

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

Mark's Party Store,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0200817

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 Mark's Party Store (hereinafter "Mark's Party Store" and/or "Appellant") and its owners/partners 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 Mark's Party Store in a letter dated August 30, 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.

CASE CHRONOLOGY

In a letter dated August 8, 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 §§

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

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, in writing. Following documented consideration of Appellant’s response 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 30, 2017, documented to have been delivered to Appellant on August 31, 2017.

The determination letter also advised 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 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 September 9, 2017, received in the offices of the Administrative Review Branch on September 13, 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.

Over the course of the pendency of this appeal counsel has requested and received various extensions for the provision of materials for consideration. Upon submission of additional materials those have been made available to the Retailer Operations Division for analysis and assessment of any impact to the permanent disqualification in appeal. Additionally, counsel, on behalf of Appellant submitted a Freedom of Information Act (FOIA) request on January 18, 2018, for which responsive materials are documented to have been provided on March 15, 2018. Following counsel’s receipt of the FOIA materials no further information has been made available in the 21 days allowed for additional response.

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.

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

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

7 CFR § 278.6(e)(1)(i) states, in relevant part:

“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, in relevant part:

“ ... 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, in relevant part:

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

7 CFR § 278.6(a) states, in relevant part:

“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, in relevant part:

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

“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, in relevant part:

“Firms that request consideration of a civil money penalty in lieu of a permanent disqualification for trafficking shall have the opportunity to submit to FNS information and evidence ... that establishes the firm’s eligibility for a civil money penalty in lieu of a permanent disqualification in accordance with the criteria included in §278.6(i). **This information and evidence shall be submitted within 10 days, as specified in §278.6(b)(1).**” [Emphasis added]

7 CFR § 278.6(i), states, in relevant part:

“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 August 8, 2017, reveal that charges were based on an analysis of EBT SNAP benefit transaction data during the six (6) month period of January through June 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 September 9, 2017, counsel, on behalf of Appellant, contends that:

- The allegations included in the August 8, 2017 letter of charges were not specific;
- The request for responsive material type was vague;
- The issue of re-training was not raised in the letter of charges;
- Appellant was not given a meaningful opportunity to mitigate, clear up and/or address issues presented in the letter of charges;
- Appellant has no prior record of SNAP violations, beyond the sale of ineligible items identified in a USDA investigation more than 25 years ago;
- Appellant sought guidance regarding expected responses to the letter of charges; was rebuffed, denied and permanently disqualified;

- Appellant made it clear that no Point-of-Sale (POS) system equipped to track individual transactions was available; thereby putting Appellant at a disadvantage in the ability to provide responses to specific transactions; and,
- Despite Appellant's cooperation with an in-store visit in February 2017⁴, no notice of possible violation was brought to Appellant's attention.

Counsel, on behalf of Appellant requested that:

- The decision to permanently disqualify Appellant be overturned with the SNAP authorization privileges restored;
- For mitigation purposes:
 - Appellant be required to engage in extensive training;
 - Appellant be required to install a POS system capable of accurately tracking specific transactions; and,
 - A probationary period of 90 days be instituted.

Counsel, on behalf of Appellant, subsequently provided materials including photographs, proof of inventory purchases for January through June 2017; and a 41 point explanation of the transactions identified in the August 8, 2017 letter of charges. The responsive materials were provided to the Retailer Operations Division for analysis and consideration of their impact to the determination of permanent disqualification in review.

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 11, 2017. The May 11, 2017 visit was authorized by one (1) of the owners/partners of record and resulted in materials reflecting observations made, and responses

⁴ No record of a February 2017 store visit was found in the official record.

received, from the owner during the store visit which describes the nature and scope of Appellant's operation, as well as the stock and facilities.

The record indicates that Appellant was most recently authorized in SNAP effective May 3, 2012 as a convenience store, in accordance with FNS definitions. The record also includes a history of participation of Appellant, from August 4, 1986 to June 18, 1997. There is no record of SNAP authorization for Appellant between June 18, 1997 and May 3, 2012.

