

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

**York Fuel Stop Inc,**

**Appellant,**

**v.**

**Office of Retailer Operations and  
Compliance,**

**Respondent.**

**Case Number: C0226828**

**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 Office of Retailer Operations and Compliance to impose a permanent disqualification against York Fuel Stop Inc (hereinafter Appellant) from participating as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP).

**ISSUE**

The issue accepted for review is whether the Office of Retailer Operations and Compliance 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 April 29, 2020.

**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 March 2, 2020, the Office of Retailer Operations and Compliance charged Appellant with trafficking based on a series of irregular SNAP transaction patterns that occurred in August 2019 through January 2020. 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, requested an extension of time to respond to the charges in a request made verbally on March 24, 2020, that was approved. Appellant, through counsel, responded to the charges in a letter dated April 13, 2020, that did not contain a request for a CMP or any documentation in support of one. The Office of Retailer Operations and Compliance notified Appellant by letter dated April 29, 2020, 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 May 11, 2020, Appellant, through counsel, appealed the Office of Retailer Operations and Compliance'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 2019 through January 2020. 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 USDA's characterization of the transactions is general and conclusory, lacking any specificity to support the serious allegations;
- Under the language of the statute, and most other statutory law, the definition of "trafficking" requires an element of knowledge or intent to perpetrate the activity noted. In this case, the owner did not knowingly or intend to violate any parameters set by the USDA;
- All of the transactions cited by the USDA were charged as grocery items, and to the extent any mistakes were possibly made, the owner has taken immediate and constructive action. Specifically, once aware that his employees were not following proper protocols, he fired two employees and re-trained those employees that remain at York Fuel Stop. This training included a focus on processing EBT transactions and what items are appropriate for EBT transactions. Since different systems must be used, the owner also initiated a process immediately to ensure that a receipt for every transaction is attached to each EBT transaction. This process will ensure proof that each transaction through the EBT machine was for approved items under USDA guidelines;
- The owner concedes that he placed too much faith in his employees to run and manage the firm. He was spending the majority of his time at his other, separate, business, but now has assumed the majority of the duties at both his businesses and will continue to

- fulfill this very demanding job until he can find and train suitable replacements;
- It is also very important to highlight that the owner was never cited, notified, or warned about any unusual, irregular, and inexplicable activity as referenced by the letter of allegations. First, this is his first alleged violation. Second, he was alleged to have violated the SNAP regulations without any prior notification. Third, the USDA conducted no on site investigation of its allegations. These three points are important because "trafficking" seems to signify a malicious or reckless intent to violate the SNAP regulations, which is not the case in this instance;
  - Counsel finds that Irobe v. USDA provides guidance when evaluating allegations of "trafficking". 890 F. 3d 371 (1st Circuit, 2018). In this case, the Court specifically references on-site investigations of the suspected allegations. These investigations, coupled with the red-flagged transactions, lead to the charge of trafficking. This on-site investigation is absent in this case. Rather, the USDA has concluded trafficking has occurred on the transaction list alone. For this reason, the owner is entitled to the USDA's exercise of discretion when exercising any sanction or punishment. Under section 2021(b)(3)(B), the USDA is given discretion in administering any sanction or disqualification, specifically when the owner "was not aware of, did not approve of, did not benefit from, and was not involved in the conduct of the violation". The circumstances of this case seem to give rise to this important distinction. Under section 278.6(e)(7), the USDA could have issued a warning letter regarding these transactions. This warning letter would have served to inform and notify the owner of the USDA's alleged "unusual, irregular, and inexplicable" transactions. With proper notice and warning from the USDA, the owner could have quickly remedied the situation, as he has since done;
  - Under section 278.6(e)(5), the USDA does not have to permanently disqualify the owner. As previously noted, the activity noted by the USDA does not rise to the level of "trafficking" as defined in section 271.2. A serious offense such as "trafficking" must require an element of intent or recklessness because the penalty for this offense is severe. Section 278.6(e)(5) more appropriately applies to the circumstances of this particular case. Under that section, the FNS regional office shall: (5) Disqualify the firm for 6 months if it is to be the first sanction for the firm and the evidence shows that the personnel of the firm have committed violations such as but not limited to the sale of common nonfood items due to carelessness or poor supervision by the firm's ownership or management. Without any intent or recklessness, the owner can only be found in violation of this section and punished accordingly. Since this is the owner's first offense and he lacked any malicious intent, the punishment of permanent disqualification is too severe a punishment for the facts in this case. Permanent disqualification would negatively impact not only the owner, but also the surrounding community that uses his convenience store for necessary grocery items;
  - On April 29, 2020, the USDA issued a letter of determination affirming its finding of trafficking and further denying the owner the right to a CMP under SNAP regulations. This letter demands review of that determination as specified under Section 278.6(n) and Part 279 of the SNAP regulations;
  - Appellant disagrees with the determination that the owner is not eligible for the CMP under Section 278.6(i) of the SNAP regulations. Specifically, in ongoing communications with the ROC, Counsel was informed that the ROC had already

