

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

Best Third Avenue Gourmet Deli Inc,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0200277

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 Program¹ was properly imposed against Best Third Avenue Gourmet Deli Inc (hereinafter “Best Third Avenue Gourmet Deli Inc” and/or “Appellant”) and its owner of record, by the Retailer Operations Division of the FNS.

ISSUE

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with 7 CFR § 278.6(e)(1) in its administration of the Supplemental Nutrition Assistance Program (SNAP) when it imposed a Permanent Disqualification against Best Third Avenue Gourmet Deli Inc in a letter dated August 17, 2017.

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.

¹ Section 4001(b) of the Food, Conservation, and Energy Act of 2008 (P.L. 110-234; 122 Stat. 1092) amended the Food and Nutrition Act of 2008 by striking “food stamp program” and inserting “supplemental nutrition assistance program” effective October 1, 2008

CASE CHRONOLOGY

In a letter dated June 20, 2017, the Retailer Operations Division informed Appellant that it was being charged with violation of the terms and conditions of the SNAP regulations, 7 CFR §§ 270-282, based on Electronic Benefit Transaction (EBT) SNAP benefit transactions considered to “establish clear and repetitive patterns of unusual, irregular, and inexplicable SNAP activity for your type of firm.”

The Retailer Operations Division record indicates Appellant responded, through counsel, both verbally and in writing and that those responses were duly considered by the Retailer Operations Division. Following that due consideration to the letter of charges, the Retailer Operations Division advised Appellant of a final determination of permanent disqualification from participation in the SNAP in accordance with 7 CFR § 278.6(c) and § 278.6(e)(1) for trafficking violations, in a letter dated August 17, 2017, documented to have been delivered to Appellant on August 18, 2017.

The determination letter also stated that the Retailer Operations Division considered Appellant’s eligibility for a trafficking civil money penalty (CMP) according to the terms of Section § 278.6(i) of the SNAP regulations. The Retailer Operations Division determined that the Appellant was not eligible for the trafficking CMP because the Appellant did not timely submit any evidence to demonstrate the firm had established and implemented an effective compliance policy and program to prevent violations of the SNAP.

In a letter dated August 28, 2017, received in the offices of the Administrative Review Branch on August 29, 2017, Appellant, through counsel, submitted an appeal of the Retailer Operations Division’s assessment, requesting an administrative review of the action. The appeal was granted.

STANDARD OF REVIEW

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

CONTROLLING LAW AND REGULATIONS

The controlling law in this matter is contained in the Food and Nutrition Act of 2008, as amended (the “Act”)², 7 U.S.C. § 2021 and promulgated through regulation under Title 7 of the Code of Federal Regulations (CFR),³ part 278. In particular 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.

² Effective October 1, 2008, the Food Stamp Act of 1977 was superseded by the Food and Nutrition Act of 2008, as amended through P.L. 110-246.

³ Title 7 of the Code of Federal Regulations may be accessed in its entirety via the Internet at https://www.ecfr.gov/cgi-bin/text-idx?tpl=/ecfrbrowse/Title07/7tab_02.tpl

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(e)(1)(i) states, *inter alia*:

“FNS shall disqualify a firm permanently if personnel of the firm have trafficked as defined in §271.2.”

7 CFR § 271.2(1) defines trafficking, *inter alia*:

“ ... the buying, selling, stealing, or otherwise effecting an exchange of SNAP benefits ... 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, *inter alia*:

“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(a) states, *inter alia*:

*“FNS may disqualify any authorized retail food store ... if the firm fails to comply with the Food & Nutrition Act of 2008, as amended, or this part. Such disqualification shall result from a finding of a violation on the basis of evidence that may include facts established through on-site investigations, inconsistent redemption data, **evidence obtained through a transaction report under an electronic benefit transfer system....**” (Emphasis added.)*

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

“Review of evidence. 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...”