Appellant is currently reported to be open from 9AM until 10PM, from Sunday through Thursday; and from 9AM until 11PM on Friday and Saturday; operating out of a commercial space of approximately 1000 square feet at street level of what appears to be a warehouse type structure. (See photos below)

The material indicates that Appellant's operation includes five (5) two-sided aisles; front opening refrigerated coolers against one (1) wall that are annotated as stocked with beer. Appellant's back wall is shown to include a "broken freezer" and front opening refrigerated coolers containing juice and soda. Along the front wall Appellant is shown to display paper stock (toilet paper, paper towels, and Kleenex tissues). The checkout area enclosed in Plexiglas and equipped with carousel type pass-through windows for the processing of purchase transactions. The counter space in front of the pass-through carousels is stocked with candy, various merchandise displays, and lottery materials. The checkout area is fronted with an ice cream freezer and a stack of charcoal and charcoal lighter obstructing two (2) of what appear to be three (3) carousel windows. Behind the checkout counter area Appellant is shown to stock various liquors; and includes two (2) glass enclosed containers holding non-food health and beauty aids, miscellaneous clothing articles (hats, t-shirts) and a limited supply of infant formula. There is a deli case shown, displaying readymade sandwiches.

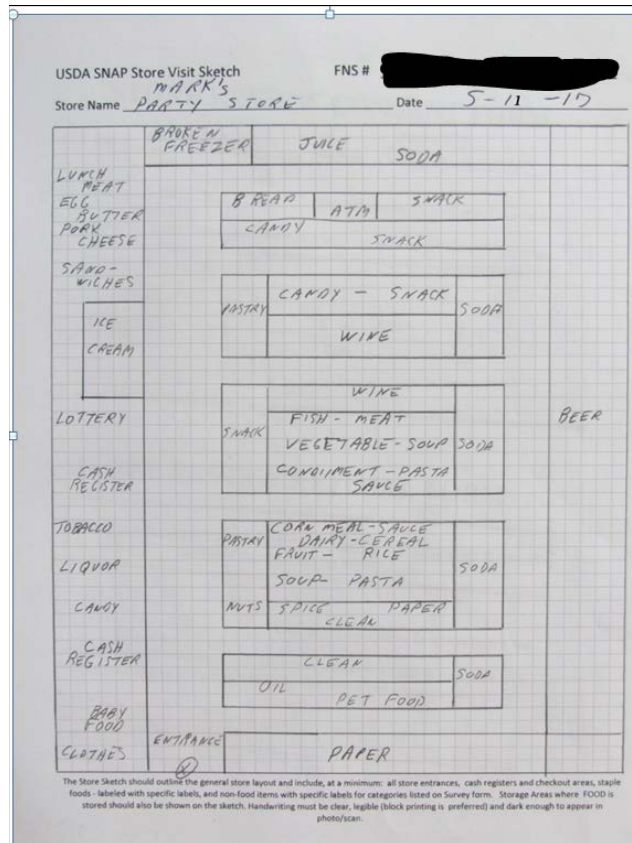


Photo # 9 – Store Sketch

No out of public view storage was declared or identified in the sketch of the store layout however Appellant provided photos show storage space available behind the displayed product in the refrigerated coolers; and, an area where recycled cans and bottles are shown in plastic bags.

The store visit materials describe Mark's Party Store to be operating with two (2) cash registers, one (1) used for general grocery checkout and the other dedicated to lottery activity. Neither register is identified to be equipped with scanning technology. There is one (1) POS terminal declared and seen in the store visit photographs. The checkout operation is seen in the certified store visit photographs to include limited space for placement of products presented for purchase, further hampered by merchandise and lottery displays. The use of carousel style checkout windows further hampers the customer's ability to pass through larger items, inhibiting the checkout process further.

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.

Appellant's operation includes a deli, stocked with pre-packaged sandwiches, at the time of the store visit. Photographs provided during the pendency of the appeal, by Appellant, show the deli case empty of the sandwich stock seen during the store visit.

Certified photographs from the May 11, 2017, contracted store visit are presented below:



Photo # 26 – Storefront with Signage



Photo # 12 – Counter Area with POS Device



Photo # 21 - Storefront



Photo #13 – Checkout Carousel #2



Photo # 17 – Checkout Carousel #3



Photo # 10 – Stock of Infant Formula



Photo # 22 – Store Overview



Photo # 35 – Stock of Infant Formula & HBA

The inventory checklist completed at the time of the May 11, 2017 store visit identifies food varieties available in each of the four (4) staple food groups as follows:

- Five (5) varieties of dairy products including more than 20 units of butter/margarine and ice cream; and, between six (6) and 20 units of cheese, milk, and infant formula.
- Thirteen (13) varieties of fruits and vegetables with four (4) of those varieties available in units of 20 or more consisting of primarily canned stock. Six (6) of the remaining identified stocking units of between six (6) and 20. Three (3) of the varieties included less than five (5) units each. Notably the only fresh frozen or refrigerated foods include fruit juices.
- Eight (8) varieties of breads and cereals were identified with between six (6) and 20 units of breakfast cereals and loaf bread; and, the remaining varieties were documented as available in units of 20 or more and consisted of snacks, pasta, cakes/muffins, and corn meal/grits.
- Seven (7) varieties of meat/poultry/fish staple foods are identified in the store visit materials with one (1) package of bacon; five (5) dozen eggs; between six (6) and 20 units of deli meats/hot dogs; and, canned shell fish. There are three (3) inventory items showing more than 20 units each and those include canned meats, canned finned fish, and meat jerky.

