

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

Markle Deli & Grocery,

Appellant,

v.

Case Number: C0186224

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 Markle Deli & Grocery (hereinafter “Markle Deli & Grocery” 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 Markle Deli & Grocery.

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 December 3, 2015, the Retailer Operations Division informed the Appellant that Markle Deli & Grocery 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).

The record indicates that in a letter dated December 9, 2015, the Appellant's counsel requested information and documents from FNS with regard to the agency's case against Markle Deli & Grocery pursuant to the Freedom of Information Act (FOIA). In a letter dated January 15, 2016, 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 received on March 1, 2016. In a letter dated August 10, 2020, FNS provided the Appellant's counsel with a response to the FOIA appeal. On August 12, 2020, the Retailer Operations Division sent a 10 day letter to counsel providing the opportunity to respond to the letter of charges. In an email correspondence of August 21, 2020, the Appellant's counsel requested and was granted an extension to September 11, 2020 to provide a response to the charge letter.

In responses to the Retailer Operations Division of August 21, 2020 and September 11, 2020, the Appellant, through counsel, replied to the charges therein denying the trafficking allegations and providing various explanations for the SNAP transactions outlined in the December 3, 2015 charge letter. The Appellant also requested in the event that FNS determines that SNAP violations occurred at the Appellant firm, that a civil money penalty be imposed in lieu of a SNAP disqualification.

After considering the Appellant's replies and the evidence in the case, the Retailer Operations Division issued a determination letter dated September 18, 2020, informing the Appellant that Markle Deli & Grocery was being permanently disqualified from participation in the SNAP in accordance with 7 CFR § 278.6(e)(1) for trafficking violations. The letter also stated that the Appellant was not eligible for a trafficking civil money penalty (CMP) 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 September 30, 2020, the Appellant, through counsel, requested an administrative review of the Retailer Operations Division's decision to permanently disqualify the firm from participation in the SNAP. FNS granted the Appellant's request for administrative review by letter dated October 15, 2020. In an email correspondence of October 30, 2020, the Appellant's counsel requested and was granted an extension to November 20, 2020 to provide additional information in support of the request for administrative review. In an email correspondence of November 19, 2020, the Appellant, through counsel, provided additional information in support of the request for administrative review.

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 contained in the Food and Nutrition Act of 2008, amended, 7 U.S.C. § 2021 and 278 of Title 7 of the Code of Federal Regulations (CFR). 7 U.S.C. § 2021, Part 278.6(a) and Part 278.6(e)(1)(i) of the Regulations establish the authority upon which a permanent disqualification may be imposed upon a retail food store or wholesale food concern. There also exist FNS policy memoranda and clarification letters which further explain the conditions necessary in order to permanently disqualify retail stores.

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

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

7 CFR § 278.6(a) states, inter alia:

FNS may disqualify any authorized retail food store ... if the firm fails to comply with the Food 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 June 2015 through October 2015. This involved the following SNAP transactions patterns which are indicative of trafficking:

- There were multiple transactions made from the accounts of individual SNAP households in unusually short timeframes; and
- There were excessively large EBT purchase transactions made from SNAP 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 replies to the charge letter, in the administrative review request, and in subsequent correspondence, the Appellant, through counsel, stated the following summarized contentions, in relevant part:

- The Appellant denies that any violations of the SNAP regulations has occurred. Neither of the allegations noted in charge letter themselves are strict proof of trafficking and are violations of trafficking under statutory definitions as outlined in Section 271.2. A close

analysis of the statute reveals that no trafficking violations as outlined by the statute have occurred. USDA did not provide any evidence of any returns being made and therefore no trafficking has occurred under sections 271.2 (3) and (4). A visit of the store facilities revealed that no firearms or other materials listed in 271.2 (2) have occurred.