determined ineligibility for a CMP because the owner did not respond in time. This determination is not in accord with the facts of this case. The owner responded to these allegations by conversation on March 12, 2020, which was 10 days after the date of the letter and only 7 days after receipt of it. If you consider either date, the owner timely responded to the USDA's allegations. Even if additional information or arguments were required, this initial conversation occurred within the parameters of the SNAP regulations, making him eligible for a CMP. Under Section 278.6(i) of the SNAP regulations, the USDA lays out the specific requirements for a CMP and the owner has met all four criteria listed. First, he has an effective compliance policy in place and even fired two employees as a result of their not following this policy. Second, his policy was in effect prior to the allegations and he has also reaffirmed these policies to his staff since receiving the letter of allegations. Third, he has developed and instituted an effective personnel training program, which he administers personally to all new staff. Fourth, he "was not aware of, did not approve, did not benefit from, or was in any way involved in the conduct or approval of trafficking violations". In fact, once the owner received the letter of allegations notifying him of the suspicious activity, he fired two employees and took upon himself the task of running the store until a suitable replacement could be trained. Since all four criterion are met, the owner should be considered for a CMP in lieu of permanent disqualification; and,

- It is important to note that many families shop at the store many times a day because of its close proximity to city housing. The store is in walking distance for many of the customers and, as such, multiple transactions on the same card are rather commonplace. This position serves to address the USDA's flagging of transactions that occurred on the same accounts within a certain timeframe-namely the same day. It is concerning that the USDA seeks to permanently disqualify the owner from SNAP without first giving him notice of suspicious activity.

Appellant submitted no evidence or other rationales 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 August 4, 2016. The record indicates that in reaching a disqualification determination, the Office of Retailer Operations and Compliance considered information obtained during a November 6, 2019, store visit conducted by an 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 transactions. The store visit documented the following store size, description, and characteristics:

- The firm was a small gas station convenience store offering an extremely limited quantity and variety of staple foods and carrying no unique items or offering any distinctive services. The store stocked traditional American brands and had no ethnic or specialty food items.
- The store visit report and photos showed no shopping carts or handheld baskets for customer use.
- No food packages, bundles, case sales, bulk items, or other sales were evident that would explain the unusual transactions and no SNAP eligible cased items were available for purchase.
- 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 checkout counter was a night security window set into a plastic security wall with an opening in front that was approximately 1.0 feet wide and 1.5 feet deep with numerous displays on both sides 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, one POS terminal, and an optical scanner as confirmed by the store manager.
- 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, other drinks, and ineligible items.
- 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 meat/poultry/fish, one package of hot dogs, several packages of lunch meat, and jerky), no bacon, no sausages, no deli meats, no frozen dinners, no frozen entrees, eight cartons of eggs, no fresh fruit, no fresh vegetables, no frozen fruit, no frozen vegetables, no dried beans or lentils, single serving and packaged nuts, 100 percent fruit juices, no 100 percent vegetable juices, no packaged fruit cups, a very limited stock of canned soups, an extremely limited quantity and variety of canned and packaged staple food items, no deli cheese, packaged cheese, no single serving cheese, four yogurt, no single serving yogurt, no single serving yogurt drinks, seven butter, one margarine, no sour cream, fresh milk, no single serving fresh milk, canned milk, no soy milk, no Lactaid milk, no single serving milk drinks, no cottage cheese, four cream cheese, no cheese chip dips, no fresh bread, no frozen bread, no rolls, five tortillas, no pitas, no tostadas, no corn meal, no AP flour, no multigrain flour, four small boxes of sugar, no brown sugar, two small boxes of rice, no spices, several boxes of cold cereal, single serving cold cereal, no hot cereal, single serving Ramen noodle soups, several canned pasta, no single serving pasta, dry pasta, no

dry noodles, no pancake mixes, three baking mixes, mac&cheese, no single serving mac&cheese, several single serving heat & eat foods, four bottles of cooking oil, coffee, tea, cocoa, no baby cereal, no baby foods, no infant formula, and very few expensive staple food items.