There were only three (3) items identified with prices over \$5 and those include:

- Pre-packaged sandwiches selling for \$5.99 each;
- Similac infant formula selling for \$15.99; and,
- Bags of Pistachios selling for \$5.49.

The store visit materials specifically indicate that there were no other SNAP eligible food items priced at more than \$5 at the time of the store visit.

As previously indicated there are 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 as available for customer purchase. The only frozen offering, stored in the chest type freezer, appeared to be ice.

Non-SNAP products and services offered at Appellant include, alcoholic beverages (beer & liquor), lottery tickets; tobacco products; health and beauty aids; paper goods; cleaning products; automotive products; charcoal and lighter fluid; pet foods; and a limited supply of clothes such as hats and T-shirts.

Charge Letter Attachment Analysis:

The data reflected in the letter of charges dated August 8, 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 50 transactions; grouped in 18 sets; where 14 households redeemed SNAP benefits in sets of two (2) to four (4) transactions; 5 U.S.C. § 552 (b)(6) & (b)(7)(C). The transactions listed represent 5 U.S.C. § 552 (b)(6) & (b)(7)(C) or almost nine (9) percent of Appellant's total SNAP redemptions during the focus period. 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

The Retailer Operations Division documents that completing multiple transactions within a 5 U.S.C. § 552 (b)(6) & (b)(7)(C) period is a method used by some stores to avoid high dollar transactions that cannot be supported and are indicative of trafficking.

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.

In materials provided while pending this appeal 41 contentions were provided to counter the conclusion drawn by the Retailer Operations Division. Consolidated and summarized points relative to the pattern in review include:

- Some multiple entries can be explained by machine and employee errors.
- Many patrons are indecisive and add additional items after their orders have already been processed.
- The aberrant transaction patterns are reflective of the economic and racial demographics of the neighborhood and the fact that the area is urban.

On review of Appellant's explanations the Retailer Operations Division found that:

- A claim of mechanical or human error is vague and anecdotal, not explaining the transaction pattern, or the specific transactions in review.
- The transactions in the pattern being reviewed are not supported with an explanation of indecisiveness at checkout. 5 U.S.C. § 552 (b)(6) & (b)(7)(C).
- If unique local demographics or shopping preferences could explain the aberrant transaction patterns outlined in the charge letter, one would expect to see similar trends among the five (5) nearest SNAP-authorized competitors of the same store type. This was not the case.

On review it is noted that the transactions listed include characteristics which add to the suspicion of their legitimacy. For example there are three (3) transactions that are noted to have been completed outside the business hours of Appellant (prior to the 9AM posted opening). Similarly there are two (2) transaction sets in which at least one (1) of the transactions was completed in a different method than the other transactions in a set. Typically SNAP EBT transactions are conducted in the "swipe" method which indicates the card is on site and being swiped to complete the action. Other times, SNAP EBT cards do not properly function on the POS devices resulting in "manual" transaction processing. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Additionally, two (2) households are each shown to have completed multiple transactions in multiple months of the review period.

Attachment #2: Represents **excessively large purchase transactions made from the accounts of SNAP recipients** with 280 transactions 5 U.S.C. § 552 (b)(6) & (b)(7)(C) conducted by 87 households at Mark's Party Store in the focus period. The transactions represent 5 U.S.C. § 552 (b)(6) & (b)(7)(C) over 42 percent of Appellant's total SNAP redemptions recorded in the focus period.

The Retailer Operations Division indicates that the average convenience store transaction in the State of Michigan in the focus period was \$6.22; the average convenience store transaction in the county (Wayne) was \$5.63; 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

The Retailer Operations Division documents that review of the store visit materials did not reveal an specialty food items, no fresh meat, and no individual products that would justify the amounts identified as excessively large in the cited attachment. Further, the 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 owner authorizing the May 11, 2017 contracted store visit, reveal only three (3) total items priced above \$5.

