

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

190 Express Deli Inc.,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0211867

FINAL AGENCY DECISION

It is the decision of the U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS) that there is sufficient evidence to support a permanent disqualification of 190 Express Deli Inc. (hereinafter “Appellant”) from participation as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP) as imposed by FNS’s Retailer Operations Division.

ISSUE

The issue accepted for review is whether the Retailer Operations Division, in its administration of SNAP, took appropriate action, consistent with Title 7 Code of Federal Regulations (CFR) Part 278, when it imposed a permanent disqualification against 190 Express Deli Inc.

AUTHORITY

7 U.S.C. § 2023 and its implementing regulations at 7 CFR § 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.”

SUMMARY OF CHARGES

The Appellant was charged with trafficking and subsequently permanently disqualified from SNAP based on an analysis of EBT transaction data from February 2018 through July 2018. This involved the following transaction patterns which are common trafficking indicators:

- There were an unusual number of transactions ending in a same cents value.
- Excessively large purchases transactions were made from recipient accounts.

CASE CHRONOLOGY

The agency's record shows that FNS initially authorized 190 Express Deli Inc. for SNAP participation as a convenience store on September 12, 2014. In a letter dated October 18, 2018, 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 between the months of February 2018 and July 2018. The letter noted that the penalty for trafficking is permanent disqualification as provided by 7 CFR § 278.6(e)(1). The letter also stated that the Appellant could request a civil money penalty (CMP) in lieu of permanent disqualification, but noted that such a request must be made and supporting documentation filed within 10 days of receipt of the charge letter under the conditions specified in 7 CFR § 278.6(i).

On October 29, 2018, the Appellant, through counsel Sadik Kaid, provided an initial response to the charges, claiming that no violations had taken place at the store and arguing that every employee was trained in SNAP procedures and was well-versed in the handling of SNAP benefits. The Appellant argued that the transaction patterns listed in the charge letter were merely coincidences and the result of customer shopping choices. The Appellant further argued that FNS's use of EBT transaction records as a basis for trafficking allegations was inadequate and not based on fact. The Appellant also claimed that a permanent disqualification would cause the firm to suffer irreparable injury and damage and would cause hardship to households in the area.

To conclude its response, the Appellant submitted a request for case file information in a request made under the Freedom of Information Act (FOIA). This request put a hold on any case activity until after FNS responded to the FOIA request.

On November 18, 2018, FNS provided the Appellant with its response to the FOIA request. The response included a five-page letter and 105 pages of responsive documents. The response letter further stated that the Appellant could appeal the agency's response, but must do so within 90 days of the date of the letter.

In a letter dated February 11, 2019, new attorney Jess Berkowitz filed an appeal to the agency's FOIA response. This appeal meant that the case continued to be held in abeyance pending completion of the FOIA process.

On December 17, 2020, the FOIA appeal response was completed and on December 21, 2020, the FNS FOIA office sent the response to Appellant's counsel.

On December 24, 2020, the Retailer Operations Division received notification that the Appellant had once again changed attorneys. The firm was now being represented by Phil Modrzynski.

On January 11, 2021, the Appellant, through Attorney Modrzynski, provided an additional response to the charge letter. In this response, the Appellant argued that the trafficking allegations were based solely on the appearance of impropriety, not on any actual accounts of malfeasance. With respect to same-cents transactions, the Appellant argued that a worker at the store was ringing up items in even-dollar amounts and not applying tax to the transactions. According to the Appellant, this was happening with all transactions, not just SNAP. To corroborate these claims,

the Appellant submitted 63 pages of credit card transactions that occurred at the store during the review period showing large numbers of transactions ending in .00 or .50. The Appellant further stated that some items in the store were evenly-priced, such as a loaf of bread for \$2.00, and the purchase of several such items could result in an even-dollar transaction. The Appellant argued that because a very high percentage of all transactions at the store were in these even-dollar amounts (or in amounts divisible by .25, such as .25, .50, .75, and .00), it was clear that the transactions were not the result of trafficking.

