

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

305 Grocery Deli Corp,

Appellant,

v.

Case Number: C0211543

Retailer Operations Division,

Respondent.

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 finding that a permanent disqualification from participation as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP) was properly imposed against 305 Grocery Deli Corp (hereinafter “305 Grocery Deli Corp” or “Appellant”) by the Retailer Operations Division of FNS.

ISSUE

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with 7 CFR § 278.6(e)(1)(i) in its administration of the SNAP, when it imposed a permanent disqualification against 305 Grocery Deli Corp.

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.

CASE CHRONOLOGY

In a letter dated October 9, 2018, the Retailer Operations Division informed the Appellant that 305 Grocery Deli Corp was in violation of the terms and conditions of the SNAP regulations, 7 CFR § 270–282, based on EBT SNAP benefit transactions that “establish clear and repetitive patterns of unusual, irregular, and inexplicable SNAP activity for your type of firm.” The letter also noted that the Appellant could request a trafficking civil money penalty (CMP) in lieu of a permanent disqualification within 10 days of receipt under the conditions specified in 7 CFR § 278.6(i). Per UPS confirmation of delivery, the charge letter was delivered to the Appellant at the store address of record on October 11, 2018.

In a response to the Retailer Operations Division of October 22, 2018, the Appellant, through counsel, replied to the letter of charges. The record reflects that the Retailer Operations Division received and considered the information provided prior to making a determination.

The record indicates that in the October 22, 2018 response, the Appellant's counsel requested information and documents from FNS with regard to the agency's case against 305 Grocery Deli Corp pursuant to the Freedom of Information Act (FOIA). In a letter dated November 20, 2018, FNS provided the Appellant's counsel with a response to the initial FOIA request. The Appellant's counsel appealed the FOIA request in a letter of March 17, 2019. In a letter dated February 3, 2021, FNS provided the Appellant's counsel with a response to the FOIA appeal. On February 4, 2021, the Retailer Operations Division sent a 10 day letter to counsel providing the opportunity to respond to the letter of charges. No additional information or response was provided by the Appellant or counsel.

After considering the Appellant's response and the evidence in the case, the Retailer Operations Division issued a determination letter dated July 19, 2021, informing the Appellant that 305 Grocery Deli Corp was being permanently disqualified from participation in the SNAP in accordance with 7 CFR § 278.6(e)(1) for trafficking violations. The determination letter also stated that the Appellant was not eligible for a trafficking civil money penalty according to the terms of Section 278.6(i) of the SNAP regulations as the Appellant did not submit sufficient evidence to demonstrate that the firm had established and implemented an effective compliance policy and program to prevent violations of the SNAP.

In a letter postmarked July 30, 2021, the Appellant, through counsel, requested an administrative review of the Retailer Operations Division's determination. FNS granted the Appellant's request for administrative review by letter dated August 18, 2021.

STANDARD OF REVIEW

In appeals of adverse actions, the Appellant bears the burden of proving by a preponderance of the evidence, that the administrative actions should be reversed. That means the Appellant has the burden of providing relevant evidence which a reasonable mind, considering the record as a whole, would accept as sufficient to support a conclusion that the matter asserted is more likely to be true than not true.

CONTROLLING LAW

The controlling statute in this matter is covered 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. There also exist FNS policy memoranda and clarification letters which further explain the conditions necessary in order to permanently disqualify retail stores.

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

... a disqualification under subsection (a) shall be ... permanent upon ... the first occasion or any subsequent occasion of a disqualification based on the purchase of coupons or trafficking in coupons or authorization cards by a retail food store or wholesale food concern or a

finding of the unauthorized redemption, use, transfer, acquisition, alteration, or possession of EBT cards ...

7 CFR § 278.6(a) states, inter alia:

FNS may disqualify any authorized retail food store ... if the firm fails to comply with the Food 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 ... [Emphasis added].