- Ineligible items included: gasoline, lottery, tobacco, smoking accessories, hot drinks, household products, paper products, health and beauty items, clothing, electronics accessories, diapers, incense, and sunglasses while accessory foods included: candy, snacks, baked goods, condiments, four cooking oil, three baking mixes, four sugar, coffee, tea, cocoa, and un/carbonated drinks.
- The firm's hours of operation were open 24/7 per the store manager. The manager also stated that the firm did not take phone or online grocery orders, did not deliver groceries, and did not round price 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 individually priced and comments on the FNS store visit report, completed in conjunction with the store manager, showed that most food prices end in .x9 cents. A price ending in .x9 cents is a common pricing structure for smaller stores.
- The FNS store visit report listed the four most expensive food items costing more than \$5.00 for sale in the store as being: a two pack of Red Bull (16 ounce cans) priced at \$7.00, a 2.5 ounce bag of jerky priced at \$5.99, a two pack of Red Bull (12 ounce cans) priced at \$5.33, and a two pack of Mountain Dew Amp (16 ounce cans) priced at \$5.00. There were more than 10 stocking units of each of these four items in store inventory. This listing of the most expensive items was provided by the store manager during the store visit.
- The firm was not a WIC vendor.

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

This Attachment documents 48 individual transactions in 19 sets of two or more transactions conducted by 13 different households in a short period of time.

**5 U.S.C. § 552 (b)(6) & (b)(7)(C).** These also include 13 transactions ending in .00 cents and three transactions ending in .50 cents representing one-third (33.33 percent) of the individual transactions that are not supported by the store's inventory or pricing structure.

**5 U.S.C. § 552 (b)(6) & (b)(7)(C).** Two of the transaction sets involve both swiped and manually keyed transactions which is indicative of trafficking. The dollar amounts of subsequent transactions in each set are substantial and nearly equal or exceed the dollar amount of the initial transaction in 14 of the 19 sets. **5 U.S.C. § 552 (b)(6) & (b)(7)(C).** There are two pairs of transactions in sets containing three or more individual transactions

**5 U.S.C. § 552 (b)(6) & (b)(7)(C)** which is an unusually short amount of time given the many steps required to complete a SNAP transaction when combined with the firm's very small checkout area, no shopping carts or handheld baskets, and the lack of many high priced eligible food items. Two transaction sets are comprised of five individual transactions, one set of four, and two sets of three while the remaining 14 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 offered no documentation or explanation to support the legitimacy of the listed transactions in this Attachment other than to claim that many families shop at the store many times a day because of its close proximity to city housing and that the store is within walking distance for many customers and, as such, multiple transactions on the same card are commonplace. No evidence in support of these assertions was offered by Appellant.

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, of a household dividing its purchases, or of households making a separate purchase to check their balance followed by another transaction 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 in amounts 5 U.S.C. § 552 (b)(6) & (b)(7)(C), far more than the cost of a forgotten item or two. Appellant offers no explanation as to why households would conduct up to five sizeable transactions at a convenience store with an extremely limited stock of staple foods in a short period of time when there are many larger retail food stores where these households are regularly shopping that includes one super store, two supermarkets, one medium grocery store, and six small grocery stores located within a 1.1 mile radius of Appellant's location with the nearest small grocery store located only one block away and the medium grocery store four blocks away. These larger stores would offer a much greater quantity and variety of foods at lower prices than the Appellant firm and their proximity would make it unlikely that any SNAP recipient would consider the Appellant firm to be 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 total 5 U.S.C. § 552 (b)(6) & (b)(7)(C) when the comparable average convenience store SNAP transaction amount in York County during the review period was \$7.63. 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.

