

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

Dollar Plus Grocery,

Appellant,

v.

Case Number: C0207281

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 Dollar Plus Grocery 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 Dollar Plus Grocery on June 26, 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 April 26, 2018, the Retailer Operations Division informed the Appellant that Dollar Plus Grocery was in violation of the terms and conditions of the SNAP regulations, 7 CFR § 270 –282, based on EBT SNAP benefit transactions that "establish clear and repetitive patterns of unusual, irregular, and inexplicable SNAP activity for your type of firm."

In a response to the Retailer Operations Division dated May 10, 2018, the Appellant, through counsel, denied the trafficking charges and provided various arguments in support of its case including a claim that there is a lack of regulatory support to uphold a charge of trafficking.

There was no prior warning provided by the Retailer Operations Division to warn about the possibility that violations were occurring. The Appellant also noted that a permanent SNAP disqualification of Dollar Plus Grocery would inevitably cause hardship to SNAP households.

After considering the Appellant's reply and the evidence in the case, the Retailer Operations Division issued a Determination Letter dated June 26, 2018, informing the Appellant that Dollar Plus Grocery 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 July 6, 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 July 18, 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 December 2017 through February 2018. This involved the following SNAP transactions patterns which are indicative of trafficking:

- There were an unusual number of transactions ending in a same cents value;
- 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 reply to the Charge Letter, in the administrative review request postmarked July 6, 2018, and in subsequent correspondences dated August 4, 2018, the Appellant, through counsel, stated the following summarized contentions, in relevant part:

- The Appellant vehemently denies that trafficking of SNAP benefits occurred at Dollar Plus Grocery.
- If SNAP violations occurred at Dollar Plus Grocery, they were mistakenly conducted by two employees who were taking care of the store while the Appellant was out of the country the past two years for treatment. If SNAP violations occurred, they were done so without the Appellant’s knowledge or approval.
- USDA did not provide the Appellant with the statutory and regulatory authority in the Charge Letter to charge the firm with trafficking as there are no allegations in the letter that money was exchanged for SNAP benefits. The transactions flagged by USDA as evidence of “trafficking” were not defined and the allegations were “vague and/or overbroad”.
- The Appellant is unaware of any trafficking or other illegal trading of SNAP benefits for cash as defined in the SNAP regulations. USDA wants store employees to be mind readers while simultaneously restricting SNAP recipients’ freedom to purchase. There is no evidence whatsoever that demonstrates any intent by the firm to violate the law, knowingly or otherwise. There is no evidence whatsoever that demonstrates a law was violated.
- Regarding the unusual number of transactions ending in a same cents value, there is no evidentiary or regulatory support prohibiting transactions that end in even numbers, **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**, as long as the items purchased are “eligible”.
- Regarding the multiple transactions made from individual benefit accounts within a set period of time, there is no limitation cited in the SNAP regulations prohibiting individuals to make multiple transactions within a limited timeframe. These transactions are the result of SNAP customers purchasing goods several times within the same day and sharing their SNAP benefits and food with other people. The Appellant cannot stop SNAP customers from purchasing goods repeatedly.

- The SNAP recipient who made the “excessively large” purchase **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** has violated the law by making such a transaction and that person’s identity is already known by SNAP regulators. If the firm has violated the law by allowing the “excessively large” transaction, then there is a lack of clarity in the regulations that would allow the firm to assume that this amount, or any of the other amounts listed, is too high. The *SNAP Training Guide for Retailers* and the regulations speak as to *types* of purchases that are allowed and disallowed, but there is no guidance as to dollar amounts and the frequency to which lawful goods are purchased.
- Any sanction imposed on Dollar Plus Grocery would be unfair, unjust, and in deprivation of the Appellant’s due process rights.
- There was no prior warning provided by the Retailer Operations Division to warn the Appellant about the possibility that violations were occurring.
- To ensure that SNAP violations do not occur in the future, the Appellant will retrain store employees (including itself) on the SNAP regulations and training materials provided on the SNAP website. The Appellant will be more involved in the daily operation of the business and will make and provide an employee handbook for education and training purposes.
- Most of the store’s customers are low-income residents who live in public housing. Due to few options for neighborhood residents in terms of convenience store shopping, a permanent SNAP disqualification of Dollar Plus Grocery would inevitably cause hardship to SNAP households.
- A permanent SNAP disqualification will impose a financial hardship on Dollar Plus Grocery and will destroy the livelihood of the Appellant. Approximately 95% of the store’s sales come from SNAP sales.
- The Appellant requests that FNS reconsider its decision to permanently disqualify Dollar Plus Grocery from participating in the SNAP.

