

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

Melvin Deli Grocery LLC,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0200099

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 Melvin Deli Grocery LLC (hereinafter “Melvin Deli Grocery LLC” 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 Melvin Deli Grocery LLC in a letter dated August 7, 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 23, 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 and that those responses were duly considered by the Retailer Operations Division. Following that due consideration 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 7, 2017, documented to have been delivered to Appellant on August 8, 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 10, 2017, received in the offices of the Administrative Review Branch on August 21, 2017, Appellant, through ownership, 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

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.

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, *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 states, *inter alia*:

*“ **Trafficking** means 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...”

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 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 23, 2017, reveal that charges were based on an analysis of EBT SNAP benefit transaction data during the six (6) month period of November 2016 through April 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 10, 2017, Appellant’s owner requested review of the permanent disqualification imposed by the Retailer Operations Division. In support of the request the following contentions were provided:

- An “extensive amount” of information has been provided in response to the letter of charges and it is not believed the Retailer Operations Division took the proper time to review all the materials provided before concluding that a permanent disqualification was the appropriate sanction.
- It is explained that:
 - Families share benefits and track their purchases separately which accounts for the multiple transactions;
 - Appellant uses a calculator to speed up the transaction process;

- Basic food prices are higher than ever resulting in only a few items
5 U.S.C. § 552 (b)(6) & (b)(7)(C);
 - Appellant sells a large variety of cold sandwiches;
 - Appellant's location in a low-income residential area supports larger than usual transactions;
 - In store credit has been allowed for a few families resulting in multiple transactions involving the payoff of credit balances followed with purchases at the same time;
 - It is not unusual for stocking deliveries made throughout the day to prompt customers to make second purchases.
- Appellant is a rule abiding business largely dependent on SNAP and will likely not survive a permanent disqualification forcing it to close.
 - A civil money penalty is being requested in lieu of permanent disqualification.

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 31, 2017. The May 31, 2017 visit was authorized by the self-identified "worker" and resulted in materials reflecting observations made 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 was authorized as a SNAP retailer on August 30, 2016.

Appellant is reported to be open seven (7) days per week from 6:30AM until 1:00AM; reported by store personnel to be operating out of a commercial space of approximately 1300 square feet at street level of what appears to include upper level housing. No out of public view storage was

declared or identified in either the store visit certified photographs or the sketch of the store layout.



The store visit materials describe Melvin Deli Grocery LLC as a convenience store; 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 and a novelty ice cream freezer positioned in front of the checkout window.



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 that displays prepared foods (casseroles, salads) and deli meats and cheese sold by weight as well as used for preparing made-to-order sandwiches (hot and cold). Advertisement posted indicates that phone orders are taken and delivery is offered.



Photo #40 – Deli stocked with tortillas (upper left) deli meats and cheeses (top shelf right and shelf #2) and prepared foods in bottom shelf.

An extensive prepared food menu is displayed over the deli food and hot food buffet area. Notably prepared items sold “hot” are not eligible to be redeemed for SNAP benefits.



Photo #26 – menu display



The inventory at the time of the May 31, 2017 store visit includes varieties in each of the four (4) staple food groups as follows:

- Six (6) varieties of dairy products with more than 20 units identified in each of the varieties. Two (2) of the highest priced foods identified at the time of the store visit include Enfamil selling @ \$18.12 per 12.5 ounce container and deli cheese selling at \$7.99 per pound.
- Seventeen (17) varieties of fruits and vegetables with all but one (1) in units of 20 or more

- Nine (9) varieties of breads and cereals were identified all 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.
- Seven (7) varieties of meat/poultry/fish staple foods are identified in the store visit materials. The inventory appears to include a substantial supply of canned meat and fish. The deli meats shown 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. No fresh or frozen beef, poultry or pork is noted as available.

The store visit materials indicate that the most expensive SNAP eligible items sold at Appellant include Enfamil formula priced @ \$18.12; deli lunchmeat priced @ \$8.99 per pound; deli cheese price @ \$7.99 per pound; and, cereal in a 48 ounce box priced @ \$9.99.

Non-SNAP products and services offered at Appellant include hot foods such as made-to-order meals as posted on the in-store menu, alcohol, tobacco products, health and beauty aids, paper goods, cleaning products; and an ATM and Western Union money transfer service.

Charge Letter Attachment Analysis:

The data reflected in the letter of charges dated June 23, 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 170 transactions; grouped in 73 sets; where 42 households redeemed SNAP benefits in sets of two (2) to five (5) transactions; in time spans **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 materials in review did

not evidence any reason why SNAP customers would consider Appellant as its first choice food destination for large orders or multiple purchases.