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

*“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).**” [Emphasis added]*

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 of the Program.”* [Emphasis added]

SUMMARY OF THE CHARGES

The Retailer Operations Division materials and the charge letter dated June 20, 2017, reveal that charges were based on an analysis of EBT SNAP benefit transaction data during the six (6) month period of October 2016 through March 2017 and involved two (2) patterns of EBT transaction characteristics indicative of trafficking as follow:

- Attachment #1 lists multiple SNAP EBT transactions made from individual benefit accounts in unusually short timeframes.
- Attachment #2 lists excessively large purchase transactions made from the accounts of SNAP recipients.

APPELLANT’S CONTENTIONS

In the letter dated August 28, 2017, counsel, on behalf of Appellant, requested that the charges leading to the permanent disqualification be dropped and the investigation closed. In support of the request duplicate copies of the information provided to the Retailer Operations Division in response to the letter of charges were provided for consideration. Those materials include:

- Explanation that it is believed that Appellant is incorrectly categorized as a convenience store when it operates much more as a grocery store; serving the urban environment of East Harlem with close proximity to several public housing developments.
- Indication that the FNS should re-examine the parameters and categorization of its automated system as it applies to Appellant.
- Denial that the transactions identified in Attachment #1 represent clear and repetitive patterns of unusual, irregular, and inexplicable activity;
 - Citing *Skyson USA, LLC v United States*, No. CV 09-00278BMK, 2010 WL 651032 at *11 where it was determined that there are explanations for multiple transactions in short time frames.
 - Indicating that the Attachment #1 material is “limited” because it represents only 25 unique households; 38 pairings over the six (6) month period; and seven (7) instances of repeat purchases **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**.

- Denial that the transactions identified in Attachment #2 represent sales of unusual, irregular or inexplicable activity because:

Appellant offers a wide variety of SNAP eligible food such as a full Boar's Head deli, name brand cereals, soups, and a wide variety of non-alcoholic beverages; some items are sold in bulk such as cases of water and Red Bull which can exceed 5 U.S.C. § 552 (b)(6) & (b)(7)(C); and, costly infant formula is sold. (Photos provided)

- Even if Appellant suspects some of its customers may purchase bulk items with the intent to re-sell those items elsewhere Appellant is not responsible for the bad acts of its customers. (Reference *USDA Announces Steps to Reduce Fraud and Misuse in SNAP*, FNS Release No. 0002-13)
 - The fact that many of the alleged excessively large transactions occurred at the start of the month supports that they are legitimate purchases because they represent expected results as published in the *Benefit Redemption Patterns in SNAP*, February 2011.
- A sampling of purchase order receipts from vendors to demonstrate that Appellant is a wholly legitimate grocery store that has not and does not engage in SNAP trafficking.

The preceding represents only a brief 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.

ANALYSIS AND FINDINGS

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.

With regards to Appellant's contentions in explanation of questionable transactions, the issue in review is whether there is sufficient evidence, through a preponderance of that evidence, that it is more likely true than not true that the questionable transactions were the result of trafficking.

Appellant Operations:

The record reveals that in reaching a disqualification determination, the Retailer Operations Division considered information obtained during a store visit conducted by FNS contracted personnel on May 15, 2017. The May 15, 2017 visit was authorized by a "worker" and resulted in materials reflecting observations made and responses received from the worker during the store visit which describe the nature and scope of Appellant's operation, as well as the stock and facilities.

The record indicates that Appellant has been authorized in SNAP since August 2016 and is reported to be open 24 hours a day, seven (7) days per week; operating out of a commercial space of approximately 1100 square feet at street level of what appears to include upper level housing. The

material indicates that Appellant operation includes one (1) center display aisle surrounded with refrigerated coolers on one wall, miscellaneous non-food items on the back wall and a deli with kitchen area against the opposite wall. No out of public view storage was declared or identified in the sketch of the store layout however the certified photographs show an area against the back wall that appears to include stacks of beverages which might be considered a stock room (Photo below).



**Photo #11 – Stock Room
Entrance at end of aisle?**



Photo #32 - Storefront

The store visit materials describe Best Third Avenue Gourmet Deli Inc as a convenience; operating with one (1) general use cash register that is not equipped with scanning technology; and, one (1) point-of-sale (POS) terminal. The checkout operation is seen in the certified store visit photographs to be enclosed in a Plexiglas area; with the space for placement of products presented for purchase further hampered by merchandise displays (e.g. bananas in the window seen in photo).