- With regard to the SNAP transactions documented in charge letter Attachment 1, USDA has submitted six transactions alleging that they were completed in close time proximately and therefore has arbitrarily determined that this indicates that trafficking or other illegal activity has occurred. USDA has failed to provide appropriate identifying information to properly investigate the charges. Specifically, who made the purchases and what items were purchased. Therefore, the Appellant must give his best answer according to his reasonable beliefs as to what occurred during these transactions. Alleged violations 1 through 62 are a series of transactions in which the same account was charged twice in rapid succession. Where rapid succession is considered as the same card being swiped 5 U.S.C. § 552 (b)(6) & (b)(7)(C), this happened 31 times within 175 days resulting in 62 alleged violations. None of these violations occurred on the same day, meaning over the course of the 175-day review period, this happened on 31 of those days and the 31 times it happened only once that day. This frequency, or lack thereof, is a strong indicator that these are random occurrences and not part of a program or store policy to engage in any routine prohibited activity. These charges alone are not evidence that trafficking has occurred. For various personal reasons customers choose to process their orders at the checkout counter as separate purchases. Some customers choose this option for personal budgeting purposes, others forget items and add them on after their order has been totaled. Lastly, many simply are unaware of what their total will be until the transaction is complete. Once the transaction is complete, they are clear they have more money to spend and add additional items. The store visit observations concluded that the store operator had a simple cash register which is not the type that subtotals items and shows the result to the customer. Therefore, a customer who is unable or unwilling to calculate their own subtotal must wait until the transaction is complete.
- With regard to the SNAP transactions documented in charge letter Attachment 2, USDA provided a list of 246 transactions, providing only date, time and amount alleging they are “excessively large purchase transactions” alleging that this is proof of trafficking. This is not proof of trafficking, there is no evidence to support these transactions are excessively large as they are alleged. Under Section 271.2 large transactions do not constitute trafficking as defined in the statute. According to a report from USDA, the Appellant sold 5 U.S.C. § 552 (b)(6) & (b)(7)(C) annually resulting in an average monthly food sale of 5 U.S.C. § 552 (b)(6) & (b)(7)(C), an average of 5 U.S.C. § 552 (b)(6) & (b)(7)(C) per day based on 252 business days per year. During the five month review period, the Appellant conducted 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in sales. The alleged 246 “excessively large” purchases 5 U.S.C. § 552 (b)(6) & (b)(7)(C). The primary business of the store is grocery sales. There is no evidence presented to determine what constitutes an excessively large purchase. As customer needs vary according to family size it cannot be determined merely by looking at the charge that a trafficking violation has occurred as each customer has unique and specific needs regarding their food budget. However, all things being considered 5 U.S.C. § 552 (b)(6) & (b)(7)(C) is a small fee to spend on groceries and it is unreasonable to be considered an “excessively large” purchase. The remaining 70

alleged excessive transactions **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. Overall, no evidence has been presented to establish what makes these charges excessive and how that constitutes trafficking. It is understood by all that there are various customers with varying food needs and evidence of some customers spending more than others is no way evidence of wrongdoing or falls within any statutory definition of trafficking. Without being provided the identity of who purchased these items, the Appellant cannot know with certainty the content of these purchases. USDA has failed to provide that information and therefore, the Appellant must respond with his best estimate as to what constituted those charges over the review period. To the best of his knowledge and information, the charges presented represent the normal variety of purchases seen within a busy grocery store setting. None of the charges exceed 20% of the average daily sales and therefore it begs to reason that they simply occurred within the normal course of business.

- In the event that FNS determines, despite the evidence, that a violation has occurred the Appellant requests consideration of a civil money penalty in lieu of a SNAP disqualification. The Appellant is owned by a sole owner whom has taken great care to make sure that no violations have ever occurred prior to or since this allegation. The owner has taken all the necessary training materials provided by USDA and never knowingly violated any SNAP regulations. As English is not the owner's first language, he has taken all reasonable precautions to ensure he is operating within the color of the law.

ANALYSIS AND FINDINGS

SNAP Authorization

FNS authorized Markle Deli & Grocery for participation in the SNAP on January 30, 2012. During the review period of June 2015 through October 2015, Markle Deli & Grocery 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 September 30, 2015 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 900 square feet in size with no storage outside of public view;
- No shopping carts or 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;
- No optical scanners;
- 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;
- Had some partially-filled shelves;
- No fresh or frozen meats, poultry, or seafood;
- No frozen foods;
- Hot foods were not sold;
- Deli meats and cheeses and prepared salads were sold by the pound and prepared, made-to-order sandwiches were sold;
- Meat items included units of canned fish, canned/potted meat, bacon, and hot dogs;
- Dairy included milk, butter, sour cream, and cheese;
- Fresh produce stock consisted of a few onions and bananas;
- Other staple foods available for purchase included such items as juice, pasta, rice, cereal, baking mix, loaf bread, corn meal, flour, and canned goods;
- Much of the remaining food stock consisted of accessory foods such as candy, carbonated and non-carbonated drinks, sugar, vegetable oil, and condiments; and
- Ineligible nonfood items included tobacco products, health and beauty aids, paper products, household cleaning supplies, automotive supplies, clothing, pet food, and charcoal.

