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

Urban Family Food and Merch,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0197641

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 Urban Family Food and Merch (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 March 6, 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 April through December 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 May 2, 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 May 9, 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. There also exist FNS policy memoranda and clarification letters which further explain the conditions necessary in order to permanently disqualify retail stores.

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

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

7 CFR § 278.6(a) states, *inter alia*:

> FNS may disqualify any authorized retail food store … if the firm fails to comply with the Food & 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)8 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 May 9, 2017, and in subsequent correspondence, it was argued that:

1. The charges are based on pure speculation. Appellant doesn't understand the logic of the charges.
2. The firm has never had any trouble in the past.
3. Appellant should have received a warning prior to being charged with SNAP-benefit trafficking and disqualified and should be given a chance to correct any problem or wrong-doing created by the Owner or the employees.
4. Appellant does not think that a proper investigation was conducted and that it was not in accordance with department equal employer guidelines.
5. Appellant worked hard to be a part of the SNAP in order to provide the community with great service and adequate pricing as a local convenience store. Appellant received great support from the community and from people outside the community because of the commitment of the Store Owner and staff. 80% or more of sales are SNAP-eligible. Over 70 to 80% of customers receive SNAP benefits. The SNAP is crucial to the business. Customers that shopped at the Appellant store are now forced to shop at neighboring stores selling alcohol and tobacco and in crime infested areas. The disqualification will work hardship upon the firm and customers.
6. Appellant will create a better bookkeeping system in the near future to show the day to day activity. Such would upgrade the firm's point-of-sale system and provide an itemized receipt to every customer for every purchase. Appellant has obtained and reviewed a copy of the rules and regulations of the SNAP in order to better train employees and to identify fraud.
7. Regarding Attachment 1 to the Charge Letter, Appellant encourages customers to return often and spend more, which is what all retail business desire. The firm also serves a battered women's shelter across the street and a grammar school is located on the other side; these considerations play a major part in the firm's volume of traffic and why things look strange sometimes.

8. Regarding Attachment 2 to the Charge Letter, Appellant cannot control customers' spending of SNAP benefits. Also, Appellant implemented a pilot program which allowed customers to buy overstocked items at a discount, resulting in large purchases. Appellant ended the program in February of 2017 because of lack of space and inability to keep better records of this type of purchase. Appellant provides documentation of food and retail sales and purchases; Appellant does not keep itemized receipts but will provide what it has.
9. Appellant would like a chance to reach out to an Attorney if needed.

ANALYSIS AND FINDINGS

At the outset it should be noted that the ROD Office ordered a contracted store visit to the Appellant firm as part of its investigation into Appellant's questionable transaction activity; the visit was conducted on February 9, 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 optical scanners.
- No meat/seafood bundles/specials or fruit/vegetable boxes.
- Approximately 1150 square feet of store space.
- The firm sold health and beauty products, paper goods, cleaning products, gift items, clothing, party supplies, souvenirs and other non-food items.
- The firm also operated an ATM and/or money transfer service.
- Empty/sparsely-stocked shelves/coolers noted. Photos: 1, 14, 15, 16, 17, 20, 22, 23 and 24.
- Dusty canned goods. Photo: 23.
- A note by the check-out counter read "no credit/tabs effective now."
- Cash register behind Plexiglas barrier; approximately 2 x 1 feet of counter space surrounded by candy, over-the-counter medicines, candy, clothing and other non-food items. Photo: 25,
- Reviewer Comments: "The store sells nachos and sno-cones when weather permits. They do not sell meat packages. They do not have any additional storage areas for food products. Although not completely empty there are lots of spacey shelves."

The documentation presents no indication of advertised specials, promotions or bulk or expensive food items. The checkout area was set up in convenience store fashion, utilizing a small check-out area (approximately 2 by 1 feet of useable space); the register was behind a Plexiglas barrier. The area was otherwise surrounded by snack items, candy, clothing, over- the-counter medicines 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 Illinois during the analysis period was $6.44 and $8.96 in Cook County, reflecting that large purchases are not routinely made in such stores.

In regard to contention 1 above, Charge Letters are not required by regulation 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 the substance of the ROD Office's case against the firm is derived from speculation 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 February 9, 2017. These documents reflect the firm to have been a marginally-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 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.

Regarding contention 2 above, Appellant notes that this case represents the firm's first and only SNAP violation (or series of same); however, 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. There is no provision in the Act, regulations or agency policy that reverses or reduces a sanction based upon a lack of prior and/or subsequent violations or assurances of future compliance by a firm and its owners, managers and/or employees; likewise, sanctions for prior violations are not prerequisite to sanctions due to later violations. 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, it should be noted that a warning letter is not prerequisite to a disqualification: the presence of a prior warning may in some cases increase the sanction imposed on a firm (see §278.6(e)(2), (3)(i) & (ii), (4) and (6)); however, the lack of a warning does not decrease a sanction properly imposed or prevent the imposition of such a sanction. The statute and regulations allow for no sanctioning discretion in trafficking cases, other than a civil money penalty, as noted below; such provisions are prescriptive in that sufficient evidence of trafficking always warrants permanent disqualification unless a firm qualifies for a civil money penalty. No minimum amount of benefits trafficked or a minimum proportion of cash to SNAP benefits exchanged is required; any amount of cash exchanged for any amount of SNAP benefits is considered SNAP benefit trafficking.