The store visit materials document that there are no hand-held shopping baskets or shopping carts available to support the delivery of purchases to the counter/checkout area for the completion of merchandise price totaling and payment. There is no identifiable area for staging and packaging items presented for purchase.

Appellant's operation includes a deli advertising cold and hot made-to-order sandwiches/ subs/ heroes together with breakfast sandwiches, burgers; and, meat/cheese sold by weight.



Photo #21 – Deli left side



Photo #17 – Deli right side

Photo #46 – Menu Board



The inventory at the time of the May 15, 2017 store visit includes varieties in each of the four (4) staple food groups as follows:

- Five (5) varieties of dairy products with more than 20 units identified in three (3) varieties. Five (5) units of butter or margarine were noted and between six (6) and 20 units of infant formula is identified. Enfamil infant formula priced at \$29.99 for the 22.2 ounce can and \$19.99 for the 12.5 ounce can are identified as two (2) of the four (4) most expensive items in store stock. Notably one of the cans of Enfamil is identified in the photograph to be a product that includes a sticker advising that the product was intended for sale at Walgreens and should be reported if found at alternative outlets. (see photos below)





- Fifteen (15) varieties of fruits and vegetables with the majority (14) identified in units of 20 or more. The majority of the inventory in the fruits and vegetables category is noted to be canned or pre-packaged items with limited fresh/frozen/refrigerated items such as fruit juices, apples, bananas, citrus, onions, and potatoes.
- Eight (8) varieties of breads and cereals were identified with seven (7) of those available in units of 20 or more. The only fresh/frozen/refrigerated items identified in this category include bread and cakes/muffins. The store visit material indicates that the bread shown in inventory is also used in the deli to prepare made-to-order sandwiches.
- Five (5) varieties of meat/poultry/fish staple foods are identified in the store visit materials with deli meats and eggs listed as fresh/frozen/refrigerated. The inventory appears to include a substantial supply of canned meat and fish. The deli meats show in the deli case are understood to be both sold by weight and used in the preparation of hot and cold foods as described in the menu boards positioned above the deli area. Two (2) of the four (4) most expensive items identified for sale at Appellant include deli roast beef priced at \$9.49 per pound and cheddar cheese priced at \$7.99 per pound.

No fresh or frozen meats beyond deli meats; no frozen offerings such as boxes of chicken, individual prepared meals, or frozen vegetable or snacks were identified in the official store visit photographs.

Non-SNAP products and services offered at Appellant include hot food, alcoholic beverages (beer and wine), tobacco products, health and beauty aids, paper goods, cleaning products; and an ATM.

Store Type Classification:

Both in response to the letter of charges and on administrative review Appellant, through counsel, has explained that it is believed that Appellant is incorrectly categorized as a convenience store when

it operates much more as a “grocery store”; serving the urban environment of East Harlem with close proximity to several public housing developments. As a result of this perceived discrepancy Appellant, through counsel indicates that the FNS should re-examine the parameters and categorization of its automated system as it applies to Appellant.

The record shows that the store type classification for Appellant was reviewed by the Retailer Operations Division and found the convenience store classification to be correct within the parameters as established for the agency’s automated system considerations. The classification notwithstanding the store visit materials indicate that although operating much like a typical convenience store with one (1) cash register, one (1) point-of-service terminal, no carts or baskets, a checkout window behind a Plexiglas barrier, etc. Appellant also demonstrated stocking more grocery like items such as those identified by Appellant to include name brand cereals, Boar’s Head deli meats and cheeses for sale by weight, infant formula, etc. Therefore, in an effort to ensure appropriate comparison the Retailer Operations Division documents completing comparisons with area small grocery stores as well as to area convenience stores.