7 CFR § 278.6(e)(1)(i) states:

Disqualify a firm permanently if: Personnel of the firm have trafficked as defined in § 271.2.

7 CFR § 271.2 states, inter alia:

Trafficking means...The buying, selling, stealing, or otherwise effecting an exchange of SNAP benefits issued and accessed via Electronic Benefit Transfer (EBT) cards, card numbers 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 § 278.6(f)(1) states, inter alia:

A civil money penalty for hardship to SNAP households may not be imposed in lieu of a permanent disqualification.

7 CFR § 278.6(i) states, inter alia:

FNS may impose a civil money penalty in lieu of a permanent disqualification for trafficking as defined in § 271.2 if the firm timely submits to FNS substantial evidence which demonstrates that the firm had established and implemented an effective compliance policy and program to prevent violations ...

7 CFR § 278.6(b)(2) states, inter alia:

(ii) 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 as specified in § 278.6(i), 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). [Emphasis added].

(iii) 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 penalty. [Emphasis added].

SUMMARY OF CHARGES

The Appellant was charged and determined to be trafficking based on an analysis of EBT transaction data from February 2018 through July 2018. This involved the following SNAP transactions patterns which are indicative of trafficking:

- There were an unusual number of transactions ending in a same cents value;
- There were multiple transactions made from the accounts of individual households within a set time period; and
- There were excessively large purchase transactions made from recipient accounts.

The issue in this review is whether, through a preponderance of evidence, it is more likely true than not true that questionable transactions were the result of trafficking.

APPELLANT'S CONTENTIONS

The following represents a brief summary of the Appellant's contentions in this matter. Please be assured, however, that in reaching a decision, full attention and consideration was given to all contentions presented, including any not specifically recapitulated or specifically referenced herein.

In the reply to the charge letter and in the administrative review request, the Appellant, through counsel, stated the following summarized contentions, in relevant part:

- To the owner's knowledge, there were no violations whatsoever that took place at the Appellant.
- The owner is very aware that violations associated with SNAP or other vending transactions have severe consequences. The owner personally guards the EBT from any unusual transactions related to the exchange of SNAP benefits for cash or the exchange of SNAP benefits for ineligible items in addition to other issues concerning the SNAP.
- The charges outlined in the October 9, 2018 charge letter show pure and unrealistic presumption of transactions that happened which only show similarities. There is no concrete evidence to assert, beyond a reasonable doubt, that the firm actually committed illegal transactions. The permanent SNAP disqualification is inconclusive and arbitrary.
- All of the transactions in the charge letter are legitimate and none were the result of trafficking of SNAP benefits.
- The Appellant is open 7 days per week 20 hours a day.
- By virtue of the location of the business and the community in which it is located, a very substantial portion of its sales and revenues result from its participation in the SNAP. As a matter of fact, it is the EBT transactions in exchange for eligible items that constitute 60% of the firm's business food sales and provide the income necessary to keep this business profitable so it can continue its operation.
- The store is in a neighborhood that totally depends on public assistance and the frequent purchases by the community members varies based on their own needs to make such transactions.
- The Appellant is fully stocked with all food items, part of it on sale and the other part priced with discounts to meet the neighborhood residents' income.
- Many of the charge letter transactions resulted from telephone orders, customers picking up these orders and then purchasing additional items.

- They also resulted from telephone orders by well-established customers.
- Approximately 75% of the Appellant's customers are SNAP recipients and it is difficult for the owner to monitor who is shopping more than once a day and also who orders by phone and comes and pays with their EBT card.
- The owner and employees focus on basic rules they have learned from site, but it is hard to monitor the activities and deter those who do legal transactions but seem suspicious and illegal.
- There are four employees working in the store, including the owner.
- Every employee is well-trained to handle SNAP and other transactional activities. Employees have to go through training downloaded from <http://www.fns.usda.gov/snap/retailer-store-training-information>.
- The Appellant requests the imposition of a lower penalty such as a civil money penalty in lieu of permanent SNAP disqualification or the imposition of a six month SNAP disqualification.