In materials provided while pending this appeal 41 contentions were provided to counter the conclusion drawn by the Retailer Operations Division. Consolidated and summarized points relative to the pattern in review include:

- The area surrounding Appellant experienced recent, rapid growth.
- Despite being classified by FNS as a convenience store, Appellant is a fixture of the community and serves as the neighborhood grocery store.
- There are no major grocery stores within three (3) to five (5) miles of the subject store with three (3) area grocery stores burning down within the last three (3) years.
- Four (4) new churches (less than 0.25 miles away) added to the two (2) older churches nearby; two (2) businesses have opened up next door; and, the reopening of a large elementary school have increased traffic in the area resulting in increased Appellant patronage occurring as patrons access the various alternative services.
- Many patrons walk, bicycle, motorcycle, or take their “borderline operational” (not fit to travel long distances) cars to Appellant.
- Some items sold in the store were sandwiches, prepared foods and other deli items priced above \$5 and kept in coolers.
- Appellant serves as one (1) of very few area sources for baby formula which is a popular eligible item selling at \$20 per can. Baby formula is a necessity for many SNAP patrons who may experience immediate need requiring purchase at Appellant versus travel to alternative retailers. Additionally baby formula is sometimes purchased as a “cutting agent” for illegal drugs which may increase sales in the high crime area.
- Water and soda are sold by the case for \$20 each.
- Appellant’s stock/inventory is greater than that of a normal convenience store due to the lack of superior competition nearby and transportation difficulties experienced by area residents.

On review of Appellant’s explanations the Retailer Operations Division found that:

- The growth of the area in which Appellant operates has not resulted in a corresponding increase in the suspicious pattern identification for the five (5) closest SNAP-authorized stores.

- Appellant is properly classified as a convenience store based on the variety and volume of SNAP eligible products for sale.
- It is an exaggeration to claim that the nearest grocery store is three (3) to five (5) miles away from Appellant when review of current SNAP-authorized area stores reveals six (6) supermarkets and two (2) superstores within two (2) miles.
- The proximity of houses of worship, new businesses in the area and, the reopening of a large elementary school do not explain the incidence of the occurrence of suspicious transactions in the patterns identified for Appellant when those same patterns are not seen in other area SNAP-authorized retailers.
- The Retailer Operations Division acknowledges that some SNAP patrons may have conducted SNAP transactions at Appellant because traveling to a superior competitor may have represented an inconvenience or hardship. However, this does not explain why the incidence of suspicious transaction was nearly absent from the five (5) nearest SNAP-authorized convenience stores.
- Appellant's sale of pre-packaged sandwiches priced at \$5.99 each as identified in the store visit materials; minimally (between six (6) and 20 units) stocked infant formula priced at \$15.99 per the store visit materials; with no excess stock storage identified; 5 U.S.C. § 552 (b)(6) & (b)(7)(C).
- The May 11, 2017 store visit materials do not indicate the sale of any bulk or case items, such as water or soda, advertised or identified in stock for sale.
- Retailer Operations Division did not identify Appellant's stock/inventory to be greater than that of a normal convenience store in comparison review.

On review it is determined that Appellant's explanations do not outweigh the evidence as presented by the Retailer Operations Division.

Invoice Materials:

In support of the pending appeal Appellant, through counsel, provided invoices and receipts for consideration. The Retailer Operations Division documents assessing the materials, identifying those that corresponded to the focus period and calculating the amounts represented.

The information revealed invoices totaling 5 U.S.C. § 552 (b)(6) & (b)(7)(C) for the focus period of which 5 U.S.C. § 552 (b)(6) & (b)(7)(C) was identified as SNAP eligible food. Appellant recorded SNAP redemptions of 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in the focus period; and, absent Appellant provided profit margin information, the Retailer Operations Division determined that the amount of eligible goods purchased were roughly consistent with SNAP redemptions at an average of approximately 5 U.S.C. § 552 (b)(6) & (b)(7)(C) per month.

5 U.S.C. § 552 (b)(6) & (b)(7)(C). It was also noted that the materials provided by Appellant included an invoice issued to a local area competitor which was discounted from consideration by the Retailer Operations Division.

Given the scope of information provided Retailer Operations Division concluded that Appellant's assertions that:

- the store's inventory purchases were consistent with the inventory sold;

- the business records provided were consistent with the purchasing habits of low-income patrons who preferred to purchase “cheap meals...in bulk”;
- the purchase and inventory orders and photographs prove that Appellant is capable of high-volume convenience store sales, has sufficient counter space, three (3) checkout areas, and storage space to handle high-volume sales; and,
- Appellant purchases a minimum of 5 U.S.C. § 552 (b)(6) & (b)(7)(C) worth of groceries per month to sell to patrons; could not be accepted as reasonable and did not serve to mitigate consideration of the suspicious patterns in review.