The Office of Retailer Operations and Compliance's analysis of shopping patterns for households listed in this Attachment shows they have ready access to transportation as evidenced by their shopping at a variety of comparably sized or larger food stores located nearby and at a distance from Appellant's location, including super stores and supermarkets. Their analysis also



shows numerous households that shopped at the Appellant firm and at a super store or supermarket 5 U.S.C. § 552 (b)(6) & (b)(7)(C) and inexplicably spent more at Appellant's store than they did at the much larger stores. 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 minimally stocked convenience 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 super stores and supermarkets. 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 or supermarkets they were already regularly shopping at for less money 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). It is unlikely that the purchase at the Appellant firm consisted of legitimate SNAP food items given the time it would take for this household to load its purchases and travel from the supermarket to the Appellant firm and then to select and transport the large number of eligible food items 5 U.S.C. § 552 (b)(6) & (b)(7)(C) to the checkout area in a store with few expensive items, a very small checkout area, and no shopping carts or hand baskets. It is more likely than not that the purchase at the Appellant firm was trafficking given the improbability that the previously cited steps could be accomplished and the order rung-up in only minutes. This household returned to the Appellant firm the next day

5 U.S.C. § 552 (b)(6) & (b)(7)(C). This shopping pattern is indicative of trafficking as Appellant's extremely minimally stocked convenience store is unlikely to offer any eligible food items that could not have been purchased at the far better stocked supermarket for less money. Appellant also offered no explanation as to why a household with unfettered access to transportation as evidenced by its shopping multiple times at two super stores and a supermarket located 4.5, 4.51, and 6.97 miles from Appellant's location would spend so much of its limited SNAP benefits at Appellant's extremely minimally stocked store when the larger stores would have offered a much greater quantity and variety of staple foods at better prices.

Another household conducted two transactions (5 U.S.C. § 552 (b)(6) & (b)(7)(C)) at the Appellant firm 5 U.S.C. § 552 (b)(6) & (b)(7)(C). 5 U.S.C. § 552 (b)(6) & (b)(7)(C). 5 U.S.C. § 552 (b)(6) & (b)(7)(C). It makes no sense for a household to shop at Appellant's extremely minimally stocked store 5 U.S.C. § 552 (b)(6) & (b)(7)(C) when it was shopping at a supermarket with a substantially greater quantity and variety of staple foods including fresh and frozen meats, seafood, and produce after the three transactions at the Appellant firm. This shopping pattern is indicative of trafficking as Appellant's extremely minimally stocked convenience store is unlikely to offer any eligible food items that could not have been purchased at the far better stocked supermarket with a substantially greater quantity and variety of staple foods including fresh and frozen meats, seafood, and produce for less money.

It is highly unlikely that the Appellant firm stocked any eligible food items that would not be available at the super stores, supermarkets, and other larger grocery stores the households in this Attachment were regularly shopping at and these stores would also likely have significantly lower food prices, yet these households continued to spend large dollar amounts at a convenience

store with an extremely limited stock of staple foods. The more plausible explanation is that these households were trafficking at the firm. Other households analyzed exhibited similar shopping patterns indicative of trafficking. There is no legitimate reason why these households would spend so much of their SNAP allotments at the Appellant firm when they clearly had access to and frequently shopped at nearby and distant super stores, supermarkets, and other larger grocery stores.

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 167 individual EBT transactions **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. The substantial number of high dollar transactions is uncharacteristic for a very small convenience store offering an extremely limited stock of staple foods and calls into question the legitimacy of these transactions. The transactions are also substantially higher than the average SNAP transaction amount of \$7.63 for this store type in York County. This is unusual and indicative of trafficking.

This Attachment includes 37 transactions ending in .00 cents and 17 transactions ending in .50 cents representing nearly one-third of the high dollar value transactions. The firm has a pricing structure of most items having prices ending in .x9 cents as confirmed by the store manager. The purchase of multiple items with prices ending in .x9 cents would not result in a transaction total ending in a same cents value of .00 or .50 cents as multiples of .x9 (e.g. .09, .18, .27, etc.) seldom have a value ending in .00 or .50 cents making it statistically impossible that this many store transactions would end in .00 and .50 cents with legitimate food purchases. The purchase of a single item with a price ending in .x9 cents would also make it impossible for any transaction totals to end in .00 or .50 cents.

The evidence under review shows that SNAP households shopping at the Appellant firm are also shopping at many full-line super stores and supermarkets that offer a greater quantity and variety of SNAP eligible food 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 extremely minimal, **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** of 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 is one super store, two supermarkets, one medium grocery store, six small grocery stores, and 14 convenience stores located within a 1.1

mile radius of Appellant's location with the nearest small grocery store located only one block away and the medium grocery store four blocks away. There also are other super stores and supermarkets located further away. 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.