ANALYSIS AND FINDINGS

SNAP Authorization

FNS authorized 305 Grocery Deli Corp for participation in the SNAP on December 25, 2013. During the review period of February 2018 through July 2018, 305 Grocery Deli Corp was classified as a small grocery store. The owner signed a SNAP application for the store and acknowledged he was aware of the SNAP regulations and understood those regulations. That application included a certification and confirmation that the owner would "accept responsibility on behalf of the firm for violations of the SNAP regulations, including those committed by any of the firm's employees, paid or unpaid, new, full-time or part-time." The violations listed on this certification include accepting SNAP benefits in exchange for cash, otherwise known as trafficking, and other violations such as accepting SNAP benefits as repayment on credit accounts or in exchange for ineligible items.

Store Visit Observations

The case file indicates that in reaching a disqualification determination, the Retailer Operations Division considered information obtained during a July 13, 2018 store visit conducted by a FNS contractor to observe the nature and scope of the firm's operation, stock, and facilities. This information obtained from the store visit was also used to ascertain if there were justifiable explanations for the firm's irregular SNAP transactions. The store visit report and photographs documented the following store size, description, and characteristics:

- Approximately 800 square feet in size with approximately 100 square feet of additional storage area outside of public view which stocked predominantly drinks;
- Had storage coolers/freezers, of which the majority of space was used for the storage of food items used in the preparation of hot and cold prepared foods;
- No shopping carts and no hand-held baskets available for customer use;
- One cash register and one EBT point-of-sale (POS) device for use in ringing-up SNAP transactions;
- One small checkout counter area with limited check-out counter space which was surrounded by a Plexiglas barrier;
- No optical scanners;

- Had an ATM or money transfer service;
- Firm was not a WIC program vendor; however, it stocked a minimal variety and amount of infant formula and foods;
- No signs posted or flyers available advertising the availability of bulk foods offered at a discounted rate to include meats in bulk, foods sold by the case, and grocery package deals;
- No meat/seafood specials or bundles or fruit/vegetable boxes that might sell for high prices;
- No evidence of a wholesale business such as posted prices or separate entrances for wholesale customers;
- Did not utilize an unusual pricing structure, such as prices ending in \$x.x9, \$x.00, or \$x.50;
- Transaction totals were not rounded up or down at the checkout counter;
- Telephone orders were not taken and delivery was not offered;
- The four most expensive (costing \$5.00 and above) SNAP-eligible food items in stock were Enfamil infant formula at \$19.99 per 12.5 ounces; deli meats at \$8.99 per pound; cheese at \$7.99 per pound; and Pedialyte at \$6.49 per 1.1 quart;
- No fresh or frozen meats, poultry, or seafood;
- Frozen food items included ice cream only;
- Had a kitchen and hot and cold prepared foods were sold;
- Had a deli area and deli meats and cheeses were sold by the pound (prices were posted in the store);
- Meat items included units of canned/potted meat, eggs, meat jerky, and canned fish;
- Dairy included milk (cow and coconut varieties), margarine, yogurt, and cheese;
- Had a minimal variety and amount of fresh produce stock;
- Other staple foods available for purchase included such items as juice, pasta, rice, cereal, flour, bagels, loaf bread, buns/rolls, baking mix, corn meal, and canned goods;
- Much of the remaining food stock consisted of accessory foods such as candy, carbonated and non-carbonated drinks, condiments, cakes/pastries, snack foods, and coffee; and
- Ineligible nonfood items included health and beauty aids, paper products, household cleaning supplies, household items, tobacco products, and mobile phones/phone cards.