Retailer Operations Division documents that the households with repeated same day transactions also conducted SNAP transactions at other larger, better stocked, SNAP authorized firms either preceding or following the multiple transactions at Appellant; and, that some households appeared to consistently expend a majority of their benefits at Appellant despite there being full-line supermarkets and superstores within one-quarter mile of Appellant.

Appellant provides two (2) basic explanations for repeated transactions in short time frames by individual households to include: 1) families sharing benefits, conducting individual transactions to track amounts for repayment; and, 2) customer repayment of in store credit accounts using SNAP benefits also completing a SNAP transaction purchase at the same time.

- 1) In an effort to substantiate Appellant's contention regarding multiple users of individual cards the Retailer Operations Division compared the incidence of repeated transaction occurrences between Appellant and six (6) small grocery stores located within ¼ mile. The analysis revealed that while Appellant had 170 transactions flagged for this pattern the highest number of similar transactions at the neighboring stores, classified as small grocery stores as opposed to convenience stores, was 32. Notably the store with the 32 similar transaction sets also completed more than 2,000 more individual transactions overall. Retailer Operations Division found that the use of this pattern of shopping is not common for the area and therefore did not accept the contention as justification for the suspicious transactions.

Of the 42 households conducting the identified transaction 36 were found to have completed SNAP transactions at a supermarket or superstore, with arguably a larger stock and better pricing, within one (1) day of the repeated transactions occurring at Appellant.

- 2) With the July 6, 2017 response to the charges Appellant provided 18 notarized customer statements (English and Spanish) dated and/or notarized between June 27, 2017 and July 3, 2017, alleging that Appellant had extended credit to the signatory.

Each statement was followed with a receipt/invoice itemizing products and prices with totals displayed. Five (5) of the documents did not include names or dates; five (5) of the remaining 13 documents included only a first name; and, none of the documents included any dates either of when the purchase was made and/or when the total was repaid.

The record shows that the Retailer Operations Division sent a request for credit documentation letter dated July 7, 2017 indicating that details including account identification and corresponding dates and amounts information was required. In a facsimile received on July 20, 2017 Appellant provided 20 receipts/invoices annotated to include date of purchase, names (either first and last; first name only; or first name with last initial) and the date the total was paid with SNAP/EBT.

Review of the newly submitted materials by the Retailer Operations Division revealed questionable document credibility because all but two (2) of the documents appear to have been created with the use of two (2) receipt books based on the sequential numbering of the documents. Although the documents are sequentially numbered the dates are not. **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. The newly submitted materials do not match the previously submitted materials with the dates on the newer documents predating the initially provided materials by several months in all but one (1) instance.

Retailer Operations Division documents deciphering the names on 11 of the 18 notarized credit statements and conducting a comparison of those names to the State of New York administrative terminal identifying four (4) of the households; two (2) names showed no matches; and five (5) of the names reveals multiple matches which could not be narrowed down due to lack of address and/or alternative identifying information.

The four (4) households which could be matched were analyzed individually finding:

- Household #1 showed a reported residence address of 0.2 miles from Appellant; noting the existence of a full line supermarket between the reported residence and Appellant. SNAP purchases by the household on either the day before or following SNAP transactions at Appellant are documented to make repeated transactions sometimes in larger amounts than at the supermarket unreasonable.
- Household #2 indicates in their notarized statement that Appellant is their primary grocery store. The household shows a P.O. Box address in New York City which is between 40 minutes and an hour distance from Appellant. The household is documented to have completed transactions in the area where the P.O. Box is located.
- Household #3 indicates in their notarized statement that they do most of their shopping at Appellant and that Appellant allows credit when the household SNAP benefits have diminished. A review shows that the household frequented other SNAP authorized retailers during the focus period from a distance of approximately 32 minutes travel time.
- Household #4 indicates in Spanish that she shops at Appellant because credit is extended to her with repayment upon receipt of her SNAP benefits when she also makes SNAP purchases. Retailer Operations Division identified the reported residence address for the household at 1.7 miles or 15 minutes travel time from Appellant and reveals that the household conducted SNAP transactions at 21 other SNAP authorized retailers including eight (8) supermarkets and/or superstores.

Appellant also explained that transactions are completed quickly due to the use of a calculator to add the items presented for purchase; and, that it is not unusual for stocking deliveries made throughout the day to prompt customers to make second purchases. No evidence was provided to support the explanations as presented.

Retailer Operations Division determined that although it is possible that some SNAP transactions were the result of credit accounts the materials provided did not support a determination that use of credit was the primary reason for the suspicious transactions identified in Attachment #1. On review it is noted that, in consideration of 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 578 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 \$8.98 and the county average was \$9.15.
5 U.S.C. § 552 (b)(6) & (b)(7)(C).