The difference in the average SNAP transaction amount, the total SNAP transaction dollar volume, and the total SNAP transaction count for York County convenience stores during the review months and at the Appellant firm is significant. Appellant's average SNAP transaction dollar volume is 36.13 percent larger than York County convenience stores while its average SNAP transaction dollar amount is 35.78 percent larger and its total SNAP transaction count is comparable to that of York County convenience stores. The high SNAP transaction dollar volume and the high number of SNAP transactions combined with the comparatively low average SNAP transaction dollar amount 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 ones do not represent legitimate food purchases. The Office of Retailer Operations and Compliance considered all of these to be indicators of unusual and suspicious activity.

The firm also had irregular SNAP transaction data compared to like type York County stores. A comparison of Appellant's redemption data to the County convenience store average using ten dollar increments shows that Appellant's transaction count and dollar volume was slightly lower than that of like type stores in the lowest ranges (5 U.S.C. § 552 (b)(6) & (b)(7)(C)) where typically the majority of SNAP transactions for convenience store occur and then becomes significantly higher in all remaining ranges 5 U.S.C. § 552 (b)(6) & (b)(7)(C) at which point the Appellant firm's transactions stop. It is unusual that County convenience stores began averaging less than one transaction in each range 5 U.S.C. § 552 (b)(6) & (b)(7)(C). This transaction pattern does not appear in the transaction patterns or in the transaction count and dollar volume averages for other like type stores. These large dollar transactions are considered to be irregular and suspicious based on the firm's food inventory. The Office of Retailer Operations and Compliance 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 offered no explanation to support the legitimacy of the listed transactions in this Attachment.

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 Office of Retailer Operations and Compliance shows that Attachment households 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 super stores or supermarkets.

Information obtained during the November 6, 2019, FNS store visit on shows that the Appellant firm offered an extremely limited quantity and variety of SNAP eligible staple food items, many accessory foods, and ineligible items. Much of the inventory for sale consisted of inexpensive snacks, candy, drinks, and various single serving foods as well as ineligible items. It is specifically noted that the firm had no fresh or frozen unprocessed meat or seafood, a very limited quantity and variety of processed meat and seafood, and no fresh or frozen fruit or vegetables. The fact that gasoline, lottery, tobacco, smoking accessories, hot drinks, household products, paper products, health and beauty items, clothing, electronics accessories, diapers, incense, and sunglasses are not eligible for purchase with SNAP benefits also provides no justification for the large 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 and no evidence was provided of SNAP eligible store stock via receipts of products taken into inventory for the relevant months. The firm also has a very small checkout area and no shopping carts or hand baskets 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 minimal 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.

SNAP redemptions at the Appellant firm fluctuated unusually following receipt of the charge letter on March 4, 2020. The volume of SNAP redemptions at the Appellant firm decreased 43.02 percent from February 2020 to March 2020 while the number of SNAP transactions decreased 10.84 percent and the average dollar amount of SNAP transactions decreased 36.1 percent during the same period. A pronounced fluctuation in SNAP redemptions following receipt of the charge letter 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

The purpose of this review is to either validate or to invalidate the earlier decision of the Office of Retailer Operations and Compliance and is limited to what circumstances were at the basis of the action at the time such action was made. There is no provision in the SNAP regulations for waiver or reduction of an administrative penalty assessment on the basis of corrective actions implemented subsequent to investigative findings of program violations. 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.

Appellant claims that intent is an essential element of the basis for the decision to permanently disqualify this owner from SNAP and that the USDA has failed to establish intent. SNAP regulations at 278.6(e)(1) discuss the permanent disqualification of firms for trafficking and do not specify intent as being a required element. Additionally, the definition of trafficking contained in SNAP regulations at 271.2 contains definitions for six different types of trafficking with the first definition specifically addressing EBT trafficking. The definition of EBT trafficking does not make any mention of intent being a required element.