The available inventory of SNAP eligible food at the time of the store visit showed food stock that would be typical of a small grocery store, where households normally purchase a limited number of items. The SNAP eligible food stocked by the store was generally of a low dollar value, consisting mainly of inexpensive canned and packaged goods, snack foods, single-serving food items and accessory food items. There was little indication that SNAP households would be inclined to regularly visit the store to purchase large quantities of groceries. Given the available inventory and the store's characteristics, this review could find no reason why the Appellant firm's SNAP redemption patterns differed so significantly from those of similar sized competitors.

Charge Letter Attachments

On review, the investigative materials provided by the Retailer Operations Division, including computer printouts of transaction data available from Federal records, store visit observations, information regarding area competitor firms, and household shopping patterns, were analyzed.

Government analyses of stores caught in trafficking violations during on-site investigations have found that transactions involving trafficking consistently display particular characteristics or patterns.

These patterns include, in part, those cited in the letter of charges. Based on this empirical data, and in the absence of any reasonable explanations for such transaction patterns, a conclusion can be drawn through a preponderance of evidence that the most likely explanation for “unusual, irregular, and inexplicable” transactions and patterns cited in the letter of charges is trafficking. Transactions having such characteristics sometimes do have valid explanations that support that they were the result of legitimate purchases of eligible food items. This is why opportunities are afforded to charged retailers to explain the questionable transactions cited. In this case, the Retailer Operations Division determined that the Appellant’s contentions did not outweigh the evidence. The issue in this review is whether, through a preponderance of evidence, it is more likely true than not true that questionable transactions were the result of trafficking. As patterns of unusual transactions appear across multiple Attachments, the case of trafficking becomes more convincing.

Same Cents Transactions (Charge Letter Attachment 1)

This charge letter Attachment documents transactions ending in same cents values. This Attachment includes 1,095 transactions (as high as \$125.00) ending in \$.00 that total \$16,828.00. Also included are 915 transactions (as high as \$94.50) ending in \$.50 that total \$15,601.50.

The Appellant contends that the transactions documented in this Attachment are all legitimate EBT transactions and none were the result of trafficking of SNAP benefits.

5 U.S.C. § 552 (b)(7)(E). A review of the store visit record indicates that the store did not promote any specials that could explain the pattern of large numbers of transactions ending in these values. The Appellant did not utilize an unusual pricing structure, such as prices ending in \$.00 or \$.50. In addition, the store visit record indicates that transaction totals are not rounded up or down at the checkout counter.

A number of households whose transactions were cited in other Attachments to the charge letter also consistently made transactions that ended in same cents values. Transactions appearing in more than one Attachment to the charge letter are more suspicious as they display multiple patterns common to trafficking transactions.

Furthermore, the EBT card is like a credit card and there is no need for recipients to worry about a cent value or to round purchases for the purpose of budgeting benefits. Additionally, when rounding prices either the SNAP recipient will pay more for a purchase rounded up or the retailer will lose money if purchases are consistently rounded down to an even amount. Also, for the purpose of keeping track of any remaining balance, every SNAP transaction receipt has the recipient’s ending balance printed on the receipt or the recipient can request a “balance inquiry” at any time to determine the balance.

Based on the store visit observations, the Appellant’s inventory contains almost exclusively inexpensive single-serving, prepared food items and accessory foods. As such, it is implausible that several of these relatively inexpensive items purchased together would routinely total to a purchase amount ending in .00 or .50 cents. While some of the transactions in this Attachment may have been for legitimate staple food purchases, particularly those in the lower dollar amounts, there is insufficient evidence that these repeating same cent transactions are legitimate. The SNAP regulations do not prohibit SNAP transactions that end in a same cents number value. However, patterns of transactions ending in same cents amounts indicate that SNAP transaction

amounts are contrived. Random data, which legitimate transaction activity approximates, is extremely difficult to produce intentionally; it is very difficult to avoid repetitive patterns when attempting to create the appearance of normal, near-random transactions. That various customers each repeatedly had totals with identical cents values during the review period strains the credibility of the Appellant's declaration that this activity reflected the acceptance of SNAP benefits in exchange for eligible food items. As the Appellant has offered no rational explanation or supporting documentation for why such patterns might exist, it is reasonable to conclude that these same cents transactions are the result of trafficking.