In regard to contention 4 above, as noted in regard to contention 1 above, this review has found no evidence that the ROD Office improperly conducted any aspect of its investigative analysis and subsequent administrative actions. With regard to Appellant's reference to equal employer guidelines, this is taken to be a reference to Civil Rights requirements; likewise, this review finds no evidence that the ROD Office's actions were improper; however, Appellant has the right to pursue any such allegations directly with the USDA – FNS, Director, Office of Civil Rights, 3101 Park Center Drive, Room 942, Alexandria, Virginia 22302. Any such allegations of discrimination will be handled by that office independently of this administrative review. The following is a link to that office's website: http://www.ascr.usda.gov/complaint_filing_cust.html.

Regarding contention 5 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. Appellant was advised of this provision in the SNAP Office's Charge Letter, which also advised that documentation of eligibility for that alternative sanction was to have been provided within a specific time limit. The SNAP regulations are specific at 7 CFR §278.6(b)(2)(iii) in that if a firm fails to request consideration for a civil money penalty in lieu of a permanent disqualification for trafficking and submit documentation and evidence of its eligibility within the 10 days specified (postmarked within 10 days of receiving the letter of charges), the firm shall not be eligible for such a penalty. As Appellant did not request such consideration and provided no evidence or information in support thereof, the SNAP Office's decision not to impose a civil money penalty was appropriate pursuant to 7 CFR §278.6(b)(1), §278.6(b)(2)(ii), §278.6(b)(2)(iii) and §278.6(i). It is further noted that said provisions specify that no extensions to this time period, in which a firm may provide evidence in support of its request for a civil money penalty, may be granted.

With regard to contention 6 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 SNAP 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. It is further added for the record that, although Appellant claims corrective

action has been taken, it offers no documentary evidence of same. As such, the claim carries little weight, and as noted above, corrective action following findings of violations is not relevant in ROD Office sanction decisions.

In regard to contention 7 above, 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. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). . Residents of women's shelters and/or grammar schools, not typically having their own food storage facilities, would not reasonably make routinely large repetitive purchases at a marginally-stocked convenience store. Additionally, the ROD Office conducted an analysis of a sample of the SNAP households conducting the transactions detailed in the Charge Letter and found that all of those sampled were routinely shopping at supermarkets and super stores on or about the same day as conducting implausible transactions at the Appellant store, calling into question what the households were able to obtain at Appellant's marginally-stocked convenience store that they could not obtain at the better- stocked and quite likely more competitively-priced stores.

Regarding contention 8 above, Appellant has provided no specific documentary evidence of its pilot program in the form of flyers, items offered, item prices, sales records or any other materials relating to such program. It is unclear, given the empty and sparsely-stocked shelves noted during the store visit, why Appellant references a lack of space as a reason for ending its bulk sales program in February; it is again noted that the store visit was conducted on February 9, 2017. Appellant provided copies of product purchase invoices in support of its contention that it could justify the Charge Letter transactions. The ROD Office analyzed this information and found that several of the invoices were outside of the analysis period (April through December 2016) and could not constitute evidence of inventory held at a different time. Some invoices were undated and likewise could not be reliably said to pertain to the analysis period. The month during the analysis period for which Appellant provided the most invoices/receipts was December 2016. The ROD analysis for December is reprinted below:

5 U.S.C. § 552 (b)(7)(E)

From the table above, the contents of which this review affirms, it is readily apparent that the product purchase receipts/invoices fall far short of justifying the firm's SNAP redemptions, even while allowing a 5 U.S.C. § 552 (b)(7)(E) mark-up. It

should be added that the shortage is almost certainly understated as Appellant very likely had some cash/commercial credit/debit sales during this same period, which has not been accounted for in the above figures.

5 U.S.C. § 552 (b)(7)(E).

Appellant also submitted ST-1 sales and use tax forms for all of the months in the analysis period except December. The ROD Office notes that these documents were inconsistent with the invoices provided by the retailer, calling their validity/accuracy into question.

Appellant also submitted bank transaction statements which reflect deposit/withdrawal activity but do not provide useful information regarding the nature of Appellant's SNAP sales. The Profit and Loss Statements for April through December 2016 likewise do not provide any useful information to disprove SNAP-benefit trafficking.

With regard to the Purchase Volume report provided by Appellant, the receipt analysis conducted for December reflects that invoices don't support either the report or SNAP redemptions. Additionally, the report includes many other purchases such as professional services, business supplies and purchases of non-food items.

The ROD Office notes that, at the time of the sanction decision, there were 33 SNAP-authorized firms within a one-mile radius of the subject store, including two super stores, one supermarket, one large grocery store, three medium grocery stores (one at under one-half mile from the Appellant store), seven small grocery stores (three from under one-quarter mile to just over one- quarter mile), one combination grocery/other store and 18 other convenience stores (from just under one-quarter mile to one-half mile). The Appellant store was clearly not the only store in the immediate area offering food items to SNAP customers; as noted above, it was clearly not the best-stocked firm in the area and it was clearly not the only store being visited by Appellant's customers.

In regard to contention 9 above, Appellant is directed to the Rights and Remedies section below.

CONCLUSION

In view of the above, the decision of the ROD Office to permanently disqualify Appellant from participation in the SNAP is hereby sustained. The decision will become final upon the 30th day following Appellant's receipt of this document.

RIGHTS AND REMEDIES

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

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

DANIEL S. LAY
Administrative Review Officer

December 8, 2017