Charge Letter Attachment Analysis:

The data reflected in the letter of charges dated June 20, 2017 is the result of information gained primarily from the Anti-Fraud Locator using Electronic Benefits Transfer (EBT) Retailer Transactions (ALERT) system which is a fraud detection, decision support system designed to monitor and track electronically conducted retail transactions completed by SNAP recipients in authorized meal program and food retailer locations.

The ALERT System facilitates management of the program by providing transaction-level information to Federal personnel charged with the responsibility of SNAP retailer management and compliance. The system uses pre-defined criteria or patterns for potential fraud detection. Pre-formatted reports provide information on those stores and transactions meeting the criteria. ALERT supports both online analysis and online queries and reports for use by FNS. The system does not make the final determination instead it is used by Retailer Operations Division to develop information and evidence for consideration in support of their development of an ultimate decision.

Attachment #1: Represents **multiple SNAP EBT transactions made from individual benefit accounts in unusually short timeframes** and includes 76 transactions; grouped in 37 sets; where 26 households redeemed SNAP benefits in sets of two (2) to three (3) transactions; **5 U.S.C. § 552 (b)(6) & (b)(7)(C). 5 U.S.C. § 552 (b)(6) & (b)(7)(C).**

The Retailer Operations Division documents that completing multiple transactions **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** is a method used by some stores to avoid high dollar transactions that cannot be supported and are indicative of trafficking. The Retailer Operations Division indicates that Appellant operational materials and stock did not evidence any reason why SNAP customers would consider Appellant as a first choice food destination for large orders or multiple purchases. In the instant case there were 26 households identified in Attachment #1 and it was found that 17 of those households also shopped at alternative SNAP authorized vendors during the same general period that they shopped at Appellant. The transactions recorded at those alternative retailers, often larger better stocked firms, by those same households demonstrated shopping that did not generally

include multiple purchases in short time frames. This finding brings into question the transactions at Appellant firm.

Appellant explains that similar to judicial finding such as those identified in *Skyson USA, LLC v United States*, No. CV 09-00278BMK, 2010 WL 651032 at *11 (*Skyson*) Appellant has legitimate explanation for multiple transactions in short time frames. Those explanations include customer familiarity with the store layout which supports rapid delivery to the checkout area of merchandise presented for purchase; children making purchases following parent purchases; forgotten items; and the operation more as a grocery store than a convenience store.

It is important to understand that disqualification actions which are taken to judicial review are provided with a *Trial de Novo* which allows the introduction of new/different evidentiary materials. Thus, the outcomes of judicial cases do not always directly translate to a case in administrative review. Nonetheless the record indicates that the explanations provided by Appellant have been fully considered by the Retailer Operations Division and could not be supported with transaction information for households conducting SNAP transactions at Appellant.

Appellant further indicates that the Attachment #1 material is “limited” because it represents only 25⁴ unique households; 38 pairings over the six (6) month period; and seven (7) instances of repeat purchases 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

5 U.S.C. § 552 (b)(6) & (b)(7)(C).

Multiple very large transactions, such as those identified in transactions #1 and #2 where SNAP transactions 5 U.S.C. § 552 (b)(6) & (b)(7)(C) at a single register without scanning technology, through a window opening in a Plexiglas enclosure are certainly not likely representative of familiarity with the layout of the store, children purchases, or forgotten items.

Similarly, the transactions identified as #57 and #58, 5 U.S.C. § 552 (b)(6) & (b)(7)(C) on consecutive dates are not likely representative of the explanations referenced from the *Skyson* case.

Retailer Operations Division determined that given Appellant’s operational information it is not reasonable that households could bring to the counter quantities of SNAP eligible foods, in the amounts identified in the Attachment #1 materials, from the inventory identified at the store visit to support the transaction amounts or the transaction sets as listed.

Attachment #2: Represents **excessively large purchase transactions made from the accounts of SNAP recipients** with 284 transactions 5 U.S.C. § 552 (b)(6) & (b)(7)(C).
5 U.S.C. § 552 (b)(6) & (b)(7)(C).

The Retailer Operations Division indicates that the average convenience store transaction in the State of New York in the focus period was \$8.95 and the average convenience store transaction in the county was \$8.68. 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

5 U.S.C. § 552 (b)(6) & (b)(7)(C).

⁴ The data represent 37 (not 38) “pairings” and 26 (not 25) households.