Repeat Transactions by the Same Household (Charge Letter Attachment 2)

This charge letter Attachment documents 29 sets of transactions (77 total transactions) that total \$3,890.57 in SNAP benefits to meet the parameters of this scan. Multiple transactions conducted by the same household account within a short period of time is a method which violating stores use to avoid single high dollar transactions that cannot be supported by a retailer's inventory and structure.

The Appellant contends that to the owner's knowledge, there were no violations whatsoever that took place at the Appellant. The Appellant is fully stocked with all food items, part of it on sale and the other part priced with discounts to meet the neighborhood residents' income. Many of the charge letter transactions resulted from telephone orders, customers picking up these orders and then purchasing additional items. They also resulted from telephone orders by well-established customers. Approximately 75% of the Appellant's customers are SNAP recipients and it is difficult for the owner to monitor who is shopping more than once a day and also who orders by phone and comes and pays with their EBT card.

Although it is not uncommon for customers to have more than one transaction per day and there are no limits on the number of times EBT cards may be used or the amount of eligible foods that may be purchased, it is not common that such multiple transactions are for large dollar amounts. The SNAP transactions noted in the charge letter 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 the Appellant's stock and facilities and are therefore, indicative of trafficking.

Although many SNAP households do shop early in the month as opposed to later in the month, most households do not spend all or a majority of their monthly benefit allotment in just one or two days, especially from a small grocery store like the Appellant firm that has a moderate staple food stock, a minimal variety and amount of fresh produce, no frozen food stock other than ice cream, and carries no fresh or frozen meats, poultry, or seafood.

The report and photographs from the store visit offer no explanation as to why SNAP customers would routinely shop at 305 Grocery Deli Corp multiple times during a short period or purchase such a large volume of items, there being no great variety of products, price advantage, profusion of large packages, or significant bulk items or food cases for sale. The store visit report and photos indicate that there were no signs posted advertising the availability of specials or discounts or bulk packages. The second, third, and subsequent transactions in each set are too large to consist of forgotten items. In addition, the store manager, who signed the store visit form, attested that the firm does not take telephone or on-line orders and that delivery is not offered to customers. While research reports acknowledge the rapid spending habits of SNAP participants as normal practices, it is expected SNAP benefits are expended in establishments with adequate inventory to support purchases. Such inventory was not confirmed in the subject store.

The store visit observations also indicate that the firm had one cash register and one EBT POS device and the check-out area was limited in size and was surrounded by a Plexiglas barrier. In addition, there were no shopping carts or hand-held baskets available to customers for transporting food within the store and no optical scanners or conveyor belts to expedite high dollar or rapid consecutive purchases. The customers have no place to put multiple purchases or carry the items while shopping.

The Appellant contends that the store is in a neighborhood that totally depends on public assistance and the frequent purchases by the community members varies based on their own needs to make such transactions. While the Appellant firm may be located in a neighborhood with households that qualify for SNAP benefits, these factors are not an indication that questionable transactions would be occurring at any given store. The subject store shows unusual transaction patterns that are not displayed in other similarly stocked stores. If specific household needs are causing these questionable transactions at the subject store, it would be expected that similar patterns would also present themselves at nearby firms as well. But this is simply not the case.

It is recognized that sometimes a firm may have unusual transaction patterns due to a recipient's lack of access to other SNAP authorized stores. However, during the review period there were 153 SNAP authorized retailers of comparable or larger size located within a 1.0 mile radius of 305 Grocery Deli Corp, including 23 supermarkets and 15 super stores, that could meet the nutritional needs of SNAP customers. Some of these authorized SNAP stores are larger than 305 Grocery Deli Corp and offer a greater quantity and variety of food products at comparable or better prices as compared to the subject store.