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.

The Retailer Operations Division presented a case that the Appellant trafficked SNAP benefits. Each Attachment furnished with the charge letter represents the questionable and unusual patterns of SNAP transactions indicative of trafficking which were conducted at the Appellant during the review period. A singular transaction could appear in more than one Attachment as it can meet the criteria for several different types of flags. As patterns of unusual transactions appear across multiple Attachments the case of trafficking becomes more convincing.

Repeat Transactions by the Same Household (Charge Letter Attachment 1)

This charge letter Attachment documents 30 sets of transactions (62 total transactions) **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** in SNAP benefits to meet the parameters of this scan. These transactions were conducted by 19 different SNAP households. 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 where rapid succession is considered as the same card being swiped **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**, this happened 31 times within 175 days resulting in 62 alleged violations. None of these violations occurred on the same day, meaning over the course of the 175-day review period, this happened on 31 of those days and the 31 times it happened only once that day. This frequency, or lack thereof, is a strong indicator that these are random occurrences and not part of a program or store policy to engage in any routine prohibited activity. These charges alone are not evidence that trafficking has occurred.

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.

The Appellant contends that for various personal reasons customers choose to process their orders at the checkout counter as separate purchases. Some customers choose this option for personal budgeting purposes, others forget items and add them on after their order has been totaled. Lastly, many simply are unaware of what their total will be until the transaction is complete. Once the transaction is complete, they are clear they have more money to spend and add additional items. The store visit observations concluded that the store operator had a simple cash register which is not the type that subtotals items and shows the result to the customer. Therefore, a customer who is unable or unwilling to calculate their own subtotal must wait until the transaction is complete.

However, these transaction sets do not contain the characteristics associated with a household purchasing a forgotten item right after checking-out or of a household making a separate purchase to check their balance followed by another transaction as 25 of the 30 transaction sets

occurred 5 U.S.C. § 552 (b)(6) & (b)(7)(C) apart. The transaction sets also do not contain the characteristics of a household returning later in the day to purchase a forgotten item or two as 26 of the 30 sets have subsequent transactions 5 U.S.C. § 552 (b)(6) & (b)(7)(C), far more than the cost of a forgotten item or two.

The report and photographs from the store visit offer no explanation as to why SNAP customers would routinely shop at Markle Deli & Grocery 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. In addition, there was a small checkout area with one cash register for food purchases and one EBT POS device for ringing-up SNAP transactions. There were no shopping carts or hand-held baskets at the time of the store visit available to customers for transporting food within the store. There were no optical scanners or conveyor belts to expedite high dollar or rapid consecutive purchases.

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, there are six (6) SNAP authorized retailers of a comparable or larger size, including a supermarket, located within a 1.0 mile radius of Markle Deli & Grocery that can meet the nutritional needs of SNAP customers. Some of these authorized SNAP stores are larger than Markle Deli & Grocery 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 Markle Deli & Grocery 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.

5 U.S.C. § 552 (b)(7)(E).

Unfortunately, the Appellant has not provided any evidence to show that the transactions listed in this Attachment were legitimate purchases of eligible foods. The Appellant provided no arguments or evidence to substantiate its claim that trafficking did not occur.

Excessively Large Transactions (Charge Letter Attachment 2)

This charge letter Attachment documents 246 SNAP transactions, 5 U.S.C. § 552 (b)(6) & (b)(7)(C). 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 contends that under Section 271.2 large transactions do not constitute trafficking as defined in the statute. According to a report from USDA, the Appellant sold 5 U.S.C. § 552 (b)(6) & (b)(7)(C) annually resulting in an average monthly food sale of 5 U.S.C. § 552 (b)(6) & (b)(7)(C), an average 5 U.S.C. § 552 (b)(6) & (b)(7)(C) per day based on 252 business days per year. During the five month review period, the Appellant conducted 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in sales. The alleged 246 "excessively large" purchases 5 U.S.C. § 552 (b)(6) & (b)(7)(C). The primary business of the store is grocery sales. There is

no evidence presented to determine what constitutes an excessively large purchase. The remaining 70 alleged excessive transactions 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Overall, no evidence has been presented to establish what makes these charges excessive and how that constitutes trafficking.