5 U.S.C. § 552 (b)(6) & (b)(7)(C).

5 U.S.C. § 552 (b)(6) & (b)(7)(C).

Retailer Operations Division documents that the transactions are suspicious in consideration of the operation and facilities of Appellant. As previously indicated the store visit materials, completed in cooperation with the worker authorizing the May 15, 2017 contracted store visit, revealed that the most expensive SNAP eligible items sold @ Appellant include infant formula @ \$29.99 and \$19.99; plus deli meat and cheese and \$9.49 and \$7.99 per pound.

5 U.S.C. § 552 (b)(6) & (b)(7)(C).

As evidence Appellant provided 13 photographs of the availability of general inventory, including four (4) that specifically depict stacks of alcoholic and non-alcoholic beverages. Notably the four (4) photographs of stacked cases of beverages were not consistent with the photographs collected during the official contracted store visit of May 15, 2017.

The official store visit reports no identified stock room/basement storage of merchandise however, as noted above it is possible that there is some storage stocked in what implies the availability of a stock room at the back of the first aisle of merchandise. It is not possible to definitely identify merchandise available in bulk quantity as described by Appellant.

Appellant, through counsel, offered the position that if there might be suspicion of customers making large purchases in bulk for re-sales Appellant is not responsible for the bad acts of its customers. Appellant is correct in that Appellant bears no responsibility for the acts of its customers unless it is evidenced to be complicit or colluding with those customers in the illegal activity of reselling SNAP purchased goods (see 7 CFR 271.2(1)).

It is conceded that many of the alleged excessively large transactions occurred at the start of the month, which is consistent with the findings of the FNS *Benefit Redemption Patterns in SNAP*, February 2011 study referenced by Appellant. What time of the month the transactions occurred is not identified by the Retailer Operations Division as a consideration in the suspicious nature of the Attachment #2 materials.

Invoice Materials:

Both in response to the letter of charges and on administrative review, Appellant, through counsel provided eight (8) vendor invoices indicating that these materials demonstrate that Appellant is a wholly legitimate grocery store that has not and does not engage in SNAP trafficking. Appellant is noted to routinely refresh its inventory with sometimes twice weekly inventory purchases.

The Retailer Operations Division documents analyzing the materials finding:

- Only two (2) invoices were dated in the expressed focus period of December 2016 through May 2017 and include:
 - An invoice from Derle Far Is Inc dated May 30, 2017, 5 U.S.C. § 552 (b)(6) & (b)(7)(C) for milk.

- An invoice from Triangle Food Service, also dated May 30, 2017, for deli meat, cheese and margarine 5 U.S.C. § 552 (b)(6) & (b)(7)(C).
- The invoice dated July 17, 2017, did not include any vendor or product information.
- The remaining five (5) invoices were each from distinct vendors i.e. Ready Refresh, Frito-Lay, Tropicana, Randazzo Provisions, and Coca-Cola, therefore no pattern of repeated restocking could be established.
- Two (2) of the invoices were for deli items; one (1) was for milk; one (1) was for water; and the remaining three (3) were for beverages such as soda and accessory foods such as chips/candy.

On review it is found that the materials do not clearly evidence the existence of a “wholly legitimate grocery store that has not and does not engage in SNAP trafficking.”

Comparison/Competitor Store Information:

Retailer Operations Division documents that the subject firm is located in an area that is well served by 38 SNAP authorized retailers including one (1) superstore and one (1) supermarket located within one-quarter mile of Appellant. The number also includes 10 small grocery stores; seven (7) medium grocery stores and one (1) large grocery store. Review of the stock identified in the contracted store visit materials of May 15, 2017 reveal no unique offerings at Appellant that would suggest the comparison of neighboring firms to Appellant would be inequitable.

Comparison of the average number of transactions and the average transaction amounts for Best Third Avenue Gourmet Deli Inc and the six (6) closest small grocery stores⁵ is summarized in Table I below.