The record indicates that SNAP customers who shopped at 305 Grocery Deli Corp during the review period also shopped at other area grocery stores and, therefore, transportation to other stores is not an issue for these customers. Therefore, lack of access to other authorized stores or the availability of other food stores does not appear to be an explanation for the Appellant's abnormally high SNAP transaction amounts conducted within a short timeframe of each other.

The Appellant has not provided any evidence to show that the transactions listed in this Attachment were legitimate purchases of eligible foods and not the result of trafficking of SNAP benefits. The arguments presented by the Appellant hold little weight without some kind of evidence to substantiate its claims. The Appellant has the burden to provide relevant evidence to rebut the trafficking charges. This burden has not been met.

Excessively Large Purchase Transactions (Charge Letter Attachment 3)

This charge letter Attachment documents 130 SNAP transactions, as large as \$219.98, that total \$9,318.09. These large transaction amounts are not consistent with the store's observed characteristics and food inventory. The frequency of high dollar purchases in the review period calls into question the legitimacy of these transactions.

The Appellant denies the trafficking allegations. The Appellant is fully stocked with all food items, part of it on sale and the other part priced with discounts to meet the neighborhood residents' income. Many of the charge letter transactions resulted from telephone orders, customers picking up these orders and then purchasing additional items. They also resulted from telephone orders by well-established customers. Approximately 75% of the Appellant's customers are SNAP recipients and it

is difficult for the owner to monitor who is shopping more than once a day and also who orders by phone and comes and pays with their EBT card.

However, the food stock and facilities of the Appellant as reported in the store visit documentation do not appear sufficient to provide for all of one's food needs. People generally do not spend large sums at such stores. They usually stop at small grocery stores to pick up a few staple food items, such as bread, milk, or a can or two of food that they may consider are not worth a trip to the supermarket to purchase. The Appellant contends that the large transactions are not the result of trafficking of SNAP benefits. However, it is rare for a small grocery store such as 305 Grocery Deli Corp to have purchases like those included in this Attachment to the charge letter.

A review of the store visit report and photos indicates that 305 Grocery Deli Corp is a small grocery store offering a moderate variety and amount of staple food items and does not offer any specialty or ethnic food items that are not available at other area authorized retail food stores. As noted previously, the store manager, who signed the store visit form, attested that the firm does not take telephone or on-line orders and that delivery is not offered to customers. The store visit observations indicate that there were no signs posted advertising the availability of specials or discounts or bulk packages. The stock of SNAP eligible foods is moderate with no fresh meats, poultry, or seafood, no frozen meats, poultry, or seafood, a limited variety and amount of fresh produce, no frozen food stock other than ice cream, and lacks an abundant depth and breadth of staple foods. The store visit evidence also shows only a few high priced eligible foods in stock so the majority of the food items stocked at the store are low priced items. These large transaction amounts are not consistent with the Appellant store's inventory.

While there is no definition in the SNAP regulations for an excessively large purchase or transaction, FNS makes its determination based on the store type, characteristics and stocked inventory. The burden is on the Appellant to prove transactions FNS identified as large for the store type (in this case, a small grocery store) are for legitimate purchases. According to the store visit of July 13, 2018, the subject store did not have inventory to support the numerous large transactions. The Appellant also provided no evidence of continuously purchasing inventory throughout the review period to satisfy the large transactions. The store must have stocked inventory to repetitively generate large sales, which was not evident in the store visit.