However, the FNS store visit report and photos show that Markle Deli & Grocery offers a minimal stock of SNAP eligible foods with no fresh or frozen meats, poultry, or seafood, a minimal variety and amount of fresh produce, no frozen foods, and a lack of an abundant depth and breadth of staple foods. The store also had some partially stocked shelves. The store visit evidence also shows only a few high priced eligible foods in stock that would account for these large amounts and no evidence of a price advantage or custom or special services rendered at the subject store that are not offered at other authorized SNAP stores in the area. 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 September 30, 2015, 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. And, although the Appellant asserts that 5 U.S.C. § 552 (b)(6) & (b)(7)(C) is a small grocery fee, the store must have stocked inventory to repetitively generate large sales, which was not evident in the store visit.

The Appellant contends that it is understood by all that there are various customers with varying food needs and evidence of some customers spending more than others is no way evidence of wrongdoing or falls within any statutory definition of trafficking. To the best of his knowledge and information, the charges presented represent the normal variety of purchases seen within a busy grocery store setting. None of the charges exceed 20% of the average daily sales and therefore it begs to reason that they simply occurred within the normal course of business.

FNS agrees that families have various food needs depending on their size, budget and other characteristics; however, the establishment must provide items for the customers' shopping desires. The stock in the subject store was more consistent with that of a convenience store as opposed to a small grocery store. 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. It is rare for a small grocery store such as the Appellant firm to have purchases like those included in Attachment 2 to the charge letter.

5 U.S.C. § 552 (b)(7)(E).

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.

5 U.S.C. § 552 (b)(7)(E).

The store's layout, infrastructure, and food inventory do not support a high percentage of transactions markedly exceeding those of similar type stores. In addition to the statistical irregularity of such high dollar transactions, the limited availability of counter space for checking out and the lack of shopping carts and hand-held baskets support the Retailer Operations Division's determination. It is not plausible that the store's customers are carrying large amounts of food around the store without the benefit of shopping carts and/or hand-held baskets. Customers purchasing such large quantities of food items would have to hold them in their arms, or enlist the help of others while shopping.

The 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.

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.

CIVIL MONEY PENALTY

In the December 3, 2015 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 as specified within ten days of the Appellant's receipt of their charge letter. As specified in 7 CFR § 278.6(i), in determining the minimum standards of eligibility of a firm for a civil money penalty in lieu of trafficking, the firm shall, at a minimum, establish by substantial evidence its fulfillment of each of the following four criteria:

Criterion 1. The firm shall have developed an effective compliance policy as specified in 7 CFR § 278.6(i)(1);

Criterion 2. The firm shall establish that both its compliance policy and program were in operation at the location where the violations(s) occurred prior to the occurrence of violations cited in the charge letter;

Criterion 3. The firm had developed and instituted an effective personnel training program as specified in 7 CFR § 278.6(i)(2); and

Criterion 4. Firm ownership was not aware of, did not approve, did not benefit from, or was not in any way involved in the conduct or approval of trafficking violations.

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 replies to the charge letter and in subsequent correspondence provided in support of the administrative review request, the Appellant requested consideration of a civil money penalty in lieu of a SNAP disqualification. The Appellant contends that the firm is owned by a sole owner whom has taken great care to make sure that no violations have ever occurred prior to or since this allegation. The owner has taken all the necessary training materials provided by USDA and never knowingly violated any SNAP regulations. As English is not the owner's first language, he has taken all reasonable precautions to ensure he is operating within the color of the law.

However, the Appellant provided no supporting documentation in support of its request for the imposition of a CMP in lieu of SNAP disqualification. The Retailer Operations Division therefore determined that the Appellant was not eligible for a trafficking civil money penalty in lieu of a disqualification under 7 CFR § 278.6(i) 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. **5 U.S.C. § 552 (b)(7)(E).**

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).

With regard to the Appellant's contention that the firm is owned by a sole owner whom has taken great care to make sure that no violations have ever occurred prior to or since this allegation, a record of participation in the SNAP with no previously documented instance of violations does not constitute valid grounds for dismissal of the current charges of violations or for mitigating the impact of those charges.

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 Markle Deli & Grocery 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.

LORIE L. CONNEEN
ADMINISTRATIVE REVIEW OFFICER

December 14, 2020