

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

BJ Discount Inc,

Appellant,

v.

Case Number: C0210809

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 BJ Discount Inc. (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 BJ Discount Inc. on September 17, 2018.

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 2, 2018, the Retailer Operations Division informed the Appellant that BJ Discount Inc. 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."

In responses to the Retailer Operations Division of August 6, 2018, August 13, 2018, August 14, 2018, and September 4, 2018, the Appellant, through counsel, denied the trafficking allegations and stated that BJ Discount Inc. is located in Decatur which has a poverty level of almost twice

the average in Illinois as well as the nation. Area residents rely upon BJ Discount Inc. as it is a neighborhood grocery. Many of the customers patronizing the store do not have their own car or do not like to rely upon public transportation and, therefore, walk to the BJ Discount Inc. It is common for multi-generational households to share their SNAP cards. As BJ Discount Inc. is a full-service grocery store, it is very easy for a multi-generational family to spend upwards of 5 U.S.C. § 552 (b)(6) & (b)(7)(C) per transaction.

After considering the Appellant's replies and the evidence in the case, the Retailer Operations Division issued a Determination Letter dated September 17, 2018, informing the Appellant that BJ Discount Inc. was being permanently disqualified from participation in the SNAP in accordance with 7 CFR § 278.6(e)(1) for trafficking violations.

In a letter postmarked September 25, 2018, 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 5, 2018.

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 January 2018 through June 2018. This involved the following SNAP transactions patterns which are indicative of trafficking:

- There were multiple transactions made from individual benefit accounts within a set period of time; and
- There were excessively large purchase transactions made from recipient accounts.

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

APPELLANT'S CONTENTIONS

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

In the replies to the Charge Letter, in the administrative review request, and in subsequent correspondence to FNS, the Appellant, through counsel, stated the following summarized contentions, in relevant part:

- The Appellant has never trafficked SNAP benefits.
- BJ Discount Inc. is located in Decatur which has a poverty level of almost twice the average in Illinois as well as the nation. Within a 1.0 mile radius of the subject firm, 59.1% of the households receive government benefits. The store is located in one of the main north south thoroughfares in the middle of the inner-city of Decatur. Many of the individuals living in the inner-city of Decatur live in multi-generational homes.
- Several of the grocery stores in the area, like 5 U.S.C. § 552 (b)(6) & (b)(7)(C), have or are closing their doors as they were not profitable. There has arisen a renewed reliance upon the neighborhood grocery store, especially among those living within a 1.0 mile radius of BJ Discount Inc. Many of the area residents do not have a car or do not like to rely upon public transportation.
- BJ Discount Inc. is a full-service grocery store and not a so-called convenience store that carries limited products. It is open Monday through Friday from 7:00 am to midnight and Saturdays and Sundays from 8:00 am to midnight. The owner is the only full-time worker at the store. Frito-Lay, bread, milk, and egg deliveries are made twice a week. Cereals, canned goods, and other groceries are delivered every other week. Not only does the store stock a full array of groceries and drinks, but it also provides pet food, baby food, baby formula, diapers, kitty litter, wind shield washer fluid, vehicle oil, toiletries, toilet paper, clothing, meats, cheeses, dairy products, flour, sugar, Hispanic foods, personal hygiene products, and tobacco products. Also, a variety of desserts are stocked.
- Regarding the SNAP transactions included in Attachment 1 of the Charge Letter, these are the result of multi-generational households sharing SNAP benefit cards. An adult living with his or her parents and grandparent will use the same card whether they all shop at the same time or whether they go to the store at separate times. The Appellant has no way of knowing who the owner of the SNAP card is nor does he have a way to verify this information. When a SNAP customer comes to the checkout counter and uses his/her SNAP card, the owner is unable to see them swipe the card into the machine due to the layout of the area.
- Regarding the SNAP transactions included in Attachment 2 of the Charge Letter, these are the result of BJ Discount Inc. being a full-service grocery store. As a result of the store's location within the inner city of Decatur, people utilize it as their primary grocery store. As a result, it is very easy for a multi-generational family to spend upwards of

5 U.S.C. § 552 (b)(6) & (b)(7)(C) per transaction. Most of the inventory in the store is eligible for purchase with SNAP benefits.

- This is the first time that the Appellant has been cited for SNAP violations.
- A permanent SNAP disqualification will impose a financial hardship on the Appellant and would likely force the owner to close the store. Forty percent of the store's sales are in SNAP sales.
- A permanent SNAP disqualification will impose a hardship on SNAP customers as they rely heavily upon BJ Discount Inc. for their grocery needs.
- The Appellant requests that FNS reverse its decision to permanently disqualify BJ Discount Inc. from participation in the SNAP.