As to the excessively large transactions, the Appellant argued that there was no rule limiting the size of a SNAP purchase and contended that the firm could not prevent SNAP households from lawfully using their benefits. The Appellant further contended that numerous inventory items at the store were sold in bulk, such as frozen chicken fingers for \$19.99 or buffalo wings for \$24.99. As evidence that large transactions were common, the Appellant pointed to its pages of credit card transactions and indicated that there were transactions on that list that were even larger than those found in the charge letter. While acknowledging that the store's inventory included items that were not eligible to be purchased with SNAP benefits, the Appellant stated that most of its sales were food items. The Appellant argued that sales of \$200 or \$300 might require an explanation, but not 5 U.S.C. § 552 (b)(6) & (b)(7)(C), which is the largest transaction listed in the charge letter.

The Appellant concluded its response by stating that the firm was not trafficking in SNAP benefits, but rather running an honest and legitimate business.

In support of its response, the Appellant submitted a notarized affidavit signed by store owner Yasser Hussein, which repeated the claim that the store was not engaged in trafficking. The Appellant also submitted six undated photographs of store inventory, including items in large quantities or bulk sizes.

After evaluating the Appellant's response and further considering the evidence in the case, the Retailer Operations Division concluded that trafficking had occurred as charged and issued a determination letter dated June 29, 2021. This letter informed the Appellant that it would be permanently disqualified from SNAP upon receipt of the letter in accordance with 7 CFR § 278.6(c) and § 278.6(e)(1). The letter also stated that the Retailer Operations Division considered the Appellant's eligibility for a trafficking CMP according to the terms of Section 278.6(i) of the SNAP regulations, but that a CMP was not appropriate because the 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.

In a letter postmarked July 1, 2021, the Appellant, through counsel, appealed the Retailer Operations Division's determination by requesting an administrative review. The request was granted and the case was assigned to an administrative review officer.

On August 25, 2021, Appellant's counsel submitted a two-page letter with additional information to support its request for review.

On January 21, 2022, the review was reassigned to administrative review officer Jon Yorgason.

STANDARD OF REVIEW

In an appeal of adverse action, such as disqualification from SNAP participation, an appellant bears the burden of proving by a preponderance of the evidence that the administrative action should be reversed. This means that 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 AND REGULATIONS

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

7 U.S.C. § 2021(b)(3)(B) states, in part:

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

7 CFR § 278.6(a) states, in part:

FNS may disqualify any authorized retail food store...if the firm fails to comply with the Food 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, [or] evidence obtained through a transaction report under an electronic benefit transfer system....** [Emphasis added.]

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.

7 CFR § 271.2 states, in part:

Trafficking means: The buying, selling, stealing, or otherwise effecting an exchange of SNAP benefits issued and accessed via Electronic Benefit Transfer (EBT) cards, card numbers and personal identification 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 § 271.2 states, in part:

Eligible foods means: Any food or food product intended for human consumption except alcoholic beverages, tobacco and hot food and hot food products prepared for immediate consumption...

7 CFR § 278.6(b)(1) states, in part:

Any firm considered for disqualification...under paragraph (a) of this section...shall have full opportunity to submit to FNS information, explanation, or evidence concerning any instances of noncompliance before FNS makes a final administrative determination. The FNS regional office shall send the firm a letter of charges before making such determination. The letter shall specify the violations or actions which FNS believes constitute a basis for disqualification.... The letter shall inform the firm that it may respond either orally or in writing to the charges contained in the letter within 10 days of receiving the letter...

7 CFR § 278.6(c) states, in part:

The letter of charges, the response, and any other information available to FNS shall be reviewed and considered by the appropriate FNS regional office, which shall then issue the determination. In the case of a firm subject to permanent disqualification under paragraph (e)(1) of this section, the determination shall inform such a firm that action to permanently disqualify the firm shall be effective immediately upon the date of receipt of the notice of determination from FNS, regardless of whether a request for review is filed in accordance with part 279 of this chapter.

7 CFR § 278.6(b)(2)(ii) states, in part:

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).

7 CFR § 278.6(b)(2)(iii) states:

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.

7 CFR § 278.6(i) states, in part:

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...

APPELLANT'S CONTENTIONS

The Appellant, through counsel, made the following summarized contentions in its request for administrative review, in relevant part:

- Appellant requests that the review officer consider the firm's original reply to the charges as submitted to the Retailer Operations Division.
- The information submitted previously shows that over 80 percent of all sales ended in same cents values due to cashiers ringing them up that way at the point of sale. This is not trafficking. Similarly, credit card sales were not disputed as fraud, so they must have been correct.
- As for large transactions, the sizes of the transactions are unprecedentedly low in comparison to other similar cases in which firms were charged with trafficking. These transactions are not indicative of trafficking.