Notably while Appellant declares on appeal that there are three (3) checkout stations the official store visit photographs (see above) do not evidence error in the store visit materials where it is noted that there are two (2) cash registers, with only one (1) used for general purchases. The other cash register is identified as exclusive to lottery transactions. There is only one (1) POS device identified and it is placed on a shelving area surrounded by merchandise (principally candy) for sale.

Comparison/Competitor Store Information:

Retailer Operations Division documents that the subject firm is located in an area that is well served by alternative SNAP authorized retailers, most significantly with a supermarket located 0.67 miles from Appellant. There are six (6) SNAP-authorized supermarkets and two (2) SNAP-authorized superstores within a two (2) mile radius. An analysis of the SNAP redemptions, transaction count, average transactions, and incidence of occurrence of suspicious transactions in the same categories as those identified for Appellant was completed. The results are demonstrated in the following table:

5 U.S.C. § 552 (b)(6) & (b)(7)(C)

Retailer Operations Division also documented that Appellant conducted fewer SNAP transactions 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

Appellant’s contentions of the lack of comparable and/or superior competitors is fully discounted with the review of the Retailer Operations Division of the ALERT transaction materials. On review the availability of alternative shopping venues was affirmed with review of the FNS Retailer Locator at <https://www.fns.usda.gov/snap/retailerlocator>.

Clearly Appellant’s results are suspiciously distinct when evaluating the State as a whole, the county, and five (5) of its closest competitors. There has been no reasonable explanation offered for the distinctions. The five (5) comparison firms have reasonably:

- experienced the same recent and rapid area growth;
- experienced the same business grand openings, block parties, special daytime events, community events, and same Sunday high-volume crowds;
- experienced the opening and closing of the same area businesses, churches, and grocery stores; and,

- are similarly located in the area connecting the revitalized Southwest Detroit to the Grand Boulevard Corridor;

Household Analysis:

The Retailer Operations Division documents that it is not normal shopping behavior for a SNAP beneficiary to make a large SNAP purchase, or a series of SNAP purchases at a convenience store, immediately before or after conducting SNAP purchases at supermarkets or superstores with superior stock, variety of items, pricing and ease of checkout. Nonetheless the Retailer Operations Division identified three (3) households exhibiting such behavior on multiple occasions in multiple months in the focus period.

Appellant's defense:

Appellant, through counsel, contends that:

- The allegations included in the August 8, 2017 letter of charges were not specific;
- The request for responsive material type was vague;
- The issue of re-training was not raised in the letter of charges;
- Appellant was not given a meaningful opportunity to mitigate, clear up and/or address issues presented in the letter of charges;
- Appellant has no prior record of SNAP violations, beyond the sale of ineligible items identified in a USDA investigation more than 25 years ago;
- Appellant sought guidance regarding expected responses to the letter of charges; was rebuffed, denied and permanently disqualified;
- Appellant made it clear that no Point-of-Sale (POS) system equipped to track individual transactions was available; thereby putting Appellant at a disadvantage in the ability to provide responses to specific transactions; and,
- Despite Appellant's cooperation with an in-store visit in February 2017⁵, no notice of possible violation was brought to Appellant's attention.

On review the record shows that Appellant was provided eight (8) pages listing individual SNAP transactions found suspicious on review by the Retailer Operations Division. The transaction materials was specific as to the type of pattern represented; the date time and amount of each transaction found suspicious; and, the cumulative findings of the materials. Additionally, the charge letter of August 8, 2017 clearly referenced an opportunity to communicate with staff of the Retailer Operations Division for clarification of the materials; and, to provide information on the existing compliance and training programs that might qualify Appellant for the alternative sanction of a CMP in lieu of permanent disqualification.

The record documents discussion with counsel on August 17, 2017 during which an extension of time to provide materials for consideration was requested, and granted. Further, upon submission of a request for appeal counsel contacted the assigned Administrative Review Officer and specifically discussed the meaning of each of the attachments; how to mitigate the charges;

⁵ No record of a February 2017 store visit was found in the official record.

the judicial process; and, requested, and was granted, further several extensions for the provision of materials for consideration.

Similarly Counsel filed a FOIA request which resulted in the provision of the case record materials used as a basis for the Retailer Operations Division determination. It appears from the record that Appellant was indeed given more than one (1) meaningful opportunity to mitigate, clear up and/or address the issues presented in the letter of charges.