In support of the Appellant's contentions, the following documents were submitted to FNS:

- Photographs of the store, food stock, EBT POS device, cash register, and checkout counter area;
- Employment information for Decatur, Illinois;
- USA Today article entitled "SNAP Benefits: Which Cities Have the Most People on Food Stamps?"; and
- Total sales and SNAP sales information for October 2017 and total sales information for October 2018.

ANALYSIS AND FINDINGS

Store Characteristics

FNS authorized BJ Discount Inc. as a convenience store on February 19, 2015. The case file indicates that in reaching a disqualification determination, the Retailer Operations Division considered information obtained during a May 15, 2018 store visit conducted by a FNS contractor to observe the nature and scope of the firm's operation, stock, and facilities. This information obtained from the store visit was also used to ascertain if there were justifiable explanations for the firm's irregular SNAP transactions. The store visit report and photographs documented the following store size, description, and characteristics:

- Approximately 1,664 square feet in size with approximately 65 square feet of additional food storage outside of public view that stocks predominantly drinks;
- One shopping cart and no hand-held baskets available for customer use;
- One cash register and one EBT point-of-sale (POS) device for use in ringing-up SNAP transactions;
- 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;

- No indication from the store visit report that the firm has a special pricing structure, such as prices ending in \$x.x9 and/or \$x.00;
- The four most expensive foods items in stock were sodas at \$10.00 per 24 pack (12 ounce cans); coffee at \$6.99 per 11.3 ounces; meat jerky at \$6.99 per 3.0 ounces; and bacon at \$5.99 per 16 ounces;
- No fresh or frozen meats, poultry, or seafood;
- Deli meats and cheeses were not sold by the pound;
- Hot foods were not sold;
- Infant foods and formula were not sold;
- Meat items included units of canned/potted meat, canned fish, meat jerky, hot dogs, packaged lunch/deli meat, bacon, and eggs;
- Dairy included milk, margarine, cheese, and butter;
- No fresh produce;
- Frozen foods included single-serving size cheeseburgers and cheese steaks, pizza, and ice cream;
- Other staple foods available for purchase include such items as juice, pasta, rice, bread, cereal, flour, baking mix, and canned goods;
- Much of the remaining food stock consists of accessory foods such as candy, carbonated and non-carbonated drinks, coffee, sugar, and condiments; and
- Ineligible nonfood items included tobacco products, health and beauty items, paper products, household cleaning supplies, lottery tickets, automotive supplies, pet food, jewelry, and clothing.

The available inventory of SNAP eligible food at the time of the store visit showed food stock that would be typical of a convenience store, where households normally purchase a limited number of items. There was little indication that SNAP households would be inclined to regularly visit the store to purchase large quantities of groceries. Given the available inventory and the store's characteristics, this review could find no reason why the Appellant firm's SNAP redemption patterns differed so significantly from those of similar sized competitors.

Charge Letter Attachments

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

Government analyses of stores caught in trafficking violations during on-site investigations have found that transactions involving trafficking consistently display particular characteristics or patterns. These patterns include, in part, those cited in the letter of charges. Based on this empirical data, and in the absence of any reasonable explanations for such transaction patterns, a conclusion can be drawn through a preponderance of evidence that the most likely explanation for "unusual, irregular, and inexplicable" transactions and patterns cited in the letter of charges is trafficking. Transactions having such characteristics sometimes do have valid explanations that support that they were the result of legitimate purchases of eligible food items. This is why opportunities are afforded to charged retailers to explain the questionable transactions cited. In

this case, the Retailer Operations Division determined that the Appellant's contentions did not outweigh the evidence. The issue in this review is whether, through a preponderance of evidence, it is more likely true than not true that questionable transactions were the result of trafficking. As patterns of unusual transactions appear across multiple Attachments, the case of trafficking becomes more convincing.

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

This Charge Letter Attachment documents 19 sets of transactions (47 total transactions) **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** in SNAP benefits to meet the parameters of this scan. Multiple transactions conducted by the same household account within a short period of time is a method which violating stores use to avoid single high dollar transactions that cannot be supported by a retailer's inventory and structure.

Although it is not uncommon for customers to have more than one transaction per day, 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 photographs from the store visit offer no explanation as to why SNAP customers would routinely shop at BJ Discount Inc. multiple times during a short period or purchase such a large volume of items, there being no great variety of products, price advantage, profusion of large packages, or significant bulk items or food cases for sale. The second, third, and fourth transactions in each set are too large to consist of forgotten items.