The preceding may represent only a brief summary of the Appellant's contentions presented in this matter. However, in reaching a decision, full attention was given to all evidence and contentions submitted, including any not specifically summarized or explicitly referenced herein.

ANALYSIS AND FINDINGS

The key issue for consideration in a case based on suspicious SNAP redemption data is whether FNS's Retailer Operations Division adequately established that the Appellant firm likely engaged in the violation of trafficking. In other words, the evidence provided by FNS must show that it is more likely true than not true that the irregular and unusual transaction patterns cited in the charge letter were the result of trafficking violations.

Having reviewed the agency's evidence against 190 Express Deli Inc., this review finds that FNS has sufficiently demonstrated that trafficking violations were likely occurring. As such, the burden in this administrative review lies with the Appellant to prove, by a preponderance of the evidence, that the agency's determination of permanent disqualification was improper and that

the penalty should be reversed or modified. The paragraphs below provide an analysis of both the agency's case and the Appellant's contentions in its request for administrative review.

Contractor Store Visit

The case file indicates that in reaching a disqualification determination, the Retailer Operations Division considered not only the Appellant firm's EBT transactions, but also information obtained from an August 11, 2018 store visit which was conducted by an FNS contractor to observe the nature and scope of the firm's operation, stock, and facilities. This store visit information was used to ascertain if there were justifiable explanations for the firm's irregular SNAP transaction patterns. The store visit report and photographs documented the following store size, description, and characteristics:

- 190 Express Deli Inc. is a convenience store, roughly 3,000 square feet in size, operating in the city of Buffalo, New York.
- At the time of the contractor's store visit, the firm did not have any shopping carts or shopping baskets for customer use.
- The store visit report listed one cash register, and agency records reflected the use of one EBT point-of-sale terminal for SNAP transactions. It appeared that the firm did not use an optical scanner at the point of sale.
- The store's staple food stock was marginal overall and did not meet minimum inventory requirements for ongoing SNAP authorization. In the dairy staple food category, the store carried only milk and dairy-based infant formula in sufficient quantities. Had the store not been disqualified for trafficking violations, it is possible that the store's authorization could have been withdrawn due to its failure to stock sufficient varieties and quantities of staple foods. In general, the store's inventory appeared to be typical of a convenience store or corner market.
- The report indicated that the store sold SNAP-eligible, non-staple accessory food items, such as carbonated and uncarbonated drinks, snacks, candy, and condiments. The store also sold ineligible nonfood items, including tobacco products, health and beauty items, cleaning supplies, and other miscellaneous household merchandise.
- The checkout area included a very small countertop that would not be suitable for conducting large or rapid transactions as there was little space to place more than one or two items on the counter at a time. All transactions appeared to take place through a Plexiglas window.
- There was no indication from the store visit report that the firm had a unique pricing structure. Most prices appeared to end in 9, which is typical of retail stores. However, there was an indication that a few items were priced in even-dollar amounts, such as a gallon of cooking oil for \$10.00 or a 20-ounce container of infant formula for \$25.00.
- The store also sold prepared food items for immediate consumption, including hot and cold submarine sandwiches, pizza, tacos, chicken wings, chicken fingers, and hamburgers and fries. Prices ranged from \$2.99 for a small, cold sub sandwich to \$28.00 for a 50-piece bucket of chicken wings. Pizzas cost between \$7.99 and \$14.99. It is noted that hot food items are not eligible to be purchased with SNAP benefits.

- According to the written report, the most expensive SNAP-eligible item in the store was a 20-ounce container of Enfamil infant formula, selling for \$25.00. It is noted however, that SNAP households containing infants are almost always simultaneously eligible for participation in the Special Supplemental Nutrition Program for Women, Infants, and Children (WIC), and infant formula is part of the WIC food package. So, it is unlikely that SNAP households would use their SNAP benefits to pay for expensive infant formula. Instead, such items would most commonly be paid for with WIC benefits. Other expensive items included a 20-pound bag of rice for \$14.99; a one-gallon container of cooking oil for \$10.00, and a 30.5-ounce container of Folger's coffee for \$6.99. Most SNAP-eligible items appeared to sell for less than \$5.00. There was also no record of the store selling items in bulk or other large packages.
- According to the report, store personnel stated that the firm did not round transaction totals up or down at checkout.