5 U.S.C. § 552 (b)(7)(E).

Appellant information and materials do not explain why during the same period the instance of the type of suspicious transaction identified in the charge letter attachment is so different between Appellant and the closest six (6) small grocery stores.

Retailer Operations Division identified that instances of the occurrence of transactions in the suspicious transaction patterns shown in Attachments #1 and #2 in the letter of charges documented to have been received by Appellant on June 21, 2017, significantly reduced in the month of July 2017. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Significant changes in suspicious transaction patterns can reasonably be considered to occur when a firm is adjusting its sales patterns upon notification of the types of suspicious transactions being tracked.

Household Analysis:

An analysis was completed of the SNAP transactions of 10 households identified in the attachment materials to the letter of charges. The analysis reveals that each of the households

⁵ As indicated previously the Retailer Operations Division compared Appellant to the nearest small grocery stores instead of the nearest convenience stores in recognition of the inventory available at Appellant.

analyzed conducted numerous suspicious transactions at Appellant, clearly distinct from the patterns for the same households at alternative shopping venues as described by the Retailer Operations Division.

For example:

- One household is documented to have completed 94 total SNAP transactions in the focus period with 16 of them at Appellant. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). The remaining 78 SNAP transactions occurred at convenience stores, combination grocery stores, small grocery stores and seven (7) supermarkets and superstores. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). The average transaction at supermarkets and superstores 5 U.S.C. § 552 (b)(6) & (b)(7)(C) despite inventory at Appellant including limited fresh fruits and vegetables and no fresh or frozen meats beyond deli meats. No frozen offerings such as boxes of chicken, individual prepared meals, or frozen vegetable or snacks were identified in the official store visit photographs.
- Another household is shown to have conducted 27 SNAP transactions in the focus period with 17 of those at Appellant and 10 at a nearby superstore. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). There is no merchandise identified as available at Appellant that was not also identified as available at the superstore.
- Nine (9) of the 10 households reviewed completed both multiple transactions in short time frames and excessively large transactions at Appellant in the focus period while also conducting transactions at convenience stores, large grocery stores superstores, supermarkets, etc. intermittently dispersed throughout the period.

Denial of Charges:

Appellant provides that no trafficking has been committed asserting that Appellant is a legitimate grocery store. No owner or customer affidavits were advanced for consideration to support the denial of trafficking. Therefore, absent evidence in support of the contention, the contention cannot be used to mitigate or reverse the current charges in review.

Civil Money Penalty

Part 278.6(f)(1) 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 assessments thereunder: “A civil money penalty for hardship to Food Stamp [SNAP] households may not be imposed in lieu of a permanent disqualification.” Therefore, this civil money penalty provision is not applicable in the present case.

As previously indicated the August 17, 2017 determination letter advised Appellant of the ineligibility for consideration for a trafficking civil money penalty (CMP) according to the terms of Section § 278.6(i) of the SNAP regulations. The letter of charges dated June 20, 2017 advised Appellant that documentation of eligibility for that alternative sanction was to be provided within 10

days. The record documents that no request for a civil money penalty in lieu of disqualification was made by Appellant, either verbally or in writing. Additionally no materials were provided for consideration that Appellant met the four criteria qualifying for the alternative sanction.

Therefore, on review the Retailer Operations Division's determination that Appellant firm is ineligible for the imposition of civil money penalties in lieu of disqualification is affirmed.

CONCLUSION

The Retailer Operations Division analysis of Appellant's EBT transaction records, upon which charges of violations are based, together with observations made during the contracted store visit provide substantial evidence that questionable transactions during the focus period have characteristics that are not consistent with legitimate sales of eligible food to SNAP customers at a store of the nature and scope as described in the preceding materials. Rather, the characteristics are indicative of illegal trafficking in program benefits.

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 and that the Retailer Operations Division has provided substantial evidence of trafficking violations.

Based on the discussion above, the decision to impose a permanent disqualification from participation in the SNAP against Best Third Avenue Gourmet Deli Inc is sustained.

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.

NANCY BACA-STEPAN
Administrative Review Officer

January 9, 2018