are other larger food stores nearby which carry substantially larger varieties of food at lower costs, is implausible. 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 typically-stocked convenience store in all relevant respects and provides no plausible bases for customers' unusual attraction to the firm and unorthodox transaction patterns.

Regarding contention 5(d) above, as noted in the foregoing, while repetitive small purchases are common, repetitive large purchases are not; moreover, also as noted in the foregoing, the store visit conducted at the Appellant firm did not reflect the presence of expensive bulk and/or frozen food items.

With regard to contention 5(e) above, while households may spend half of their benefits within a week following benefit issuance, most households do not expend large amounts of benefits at convenience stores.

In regard to contention 6 above, the ROD Office evaluated the invoices provided and presented a table summarizing the results thereof, reprinted below:

**5 U.S.C. § 552 (b)(7)(E)**

As can be seen in the table above, allowing a 100% mark-up, which is extremely high, the firm's invoices fell substantially short of justifying SNAP redemptions during the analysis period. It should be noted as well that the shortfall is almost certainly understated considering that the above figures do not account for cash and commercial credit/debit sales, of which the firm

reasonably had a substantial amount during the analysis period. Photographs provided by Appellant have been addressed in the foregoing.

5 U.S.C. § 552 (b)(6) & (b)(7)(C).

Moreover, the receipts lack detail, listing primarily “grocery,” which does not identify the specific items purchased. 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

The eight receipts provided by Appellant are associated with a single household and four SNAP transactions 5 U.S.C. § 552 (b)(6) & (b)(7)(C) despite that the Appellant firm did not provide shopping carts, had a small checkout area approximately one foot square and carried no fresh meat, no fresh fruits and vegetables, no bulk/expensive packaged items and offered primarily single-serving snack foods and convenience foods.

Regarding contention 6(a, b and d) above, these considerations have been addressed in the foregoing.

With regard to contention 6 (c) above, the ROD Office points out that there were 49 different customers represented in the affidavits, most of which are generic statements claiming the customers spend from 30 to 70% of their SNAP benefits at the Appellant firm, though the affidavits do not provide the dates, amounts or descriptions of specific transactions. 19 of the names on the affidavits were illegible and no further research could be conducted. 25 names were found to have records in the state SNAP system; two of these conducted no SNAP transactions during the analysis period and four conducted no transactions at the Appellant firm during the analysis period. The remaining 19 were found to have conducted transactions at the Appellant firm during the analysis period and can be summarized as follows. All of the households shopped at numerous other stores during the analysis period, including super stores and supermarkets, many of which were over a mile from the Appellant firm; most conducted repetitive and/or excessively large transactions primarily or only at the Appellant firm. The data analysis clearly reflects that none of the households relied solely upon the Appellant firm for their grocery needs. While Appellant provided 19 affidavits of customers shopping at the 5 U.S.C. § 552 (b)(7)(E).

5 U.S.C. § 552 (b)(7)(E). As noted above, there is no basis for customers’ attraction to the Appellant firm, there being no superior selection of staple foods, no evidence of a price advantage, no evidence of package, bulk or promotional items, no extensive variety of otherwise unavailable ethnic food items and no evidence of custom or special services rendered.

The table below reflects Appellant’s monthly SNAP redemptions for the period February 2016 through October 2016:

5 U.S.C. § 552 (b)(7)(E)

5 U.S.C. § 552 (b)(7)(E).

5 U.S.C. § 552 (b)(7)(E).

In regard to contentions 7 and 8 above, the documentation provided by Appellant in its request for review is the same as that provided in reply to the Charge Letter. 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 August 31, 2016 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. The documentation and evidence provided by Appellant clearly fall short of the standard detailed at § 278.6(i), as noted in the following:

**Criterion 1:**

- 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  
**5 U.S.C. § 552 (b)(7)(E):**
  - The information constitutes neither a complete compliance policy nor a complete training document.
  - Documentation of the development and/or operation of procedures providing for internal review of employees' compliance (not provided).
  - The document does not address SNAP-benefit trafficking.

**Criterion 2:**

- Appellant did not provide documentary evidence which establishes that a complete compliance policy and program were in operation prior to the occurrence of the violations at issue.

**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.
- 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.
  - Written materials, which may include FNS publications and program regulations available to all authorized firms, are used in the training program.
  - Training materials shall clearly state that the following acts are prohibited and are in violation of the statute and regulations:
    - The exchange of SNAP benefits for cash.

- 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 confirms that the violative 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.

**5 U.S.C. § 552 (b)(7)(E).** 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. Accordingly, the SNAP Office correctly determined that Appellant did not qualify for a civil money penalty in lieu of a permanent disqualification.

### **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 30<sup>th</sup> day following Appellant's receipt of this document.

### **RIGHTS AND REMEDIES**

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

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

DANIEL S. LAY  
Administrative Review Officer

November 8, 2017