The available inventory of SNAP-eligible food at the time of the store visit showed stock that would be typical of a convenience store in the area. There was little indication that SNAP households would be inclined to purchase large quantities of groceries at this store, especially considering the lack of shopping carts and baskets and limited checkout space. Given the available inventory and the store's characteristics, this review could find no reason why the Appellant firm's SNAP transactions were routinely larger than those of its competitors.

SNAP Transaction Analysis

Charge Letter Attachment 1: There were an unusual number of transactions ending in a same cents value. This attachment lists 212 transactions ending in .00, totaling \$6,221.00 in SNAP benefits, and 217 transactions ending in .50, totaling \$7,051.50. The minimum transaction amount in Attachment 1 is \$20.00. When such transactions are not supported by a specific pricing structure at the store, they are a strong indicator of trafficking in SNAP benefits.

While the store visit report indicated that most prices ended with a cents-value of 9, the Appellant has argued that during the review period, a cashier at the store was rounding down purchase amounts in quarter-dollar increments without regard to sales tax, causing a majority of the firm's sales to end in cents values of .00, .25, .50, and .75. The Appellant further explained that this practice caused the store to lose money. According to the Appellant, the cashier did this rounding, regardless of a customer's payment method.

To corroborate its contentions, the Appellant submitted 63 pages of apparent credit card transactions (more than 2,900 transactions over the six-month period) in an effort to demonstrate that same-cents transactions were common not only in SNAP purchases, but in credit card purchases as well, thus eliminating trafficking as a reason for the unusual transaction pattern.

After reviewing the Appellant's data and explanations as well as the Retailer Operations Division's response to this information, this review finds that the Appellant's credit card documentation is likely authentic and a credible indicator that same-cents transactions (specifically, .00, .25, .50, and .75) were commonplace at the store for all payment types. Based on a preponderance of the evidence, this review is persuaded that the pattern of same cents transactions in this instance is not

an indication of trafficking, but a reflection of cashier rounding practices at the point of sale. Accordingly, the trafficking charge in Attachment 1 is dismissed.

Charge Letter Attachment 2: Excessively large purchase transactions were made from household accounts. This attachment lists 256 EBT transactions totaling \$11,259.02, for an average transaction amount of \$43.98. These large transactions are not consistent with a convenience store in the state of New York. The Retailer Operations Division has determined that during the review period, the average EBT transaction amount for a convenience store in New York was \$8.67. The average in Erie County, where 190 Express Deli Inc. is located, was even lower, at just \$7.60 per transaction. The average transaction in Attachment 2 is more than five times larger than the average purchase amount for this store type.

Given that the Appellant firm has a small number of expensive food items, such as 20-pound bags of rice and one-gallon containers of cooking oil selling for \$14.99 and \$10.00, respectively, it is likely that there would be an occasional instance where the transaction amount is high, perhaps exceeding \$40.00 or more. As such, there may be some legitimate SNAP transactions among the transactions listed in Attachment 2. However, as noted earlier, there is no evidence that the firm would be likely to have SNAP redemption patterns that differ significantly from nearby, similar-sized competitors. The substantial number of high-dollar transactions in a six-month period calls into question the legitimacy of these transactions.

As noted below, 190 Express Deli Inc. had substantially more “large” transactions over the same six-month review period than its nearest, similar-sized competitors:

5 U.S.C. § 552 (b)(6) & (b)(7)(C)

Attachment 2 lists 44 transactions for \$50.00 or more during the review period, including a high of 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Another 78 transactions were between \$40.00 and \$49.99. Considering how many food items it would typically take to add up to \$40.00 or more, and considering that the store has limited overall food inventory, no shopping carts or shopping baskets, and a very small, constricted checkout area, this review finds it difficult to believe that every large transaction in Attachment 2 was a legitimate purchase of eligible food.