As explanation for the excessively large transactions identified Appellant indicates that basic food prices are higher than ever resulting in only a few items **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**; Appellant sells a large variety of cold sandwiches which are purchased with SNAP benefits; Appellant is located in a low income residential neighborhood; and, some of the large amounts represent repayment of credit accounts which are the sum of several smaller transactions. Additionally in the request for administrative review and the second response to the letter of charges Appellant indicates that the sale of fresh meat (poultry, beef and smoked pork) contribute to the amounts of the transactions.

Retailer Operations Division documents that rising food prices, Appellant's location in a low-income residential area; and the repayment of credit may account for some of the transactions identified in Attachment #2 and are not disputed. However, when determining whether or not the transactions are indeed suspicious the operation and facilities of Appellant must be considered.

As previously indicated the store visit materials, completed in cooperation with the worker authorizing the May 31, 2017 visit, revealed that:

- the most expensive SNAP eligible items sold @ Appellant include Enfamil Infant Formula priced @ \$18.12 per 12.5 ounces; lunchmeat priced @ \$8.99 per pound and cheese priced @ \$8.99 per pound; and honey bunches cereal @ \$9.99 per 48 ounces;
- there is only one (1) cash register and one (1) point-of-service processing device without scanner capability;
- the checkout area is enclosed in Plexiglas and the checkout counter is restricted with placement of merchandise;
- the counter for presentation of merchandise consists of a narrow Plexiglas shelf positioned over a novelty ice cream freezer;

- there are no baskets or carts available to support the delivery of multiple items for purchase;
- fresh meats (poultry, beef and smoked pork) declared as sold by Appellant in response to the letter of charges were not identified in either the store visit photographs or the store visit inventory form;
- there is no reported storage; and,
- the non-food (alcohol/tobacco/paper products/health and beauty aids) or hot food (made-to-order restaurant style meals as listed on the in store menu) SNAP ineligible items represent a significant portion of the overall available stock seen in the store visit photographs.

On review it is confirmed that the determination of the Retailer Operations Division is reasonable and therefore accepted.

Comparison/Competitor Store Information:

Retailer Operations Division documents that the subject firm is located in an area that is well served by 33 alternative SNAP authorized retailers located within one-quarter mile of Appellant including one (1) superstore; and three (3) supermarkets.

Comparison of the average SNAP redemption dollar volume; SNAP transaction count; average transaction amounts and the occurrence of transactions matching those found to be suspicious at Melvin Deli Grocery LLC were made to the six (6) closest small grocery stores. The Retailer Operations Division documents using small grocery stores for the comparison versus convenience stores to allow for the depth of stock seen in the store visit photos. Appellant was documented to clearly have inventory in amounts higher than a typical convenience store despite operationally resembling a convenience store.

The analysis reveals that the SNAP redemption volume for four (4) of the comparison stores is significantly lower than that of Appellant; the number of SNAP transactions is higher at three (3) of the six (6) comparison stores; the average transaction amount is higher at five (5) of the six (6) comparison stores; and, the incidence of similar transaction patterns is significantly higher at each of the six (6) comparison stores.

Table 1 below provides an overview of a comparison between Appellant, the State and county averages for convenience stores; and the six (6) closest small grocery stores.

5 U.S.C. § 552 (b)(7)(E)\

Household Analysis:

Retailer Operations Division documents completing an analysis of the SNAP transactions of four (4) households identified in the attachment materials to the letter of charges. The analysis reveals that each of the analyzed households conducted numerous suspicious transactions at Appellant, clearly distinct from the patterns for the same households at alternative shopping venues.

- The first household is documented to have completed a total of 62 SNAP transactions at Appellant in the six (6) month focus period **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. Another 42 SNAP transactions were recorded for the household in the same period at eight (8) competitor convenience stores with a total SNAP redemption **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. The average convenience store transaction in the Bronx New York in the focus period was \$9.15 clearly revealing that the household conducted much larger transactions at Appellant than at competitor stores. While some of the difference can certainly be attributed to the more extensive stock available at Appellant the more than double difference is hard to reconcile.

Examples of questionable transactions at Appellant include the series of transactions conducted by the household during three (3) of the six (6) focus months in the focus period. In each of the three (3) months the household conducts multiple transactions at Appellant, while intermittently also completing SNAP transactions at combination stores, superstores, supermarkets, small grocery stores and competitor convenience stores as indicated in Table II below.