The Appellant has provided several contentions related to Attachment 1, including a claim that BJ Discount Inc. is located in Decatur which has a poverty level of almost twice the average in Illinois as well as the nation. Within a 1.0 mile radius of the subject firm, 59.1% of the households receive government benefits. Several of the grocery stores in the area, like **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**, have or are closing their doors as they were not profitable. There has arisen a renewed reliance upon the neighborhood grocery store, especially among those living within a 1.0 mile radius of BJ Discount Inc. Many of the area residents do not have a car or do not like to rely upon public transportation. BJ Discount Inc. is a full-service grocery store and not a so-called convenience store that carries limited products. Not only does the store stock a full array of groceries and drinks, but it also provides pet food, baby food, baby formula, diapers, kitty litter, wind shield washer fluid, vehicle oil, toiletries, toilet paper, clothing, meats, cheeses, dairy products, flour, sugar, Hispanic foods, personal hygiene products, and tobacco products. Also, a variety of desserts are stocked. The SNAP transactions included in Attachment 1 of the Charge Letter are the result of multi-generational households sharing SNAP benefit cards. An adult living with his or her parents and grandparent will use the same card whether they all shop at the same time or whether they go to the store at separate times. The Appellant has no way of knowing who the owner of the SNAP card is nor does he have a way to verify this information. When a SNAP customer comes to the checkout counter and uses his/her SNAP card, the owner is unable to see them swipe the card into the machine due to the layout of the area. In support of its contentions, the Appellant provided FNS with photographs of the store, food stock, EBT POS device, cash register, and checkout counter area; employment

information for Decatur, Illinois; and a USA Today article entitled “SNAP Benefits: Which Cities Have the Most People on Food Stamps?”.

With regard to these contentions, while there are no limits on the number of times EBT cards may be used or the amount of eligible foods that may be purchased, the SNAP transactions noted in this Charge Letter Attachment are questionable because they display characteristics of use inconsistent with the nature and extent of the store’s stock and facilities and are indicative of trafficking. Although it is not uncommon for customers to conduct more than one transaction per day, it is not common that such multiple transactions are for large dollar amounts. BJ Discount Inc. is not set up to provide for all of one’s food needs with no fresh or frozen meats, poultry, or seafood, no frozen fruits or vegetables, no fresh produce, and lacks an abundant depth and breadth of staple foods. Also, the store visit observations indicate that there is 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. The photos provided by the Appellant support the store visit observations.

The store visit report and photos of May 15, 2018 indicate that there were 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 evidence of meat/seafood specials or bundles or fruit/vegetable boxes that might sell for high prices, and no evidence of a wholesale business such as posted prices or separate entrances for wholesale customers. The store visit report and photos indicate that BJ Discount Inc. is approximately 1,664 square feet in size with approximately 65 square feet of additional storage area outside of public view that stocked predominantly drinks. It is irregular for convenience stores to have purchases such as those cited, especially when BJ Discount Inc. stocks only a few high priced food items so the majority of the food items stocked at the store are low priced items.

Sometimes a firm may have unusual transaction patterns due to a recipient’s lack of access to other SNAP authorized stores. However, there are 38 SNAP authorized retailers (including one supermarket and four super stores) located within a 2.0 mile radius of BJ Discount Inc. that can meet the nutritional needs of SNAP customers. Several of these authorized SNAP stores are larger than BJ Discount Inc. and offer a greater quantity and variety of food products at comparable or better prices as compared to the subject store. As mentioned previously, SNAP customers who shopped at BJ Discount Inc. 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 does not appear to be an explanation for BJ Discount Inc. abnormally high SNAP transaction amounts conducted within a short timeframe of each other.

As to whether or not SNAP recipients sharing their EBT cards and PIN numbers with others actually affected the Appellant firm during the review period, this argument is little more than conjecture. The Appellant has provided no evidence to show that sharing of EBT cards is particularly common among SNAP recipients in Decatur, Illinois. FNS acknowledges that the SNAP regulations and statute do not govern or mandate how or when a SNAP household should spend its benefit allotment. Regulations also do not govern how frequently a customer may visit a store or whether household members should purchase items independently. SNAP benefits are

issued to individual households and as such are meant to provide most of the nutritional needs of that household. Although sharing of SNAP benefits can occur, they are not intended to be used by households purchasing eligible food items for other household members or other households. Again, the SNAP regulations do not govern what happens to the food once it is purchased. However, the repetitive nature of the transactions identified in Attachment 1 are vastly different in BJ Discount Inc. than in any other nearby comparable firm giving credibility to the notion that trafficking is mostly likely taking place.