The Retailer Operations Division’s review of individual household records provided additional evidence to suggest that violations were occurring at the store. For example, 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

5 U.S.C. § 552 (b)(6) & (b)(7)(C)

Numerous similar examples are found in the agency’s record. Based on observations from the contractor’s store visit, 190 Express Deli Inc. does not carry inventory that could not be found in any number of other stores, including supermarkets and superstores. If the households above had ready access to larger stores with shopping carts and baskets and much larger inventories, and, in fact, frequently shopped at such stores, what would lure the households to spend such large amounts at the Appellant store, with substantially less inventory and a constricted checkout area? It is difficult to comprehend what would drive such behavior.

Unfortunately, the Appellant has not offered any evidence, such as itemized cash register receipts, to demonstrate what took place between the customer and the clerk at the point of sale or to show that the specific transactions in Attachment 2 were legitimate purchases of eligible food. As such, this review finds that the suspicious transaction patterns in question were likely the result of trafficking.

As to the Appellant's claim that numerous inventory items at the store are sold in bulk, such as frozen chicken fingers for \$19.99 or buffalo wings for \$24.99, there was no evidence of this at the time of the contractor's visit to the store. In fact, the contractor specifically stated that the storage freezer was solely for items used in the preparation of hot food, and further indicated that there was no evidence that the store sold packages of meat. The undated photographs provided by the Appellant as evidence of bulk sales are unpersuasive, as the photos were very likely taken after the store received the charge letter.

Regarding the Appellant's claim that large transactions at the store were common across all payment types, this is not reflected in the Appellant's evidence. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). It is worth noting that with a credit card, a customer can purchase anything they want at the store, including hot food, tobacco products, or other nonfood items. In contrast, there were 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Customers using SNAP benefits to pay for their purchases are limited to eligible food items only, so it stands to reason that SNAP transactions would not likely be substantially larger on a more frequent basis than credit card transactions. While the Appellant's credit card evidence was useful in identifying same cents patterns related to Attachment 1, this review finds that the same evidence actually serves to strengthen the agency's case regarding unusually large transactions and likely trafficking.

Except for the rule that SNAP benefits are to be used only for the purchase of eligible food, the regulations do not govern or mandate how a SNAP household should spend its benefit allotment, including how many times a household may use its EBT card at a particular location or how large an individual transaction can be. However, the transactions noted in Attachment 2 are questionable not because they exceed any limits for use, but because they display patterns of use that are inconsistent with the store's documented physical characteristics. It should be further noted that the transactions identified in Attachment 2 are not marginally abnormal, but decidedly so, especially in comparison with other nearby SNAP-authorized stores with similar characteristics. This review does not contend that large EBT transactions are overtly suspicious when they occur on an occasional or intermittent basis, but when such transactions form questionable patterns on a consistent basis over a substantial period of time, such activity is considered highly irregular, and a firm's intent to comply with program regulations is called into question.

In an appeal of adverse action, the onus is on the Appellant to prove, by a preponderance of the evidence, that the administrative action should be reversed. This means submitting sufficient and compelling evidence that would lead a reviewer to conclude that trafficking did not occur. This review finds that the Appellant's contentions and evidence related to Attachment 2 do not meet this standard.

Trafficking Case Based on EBT Data

The Appellant contends that the trafficking allegations were based solely on the appearance of impropriety, not on any actual accounts of malfeasance.

With regard to this contention, this review concedes that a conclusion of trafficking cannot be drawn from EBT transaction data alone. It is acknowledged that USDA employs a computerized fraud detection tool to identify EBT transactions that form patterns having characteristics indicative of trafficking. However, this tool does not, by itself, determine or conclude that trafficking has occurred. FNS's Retailer Operations Division must still analyze the transaction data and patterns with other factors, such as observations from a store visit, an analysis of customer shopping behavior, and a comparison with similar stores in the area, and then render a determination as to whether the questionable transactions were, more likely than not, the result of trafficking.

The legality of this method is identified in 7 CFR § 278.6(a) which states, in part, "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, [or] evidence obtained through a transaction report under an electronic benefit transfer system**" [Emphasis added.]

Prior to a disqualification determination, the accused firm is given ample opportunity to reply to the charges and provide any information it deems appropriate in justifying as legitimate the transaction activity detailed in the charge letter.