5 U.S.C. § 552 (b)(7)(E).

Based on the store layout, infrastructure, and available inventory, it is not credible that the Appellant would so frequently conduct large transactions closely resembling those typically found at a supermarket or super store. It is not plausible that the firm's customers would regularly carry very large amounts of merchandise around the store without the benefit of shopping carts, especially since larger, better-stocked stores are readily available and in the vicinity of the Appellant firm. The Appellant is not set up to process high-dollar transactions, as indicated by its lack of equipment to facilitate large transactions and limited counter space. There are no legitimate bases for SNAP customers' unusual attraction to the firm such as a superior selection of staple foods, price advantages, package specials, bulk or promotional items, an extensive variety of otherwise unavailable ethnic food items, or special services rendered. The Appellant failed to provide convincing evidence to establish the legitimacy of these excessively large transactions, such as itemized cash register receipts. Based on all of these factors discussed in this section, the large

volume of transactions for high-dollar amounts is unlikely to indicate a pattern of legitimate food purchases.

The Appellant requests the imposition of a lower penalty such as a six month SNAP disqualification in lieu of a permanent SNAP disqualification. However, trafficking is defined in 7 CFR § 271.2 of the SNAP regulations which states that 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... The Food and Nutrition Act of 2008, at § 2021, does not allow for discretion in determining sanctions for trafficking and is specific in its requirement that “Disqualification ... shall be permanent upon ... the first occasion of a disqualification based on ... trafficking ... by a retail food store”. The law and regulations do not provide for a lesser period of disqualification or sanction for this violation.

Based on the discussion above and in the absence of credible evidence for 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 letter of charges evidence trafficking as the most likely explanation. Nevertheless, transactions having such characteristics do sometimes have valid explanations that support that they were the result of legitimate purchases of eligible food items, and this is why opportunities are afforded to charged retailers to explain the questionable transactions cited. In this case, however, the Retailer Operations determined that the Appellant’s contentions did not outweigh the evidence. Assertions that the firm has not violated program regulations, by themselves and without supporting evidence and rationale, do not constitute valid grounds for dismissal of the current charges of violations. As noted herein, the Appellant has the burden of providing credible, relevant evidence, which 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 not true. This burden has not been met.

Evidence of Trafficking

The Appellant contends that the charges outlined in the October 9, 2018 charge letter show pure and unrealistic presumption of transactions that happened which only show similarities. There is no concrete evidence to assert, beyond a reasonable doubt, that the firm actually committed illegal transactions. The permanent SNAP disqualification is inconclusive and arbitrary.

USDA employs a computerized fraud detection tool to identify EBT transactions that form patterns that have characteristics indicative of trafficking. However, this tool does not, by itself, determine or conclude that trafficking has occurred. The Retailer Operations Division analyzes the transaction data and patterns along with other documentation such as, information from the onsite store visit report including photographs of stock and the store layout, an analysis of recipient shopping behavior, and comparisons with similar store types in local area, to render a determination as to whether or not the questionable transaction patterns were, more likely than not, the result of trafficking. The regulations at 7 CFR § 278.6(a) 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, and that such disqualification shall result from a finding of a violation on the basis of evidence that may include facts established through, inconsistent redemption data, and evidence obtained through a transaction report under an electronic benefit transfer system.

Customer Hardship

With regard to the Appellant's contentions that a SNAP disqualification would impose a hardship on area SNAP customers, 7 CFR § 278.6(f) of the SNAP regulations provides for civil money penalty assessments in cases where disqualification would cause "hardship" to SNAP households because of the unavailability of a comparable participating food store in the area to meet their needs. However, this regulation also sets forth the following specific exception to such assessments there under: "A civil money penalty for hardship to SNAP households may not be imposed in lieu of a permanent disqualification". Therefore, since this case involves a permanent disqualification action, the civil money penalty provision is not applicable to the present case.

Financial Hardship

With regard to the Appellant's contentions that a SNAP disqualification would impose a financial hardship on the firm, there is no provision in the SNAP regulations or internal agency policy directives for waiver or reduction of an administrative penalty assessment on the basis of possible economic hardship to the firm resulting from imposition of such penalty. To allow store ownership from being excused from assessed administrative penalties based on purported economic hardship to the firm would render virtually meaningless the enforcement provisions of the Food and Nutrition Act of 2008 and the enforcement efforts of the USDA.