Regarding a warning letter, there are no requirements in existing SNAP regulations that require stores suspected of trafficking or misusing SNAP benefits be provided with a written or verbal notification that violations of SNAP regulations may be occurring and the potential penalties. Both the SNAP retailer application and retailer reauthorization application contain a certification page whereby applicants must confirm their understanding of and agreement with SNAP retailer requirements in order to complete the application/reauthorization process. Store ownership did certify its understanding and agreement to abide by program rules and regulatory provisions when it initially applied to become a SNAP retailer. This certification page provides written notification that violations of program rules can result in administrative actions such as disqualification from SNAP and that they can also result in Federal, State, and/or local criminal prosecution and sanctions. The certification page also clearly states that store ownership accepts responsibility on behalf of the firm for violations of SNAP regulations, including those committed by any of the firm's employees, paid or unpaid, new, full-time, or part-time and that these violations include, but are not limited to, trafficking. SNAP regulations at 278.6(e)(1) also require permanent disqualification in all cases involving trafficking. Additionally, a record of participation in SNAP with no previously documented instance of violations does not constitute valid grounds for dismissal of the current charges of violations or for mitigating the impact of those charges.

In regard to case law cited by Appellant, considerations of relevant legal precedent through case law, or the lack thereof in relation to the present case, are beyond the scope of this review; this review relies upon the statute and regulations governing the SNAP and evaluates whether the decision of the SNAP Office to impose a disqualification upon the Appellant was in accordance

with same and sustainable by a preponderance of the evidence; Appellant's case law reference is acknowledged in this context only.

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 Office of Retailer Operations and Compliance 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 Office of Retailer Operations and Compliance 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 Office of Retailer Operations and Compliance determined that Appellant was not eligible for a trafficking CMP in lieu of permanent disqualification.

To be considered eligible for a trafficking CMP a firm must establish, by substantial evidence, its fulfillment of each of the criteria listed in Section 278.6(i). SNAP regulations are explicit in what constitutes substantial evidence. Specifically, 7 CFR § 278.6(i)(2) states in relevant part, “As specified in Criterion 3 above, in determining whether a firm has established an effective policy to prevent violations, FNS shall consider written and dated statements of firm policy which reflect a commitment to ensure that the firm is operated in a manner consistent with part 278 of current FNS regulations and current FSP policy on the proper acceptance and handling of food coupons.” This section goes on to state, “As required by Criterion 2, such policy statements shall be considered only if documentation is supplied which establishes that the policy statements were provided to the violating employee(s) prior to the commission of the violation.” This section further states, “A firm which seeks a civil money penalty in lieu of permanent disqualification shall document its training activity by submitting to FNS its dated training curricula and records of dates training sessions were conducted...”

Appellant contends the owner has met all four criteria listed for a trafficking CMP under 278.6(i) of SNAP regulations. First, he has an effective compliance policy in place and even fired two employees as a result of their not following this policy. Second, his policy was in effect prior to

the allegations and he has also reaffirmed these policies to his staff since receiving the letter of allegations. Third, he has developed and instituted an effective personnel training program, which he administers personally to all new staff. Fourth, he "was not aware of, did not approve, did not benefit from, or was in any way involved in the conduct or approval of trafficking violations". In fact, once the owner received the letter of allegations notifying him of the suspicious activity, he fired two employees and took upon himself the task of running the store until a suitable replacement could be trained. Appellant submitted no evidence supporting these assertions.

SNAP regulations at 7 CFR §278.6(i) clearly state that, "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 of the Program." The charge letter dated March 2, 2020, states that, "SNAP regulations, Section 278.6(i), list the criteria that you must meet in order to be considered for a CMP. If you request a CMP, you must meet each of the four criteria listed and provide the documentation as specified within 10 calendar days of your receipt of this letter. No extension of time can be granted for making a request for a CMP or for providing the required documentation. Your request and all documentation must be postmarked by midnight of the 10th calendar day after you receive this letter, in order to be considered timely."

Although store ownership did call the Office of Retailer Operations and Compliance and leave a telephone message on March 12, 2020, the message simply asked that he be called back. Store ownership did not request a trafficking CMP and also failed to timely submit to FNS substantial evidence demonstrating that the firm had established and implemented an effective compliance policy and program. For example, Appellant did not submit a copy of the firm's SNAP compliance policy and program, any dated training curricula and records of training sessions, any employment documentation for staff, or any other evidence supporting the existence of the compliance policy and program at the firm or that said policy and program was in effect prior to the SNAP violations.

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) within the specified timeframe. Based on the above, the Office of Retailer Operations and Compliance decision not to impose a CMP in lieu of disqualification is sustained as appropriate pursuant to 7 CFR §278.6(i).

## **CONCLUSION**

The Office of Retailer Operations and Compliance 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 Office of Retailer Operations and Compliance 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

June 30, 2020