That the charges levied represent a first time offense, over the course of many years of SNAP authorization does not mitigate the seriousness of the charges of trafficking, the most egregious of SNAP violations. Notably as referenced by Appellant there has been a prior SNAP violation recorded which resulted in a temporary disqualification during a prior period of SNAP authorization. The prior offense was not a factor for consideration in the instant review. The record shows there was a disqualification imposed, and served, at the time of that violation; and, that Appellant then failed to request SNAP retailer authorization again for a matter of several years. (June 18, 1997 until May 3, 2012).

Although Appellant has made it known that no POS system was available to support the provision of specific transaction responses, Appellant was nonetheless afforded an opportunity, and availed itself of that opportunity, to provide various evidentiary documents for consideration. The record shows that the Retailer Operations Division clearly considered the responses provided by Appellant, through counsel, both following the letter of charges and during the pendency of this review.

There is no indication in the record to support consideration that Appellant was not given full due process in the instant proceedings. Further, a full review of the record as presented by Appellant and the Retailer Operations Division does not support the conclusions drawn by Appellant. Instead the transactions identified as unusual, irregular and inexplicable are found to be just that.

Council's Recommendations:

On request for appeal counsel, on behalf of Appellant requested reversal of the decision to permanently disqualify Appellant, asking that SNAP authorization privileges be restored; with ongoing mitigation to include:

- Appellant be required to engage in extensive training;
- Appellant be required to install a POS system capable of accurately tracking specific transactions; and,
- A probationary period of 90 days be instituted.

At the time of initial SNAP retailer authorization, in the application submitted January 6, 2012, Appellant's ownership agreed to accept responsibility for SNAP violations committed by anyone associated with Appellant, including its owners/partners, managers, and employees. SNAP authorized retailers are responsible to uphold SNAP integrity at all times and any attempt by anyone to engage in SNAP violations should be rebuffed without exception. Posters, that are

required to be posted at all SNAP authorized retailers, clearly provide a summary of the rules regarding SNAP transactions and further, provide contact information for the reporting of attempts and fraud and abuse identified by either the authorized retailer or its customers.

On appeal it is noted that the owners/partners are familiar with many of Appellant's regular customers; and that, despite best efforts they are not able to be physically present at Appellant. Because Appellant is contended to be located in a high crime area; ownership recognizes the potential susceptibility of employees responsible to conduct SNAP transactions in the absence of ownership to commit SNAP violations. Nonetheless ownership does its best to manage Appellant ensuring legitimate, legal and credible SNAP transactions.

As indicated ownership is responsible for all SNAP transactions occurring at Appellant, notwithstanding the high crime area; scheduling challenges; and/or influence of customers on employees.

As indicated the Act, at 7 U.S.C. § 2021(b)(3)(B) states, in relevant part: ... a disqualification under subsection (a) **shall** be ... **permanent** upon...**the first occasion or any subsequent occasion of** a disqualification based on the purchase of coupons or **trafficking** in coupons or authorization cards by a retail food store or wholesale food concern or a finding of the unauthorized redemption, use, transfer, acquisition, alteration, or possession of EBT cards... (Emphasis added).

The SNAP regulations at 7 CFR § 278.6(e)(1)(i) support the Act, stating, in relevant part: "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, in relevant part as: "... 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:..."

The SNAP regulations further state, in relevant part, "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.)

Neither the Act, nor the regulations, support reversal of the findings of the Retailer Operations Division absent a preponderance of evidence supporting a reversal. Similarly, neither the Act nor the regulations support mitigation of the findings of the Retailer Operations Division, again, absent a preponderance of evidence to support the contentions of Appellant.

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 30, 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 August 8, 2017 advised Appellant that documentation of eligibility for that alternative sanction was to be provided within 10 days. The record does not document any request for the imposition of a CMP in lieu of permanent disqualification was provided by Appellant, or counsel.

7 CFR §278.6(i) specifies the criteria for a firm’s eligibility for a civil money penalty in lieu of permanent disqualification for trafficking. The criteria listed therein are, as a whole, specifically identified as a *minimum* standard that firms must meet in order to be eligible for such a penalty. Given these considerations, it is clear that the statute and the regulation allow no flexibility below the level of this stated standard. In the instant case the record fails to support any request and/or documentation or evidence provided by Appellant requesting the alternative penalty considerations. 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 Mark’s Party Store 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

April 10, 2018