Moreover, giving special consideration to economic hardship to the firm would forsake fairness and equity, not only to competing stores and other participating retailers who are complying fully with program regulations, but also to those retailers who have been disqualified from the program in the past for similar violations. Therefore, the Appellant's contention that the firm may incur economic hardship based on the assessment of an administrative penalty does not provide any valid basis for dismissing the charges or for mitigating the penalty imposed.

CIVIL MONEY PENALTY

In the October 9, 2018 charge letter the Appellant was informed by the Retailer Operations Division that, under certain conditions, FNS may impose a civil money penalty (CMP) of up to \$59,000 in lieu of permanent disqualification of a firm for trafficking. Per Section 278.6(i) of the SNAP regulations, four criteria must be met in order to be considered for a trafficking civil money penalty. If requesting a trafficking CMP, an Appellant must meet each of the four criteria listed and provide the documentation that shows substantial evidence which demonstrates that the firm had established and implemented an effective compliance policy and program to prevent SNAP violations as specified within ten days of the Appellant's receipt of their charge letter.

If the Appellant's request for a trafficking CMP and the required documentation are not submitted on time, it will lose its right for any further consideration for a trafficking CMP. The SNAP regulations are specific at 7 CFR §278.6(b)(2)(iii) that "if a firm fails to request consideration for a civil money penalty in lieu of a permanent disqualification for trafficking and submit documentation and evidence of its eligibility within the 10 days specified, the firm shall not be eligible for such a penalty". The regulations do not provide the agency discretion to extend the time within which documentation and evidence in support of a trafficking civil money penalty may be submitted.

In the request for administrative review postmarked July 30, 2021 (i.e., after the required 10 days of receipt of the October 9, 2018 charge letter), the Appellant requested the imposition of a civil money

penalty in lieu of a SNAP disqualification. However, the record supports that the Appellant did not submit timely substantial evidence, as required by the regulations, to meet the criteria for a trafficking CMP in lieu of permanent disqualification.

While the Appellant contends that every employee is well trained to handle SNAP and other transactional activities and that employees have to go through training downloaded from <http://www.fns.usda.gov/snap/retailer-store-training-information>, no documentation was provided by the Appellant in consideration of the trafficking civil money penalty request. Therefore, the Retailer Operations Division's decision not to impose a civil money penalty in lieu of disqualification is sustained as appropriate pursuant to 7 CFR § 278.6(i).

CONCLUSION

The Retailer Operations Division's analysis of the Appellant's EBT transaction record, upon which charges of violations are based, together with observations made during the store visit and an analysis of customer shopping behaviors, provide substantial evidence that questionable transactions during the focus period have characteristics and display patterns that are not consistent with legitimate sales of eligible food to SNAP benefit customers at a store of this type, size and makeup. Rather, the characteristics are indicative of illegal trafficking in program benefits. The Appellant's contentions do not outweigh this evidence.

The record has yielded no indication of error or discrepancy in the reported findings by the Retailer Operations Division that program benefits were accepted in exchange for cash or consideration other than eligible food. Therefore, based on a review of the evidence in this case, it is more likely true than not true that program violations did, in fact, occur as charged. Therefore, the decision to impose a permanent disqualification from participation in the SNAP against 305 Grocery Deli Corp is sustained.

RIGHTS AND REMEDIES

Your attention is called to Section 14 of the Food and Nutrition Act of 2008 (7 U.S.C. 2023) and to Section 279.7 of the Regulations (7 CFR § 279.7) with respect to your right to a judicial review of this determination. Please note that 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 you reside or are engaged in business, or in any court of record of the State having competent jurisdiction. If any Complaint is filed, it must be filed within thirty (30) days of receipt of this Decision.

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

LORIE L. CONNEEN
ADMINISTRATIVE REVIEW OFFICER

November 12, 2021