This review has thoroughly examined the documentation and information provided by the Retailer Operations Division and has found no evidence to suggest that the agency simply manufactured numerical data and declared it to be trafficking. From all indications, the Retailer Operations Division obtained the EBT data, found it to be suspicious in comparison to other area stores of similar size, and then completed a thorough analysis before concluding that trafficking was likely occurring.

It is important to restate here that in an appeal of adverse action, the onus is on the Appellant to prove by a preponderance of the evidence that the administrative action should be reversed. Despite being given a specific list of questionable transactions in Attachment 2, the Appellant has not offered any compelling evidence, such as itemized cash register receipts or other transaction records, to show that the specific transactions in question were legitimate purchases of eligible food. As such, the Appellant's contentions related to FNS's use of EBT data provide no basis for dismissing the charges or for mitigating the penalty imposed.

Hardship to Appellant and SNAP Recipients

In its first response to the charge letter, the Appellant stated that that a permanent disqualification would cause the firm to suffer irreparable injury and damage and would cause hardship to households in the area.

With regard to the contention that the community will experience hardship if the firm is disqualified, it is recognized that some degree of inconvenience to SNAP households is likely whenever a SNAP-authorized store is disqualified and a household is forced to use its benefits elsewhere. Regulations at 7 CFR § 278.6(f) do allow, in limited circumstances, for a civil money penalty to be imposed in lieu of disqualification when there is an absence of other SNAP-authorized retailers in the area. However, the regulations are clear that a CMP for hardship to SNAP households may not be imposed in lieu of permanent disqualification for trafficking; neither do the regulations allow for a dismissal or reduction of a disqualification period on the basis of hardship to SNAP households.

As for the assertion that a permanent disqualification would cause the firm to suffer irreparable injury, Federal statute at 7 U.S.C. § 2021(b)(3)(B) makes it clear that disqualification for trafficking shall be permanent. It is recognized that some degree of economic hardship is a likely consequence whenever a store is disqualified from participation in SNAP. However, there is no provision in the SNAP regulations for waiver or reduction of an administrative penalty on the basis of possible economic hardship to either the ownership personally or to the firm resulting from the imposition of such a penalty.

Civil Money Penalty

As noted earlier, the Retailer Operations Division determined that the Appellant was not eligible for a civil money penalty in lieu of permanent disqualification for trafficking because it did not submit sufficient evidence to demonstrate that it had established and implemented an effective compliance policy and program to prevent SNAP violations.

Pursuant to regulations at 7 CFR § 278.6(b)(2), in order for a CMP to be considered, a firm must not only notify FNS that it desires the agency to consider a trafficking CMP in lieu of permanent disqualification, but it must also submit appropriate supporting documentation within 10 days of receipt of the charge letter. The record shows that the Appellant did not request a trafficking CMP or provide any evidence of a compliance policy or training program within the required 10-day period. Therefore, in accordance with 7 CFR § 278.6(b)(2)(iii) and § 278.6(i), a civil money penalty in lieu of permanent disqualification for trafficking is not an option in this case.

CONCLUSION

An analysis of the Appellant's EBT transaction record was the primary basis for the decision by the Retailer Operations Division to permanently disqualify 190 Express Deli Inc. from SNAP participation. While the charge related to Attachment 1 is dismissed, there is sufficient evidence pertaining to the pattern in Attachment 2 for this review to conclude that the questionable transactions were more likely than not the result of trafficking violations committed by the Appellant. Likewise, the Appellant has not proven, by a preponderance of the evidence, that the administrative action should be reversed.

Based on a review of all available information in this case, the decision to impose a permanent disqualification against the Appellant, 190 Express Deli Inc., under the ownership of Radhwan Hussein, is sustained.

RIGHTS AND REMEDIES

Applicable rights to a judicial review of this decision are set forth in Section 14 of the Food and Nutrition Act of 2008 (7 U.S.C. § 2023) and in Section 279.7 of the SNAP regulations. If a judicial review is desired, the complaint, naming the United States as the defendant, must be filed in the U.S. District Court for the district in which the Appellant owner resides or is engaged in business, or in any court of record of the State having competent jurisdiction. If a complaint is filed, it must be filed within 30 days of receipt of this decision. The judicial filing timeframe is mandated by the Act, and this office cannot grant an extension.

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.

JON YORGASON
Administrative Review Officer

April 21, 2022