Unfortunately, the Appellant has not provided any evidence to show that the transactions listed in Attachment 1 were legitimate purchases of eligible foods. The arguments presented by the Appellant hold little weight without some kind of evidence to substantiate its claims.

Excessively Large Purchase Transactions (Charge Letter Attachment 2)

This Charge Letter Attachment lists 176 transactions (5 U.S.C. § 552 (b)(6) & (b)(7)(C)) 5 U.S.C. § 552 (b)(6) & (b)(7)(C). These large transactions are not consistent with a convenience store in Macon County, Illinois. During the review period, the average transaction amount for a convenience store in Macon County, Illinois was \$5.72. The average transaction in Attachment 2 is more than nine times larger than the average purchase amount for this store type. There is no evidence that the firm would be likely to have SNAP redemption patterns that differ considerably from similar sized competitors. These large transaction amounts are also not consistent with the store's inventory. There were no fresh or frozen meats, poultry, or seafood and no fresh produce in stock. Most of the food products in BJ Discount Inc. consisted of accessory food items such as snack foods, candy, and drinks and inexpensive staple foods such as canned and packaged goods. The frequency of high dollar purchases in the review period calls into question the legitimacy of these transactions.

The Appellant has provided several contentions related to Attachment 2, including a claim that BJ Discount Inc. is located in Decatur which has a poverty level of almost twice the average in Illinois as well as the nation. Within a 1.0 mile radius of the subject firm, 59.1% of the households receive government benefits. Several of the grocery stores in the area, like 5 U.S.C. § 552 (b)(6) & (b)(7)(C), have or are closing their doors as they were not profitable.

There has arisen a renewed reliance upon the neighborhood grocery store, especially among those living within a 1.0 mile radius of BJ Discount Inc. Many of the area residents do not have a car or do not like to rely upon public transportation. BJ Discount Inc. is a full-service grocery store and not a so-called convenience store that carries limited products. Not only does the store stock a full array of groceries and drinks, but it also provides pet food, baby food, baby formula, diapers, kitty litter, wind shield washer fluid, vehicle oil, toiletries, toilet paper, clothing, meats, cheeses, dairy products, flour, sugar, Hispanic foods, personal hygiene products, and tobacco products. Also, a variety of desserts are stocked. The SNAP transactions included in Attachment 2 of the Charge Letter are the result of BJ Discount Inc. being a full-service grocery store. As a result of the store's location within the inner city of Decatur, people utilize it as their primary grocery store. As a result, it is very easy for a multi-generational family to spend upwards of 5 U.S.C. § 552 (b)(6) & (b)(7)(C) per transaction. Most of the inventory in the store is eligible for purchase with SNAP benefits.

With regard to these contentions, 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 convenience stores to pick up a few staple food items, such as bread, milk, or a can or two of food that they may consider are not worth a trip to the supermarket to purchase. The Appellant contends that the large transactions are not the result of trafficking of SNAP benefits. However, it is rare for a convenience store such as BJ Discount Inc. to have purchases like those included in Attachment 2 to the Charge Letter. This Attachment cites 176 EBT transactions during the six month period of investigation **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**.

The FNS store visit report and photos of May 15, 2018 show that BJ Discount Inc. offers a minimal stock of SNAP eligible foods with no fresh or frozen meats, poultry, or seafood, no frozen fruits or vegetables, and no fresh produce. The store visit inventory report and photos also show only a few expensive eligible foods in stock that would account for these large amounts as well as showing the store has limited checkout counter space and only one shopping cart and no hand-held baskets in which to transport the large number of items required to make up these large transaction amounts. Without these, it is unlikely that such large dollar value transactions could be for actual food purchases and more likely they are trafficking.

The record shows that there are 38 SNAP authorized retailers located within a 2.0 mile radius of BJ Discount Inc. that can meet the nutritional needs of SNAP customers. Several of these authorized SNAP stores are larger than BJ Discount Inc. and offer a greater quantity and variety of food products at comparable or better prices as compared to the subject store. An analysis of the shopping patterns for all of the SNAP households listed in this Attachment shows that the majority of the households shopping at BJ Discount Inc. have access to transportation and that all are regularly shopping at a variety of larger stores, including super stores and/or supermarkets, located nearby and at several miles distance from the Appellant's location. While BJ Discount Inc. does offer some staple food items, SNAP recipients are already shopping at other larger SNAP retailers located in proximity to the Appellant's business offering a greater quantity and variety of products, including fresh meats/seafood and produce, at lower prices. Therefore, the store has nothing to attract SNAP customers as there are no special or custom services offered.