5 U.S.C. § 552 (b)(7)(E)

- The second household was conducting SNAP transactions at Appellant on the same day or within a day or two (2) of shopping at supermarkets or superstores. The store visit materials did not reveal any SNAP eligible items available at Appellant that would not also have been available at the alternative shopping venues which would also have presumably had much larger and more varied inventory. Table III below demonstrates the suspicious nature of the SNAP transactions of this household.

5 U.S.C. § 552 (b)(7)(E)

- Household #3 conducted 23 of its total 28 SNAP transactions during the month of December 2016 at Appellant. A partial listing of the household's SNAP redemptions during November and December 2016 are shown in Table IV below:

5 U.S.C. § 552 (b)(7)(E)

- The fourth household reviewed was shown to have completed 66 SNAP transactions during the review period with 34 of those at supermarkets and superstores **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. Table V below demonstrates the unusual pattern of SNAP transactions at Appellant interspersed with transactions, often on the same day, at supermarkets, superstores, and large supermarkets:

5 U.S.C. § 552 (b)(7)(E)

Inventory:

Retailer Operations Division documents that Appellant provided 13 pages containing 29 separate invoices spanning the review period; a two (2) page customer payment list (vendor name not included); and, a 17 page purchase history from Jetro Cash & Carry detailing customer purchases from November 2016 through July 5, 2017. The materials representing identifiable inventory purchases during the focus period were analyzed and calculated to determine if Appellant materials evidenced the purchase of foods in enough volume to support the SNAP redemptions of the same period. Because separation of food purchases for hot food and individual identification of non-foods from Jetro Cash and Carry could not be separated Retailer Operations Division allowed the full scope of the materials to be considered thus providing a clear advantage to Appellant. Similarly because it is understood that a certain percentage of food sales were conducted using cash/credit/debit a 20 percent allowance was included; and, because the invoices represent wholesale purchases a generous 50 percent markup on the purchases was also included. The results of the calculations are shown in Table VI below:

5 U.S.C. § 552 (b)(7)(E)

As indicated in the table the total verified available inventory of 5 U.S.C. § 552 (b)(6) & (b)(7)(C) does not cover the estimated total sales of 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

Photographs:

The record documents that Appellant provided 35 undated black and white photographs reported to represent Appellant stock and facilities. The Retailer Operations Division compared the photographs to the official certified photographs finding that:

- The undated photos of the deli cooler provided by Appellant show the availability of fresh meat such as chicken wings and beef patties with pricing signage. The photographs of the same deli cooler from the store visit shows prepared foods (i.e. cooked chicken wings) in that same area.
- Three (3) Appellant provided photographs show an additional checkout counter that does not appear to be from the subject firm.

Effective Evaluation of Materials:

In the August 10, 2017 request for administrative review Appellant's ownership declares that an "extensive amount" of information was provided in response to the letter of charges and it is not believed the Retailer Operations Division took the proper time to review all the materials provided before concluding that a permanent disqualification was the appropriate sanction. On

review it is determined that the Retailer Operations Division did, in fact, review all of the material presented by Appellant which is evidenced by the documentation supporting the decision to impose a sanction of permanent disqualification on Appellant.

Civil Money Penalty

Both in response to the letter of charges and on appeal Appellant has requested consideration of the imposition of a civil money penalty in lieu of permanent disqualification citing that the business will likely be forced to close if disqualified because of its reliance on SNAP for a significant portion of the overall revenue.

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 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 7, 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 23, 2017 advised Appellant that documentation of eligibility for that alternative sanction was to be provided within 10 days. The record documents that no materials were provided for consideration that Appellant met the four (4) criteria qualifying for the alternative sanction.

Appellant did not provide:

- Written and dated documentation that showed a commitment to ensuring that the firm was operated in a manner consistent with SNAP regulations;
- Documentation of the development of a policy to terminate violating employees;
- No documentation of the development of procedures for internal review of employee compliance with SNAP regulations; and,
- No documentation of procedures or policy addressing corrective action if violations were identified.

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.

With regard to Appellant’s contention that a disqualification will cause economic hardship to the firm, it is recognized that some degree of economic hardship is a likely consequence whenever a store is disqualified from participation in SNAP. However, there is no provision in the SNAP

regulations or internal agency policy directives for waiver or reduction of an administrative penalty assessment on the basis of possible economic hardship to the firm resulting from imposition of such penalty. To allow store ownership to be excused from assessed administrative penalties based on purported economic hardship to the firm would render virtually meaningless the enforcement provisions of the Food and Nutrition Act of 2008 and the enforcement efforts of the USDA. Therefore, Appellant's contention that the firm may incur economic hardship based on the assessment of an administrative penalty does not provide any valid basis for dismissing the charges or for mitigating the penalty imposed.

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 Melvin Deli Grocery LLC 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 4, 2018