5 U.S.C. § 552 (b)(7)(E).

Lastly, the case record documents that the Retailer Operations Division conducted a detailed analysis of three SNAP households identified in the Charge Letter to analyze their shopping patterns at BJ Discount Inc. compared to their shopping patterns at other SNAP authorized stores. Each of these households had access to, and shopped at larger stores including super stores and/or supermarkets. It is obvious that these SNAP households had transportation available to them to reach these other authorized stores. However, despite this access to better stocked stores, these sampled households conducted excessively large transactions at BJ Discount Inc. often **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** of shopping at the larger stores where they conducted much smaller SNAP purchases. It is highly unlikely that a convenience store with minimal staple foods would have legitimate SNAP transactions greater than these larger and better stocked stores.

In summary, 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/or 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. Based on the preponderance of the evidence, the irregular transaction patterns cited in Charge Letter Attachment 2 are more likely than not the result of trafficking in SNAP benefits.

Trafficking Denied

Regarding the Appellant's argument that it denies the trafficking allegations, this review encompasses and documents the examination of the primary and relevant information in this case, the purpose of which is, as noted above, to determine whether the Appellant demonstrates by a preponderance of the evidence that the permanent disqualification should be reversed. In this case, therefore, if the Appellant demonstrates by a preponderance of the evidence that trafficking did not occur in the Appellant's firm, then trafficking will be considered not to have occurred and the disqualification reversed. If this is not demonstrated the case is to be sustained. Assertions that the firm has not violated program rules, by themselves and without supporting evidence and rationale, do not constitute valid grounds for dismissal of the current charges of violations or for mitigating their impact.

First Time Violator

The Appellant contends that this is the first time that the firm has been cited for SNAP violations. However, a record of participation in the SNAP with no documented previously violations does not constitute valid grounds for mitigating the impact of the present serious determination of trafficking.

Financial Hardship

The Appellant contends that a permanent SNAP disqualification will impose a financial hardship on the firm and would likely force the owner to close the store. Forty percent of the store's sales are in SNAP sales. In support of its contentions, the Appellant provided FNS with total sales and SNAP sales information for October 2017 and total sales information for October 2018. 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 from being excused from assessed administrative penalties based on purported economic hardship to the firm would render virtually meaningless the enforcement provisions of the Food and Nutrition Act of 2008 and the enforcement efforts of the USDA.

Moreover, giving special consideration to economic hardship to the firm would forsake fairness and equity, not only to competing stores and other participating retailers who are complying fully

with program regulations, but also to those retailers who have been disqualified from the program in the past for similar violations. Therefore, the Appellant's contention that the firm may incur economic hardship based on the assessment of an administrative penalty does not provide any valid basis for dismissing the charges or for mitigating the penalty imposed.

Customer Hardship

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

Reconsideration of Charges

The Appellant requests that FNS reverse its decision to permanently disqualify BJ Discount Inc. from participation in the SNAP. However, the Food and Nutrition Act of 2008 at § 2021 does not allow for discretion in determining sanctions for trafficking and is specific in its requirement that "... a disqualification . . . 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 ...". In keeping with this legislative mandate, 7 CFR § 278.6(e)(1)(i) of the SNAP regulations states that FNS shall disqualify a firm permanently if personnel of the firm have trafficked. There is no agency discretion in the matter of what sanction is to be imposed when trafficking is involved.

CIVIL MONEY PENALTY

As previously indicated, the September 17, 2018 Determination Letter advised the Appellant of the ineligibility for consideration for a trafficking civil money penalty according to the terms of Section 278.6(i) of the SNAP regulations. The letter of charges dated August 2, 2018 advised the Appellant that documentation of eligibility for that alternative sanction was to be provided within 10 days. The regulations specify that such documentation must, in part, establish that there was an effective compliance policy and training program and that both were in effect and implemented prior to the occurrence of violations. The letter indicates that no information was provided by the Appellant for consideration; therefore, on review the Retailer Operations Division's determination that the Appellant firm is ineligible for the imposition of civil money penalties in lieu of disqualification is affirmed.

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 BJ Discount Inc. is sustained.

RIGHTS AND REMEDIES

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

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

LORIE L. CONNEEN
Administrative Review Officer

April 15, 2019