ANALYSIS AND FINDINGS

Store Characteristics

FNS authorized Dollar Plus Grocery as a convenience store on July 16, 2007. The case file indicates that in reaching a disqualification determination, the Retailer Operations Division considered information obtained during a March 11, 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 1,800 square feet in size and does not have additional food storage outside of public view;
- No shopping carts or hand-held baskets available for customer use;
- Two cash registers and one EBT point-of-sale (POS) device for use in ringing-up SNAP transactions;
- No optical scanners;
- The available checkout area space was limited and it is surrounded by a Plexiglas barrier;

- There were empty and scantily filled shelves;
- 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, \$x.00, or \$x.50;
- Less than four expensive (costing \$5.00 and above) staple foods in stock;
- Telephone orders are not taken and delivery is not available to customers;
- There were no fresh unprocessed meats, poultry, or seafood;
- Frozen meats included a few units of processed chicken;
- No deli area in which deli meats and cheeses were sold by the pound;
- No hot and/or cold prepared, ready-to-eat foods were prepared and sold;
- Other frozen foods included ice cream, single-serve pizza, individual meals, and appetizers;
- There were units of canned fish, eggs, canned/potted meat, hot dogs, and packaged lunch meat;
- Dairy included milk and butter;
- Infant foods included infant formula;
- No fresh produce;
- Other staple foods available for purchase included such items as juice, flour, pasta, bread, cereal, baking mix, and canned goods;
- Much of the remaining food stock consisted of accessory foods such as candy, carbonated and non-carbonated drinks, sugar, vegetable oil, and condiments; and
- Ineligible nonfood items included tobacco products, health and beauty items, paper products, household cleaning supplies, household items, automotive supplies, pet food, kitchen/cooking supplies, incense, cell phone accessories, jewelry, party goods, 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 Dollar Plus Grocery'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.

Same Cents Transactions (Charge Letter Attachment 1)

This Charge Letter Attachment documents transactions ending in same cents values. A review of the store visit record indicates that the store did not promote any specials that could explain the pattern of large numbers of transactions ending in these values.

5 U.S.C. § 552 (b)(6) & (b)(7)(C).

Dollar Plus Grocery conducted 10,758 SNAP transactions during the review period. There were a total of 2,949 SNAP transactions that met the parameters of this Attachment. Of the total SNAP transactions conducted during the review period, a total of 1,034 (10%) ended in “00” cents and 1,915 (17%) ended in “50” cents. Same cents values comprised ~27% of all of the SNAP transactions conducted by the firm during the three month review period.

A number of households whose transactions were cited in other Attachments to the Charge Letter also consistently made transactions that ended in same cents values. Transactions appearing in more than one Attachment to the Charge Letter are more suspicious as they display multiple patterns common to trafficking transactions.

With regard to the unusual number of transactions ending in a same cents value, the Appellant argues that there is no evidentiary or regulatory support prohibiting transactions that end in even numbers, **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**, as long as the items purchased are “eligible”. The SNAP regulations do not prohibit SNAP transactions that end in an even number value. However, an interesting characteristic of questionable transactions is that many of them end in a same cents value. Sets of repeating digits are highly unorthodox and do not regularly occur in legitimate transactions; such transaction structuring is a common hallmark of trafficking activity. In the absence of any compelling rationale to the contrary, these patterns strongly indicate that the firm is trafficking in SNAP benefits.

Attachment 1 to the Charge Letter documents transactions ending in same cents values. A review of the store visit record indicates that Dollar Plus Grocery did not promote any specials

nor did it have a special pricing structure, such as prices ending in \$x.x9, \$x.00, or \$x.50, that could explain the pattern of large numbers of transactions ending in these values. This Attachment includes 2,949 same cents transactions **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**.

Patterns of transactions ending in same cents amounts indicate that SNAP transaction amounts are contrived. Random data, which legitimate transaction activity approximates, is extremely difficult to produce intentionally; it is very difficult to avoid repetitive patterns when attempting to create the appearance of normal, near-random transactions. That various customers each repeatedly had totals with identical cents values during the review period strains the credibility of the Appellant's declaration that this activity reflected the acceptance of SNAP benefits in exchange for eligible food items. As the Appellant has offered no rational explanation for why such patterns might exist, it is reasonable to conclude that these same cents transactions are the result of trafficking.

Repeat Transactions by the Same Household (Charge Letter Attachment 2)

This Charge Letter Attachment documents 116 sets of transactions (329 total transactions) that **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 Dollar Plus Grocery multiple times during a short period or purchase such a large volume of items, there being no great variety of products, price advantage, profusion of large packages, or significant bulk items or food cases for sale. The second, third, fourth, fifth, and sixth transactions in each set are too large to consist of forgotten items.

The Appellant argues that with regard to the multiple transactions made from individual benefit accounts within a set period of time, there is no limitation cited in the SNAP regulations prohibiting individuals to make multiple transactions within a limited timeframe. These transactions are the result of SNAP customers purchasing goods several times within the same day and sharing their SNAP benefits and food with other people. The Appellant cannot stop SNAP customers from purchasing goods repeatedly.

As to whether or not SNAP recipients sharing their EBT cards/SNAP benefits and food 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/SNAP benefits is particularly common among SNAP recipients in Washington, D.C. 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 2 are vastly different in Dollar Plus Grocery than in any other nearby comparable firm giving credibility to the notion that trafficking is mostly likely taking place.

A review of client shopping data for the review period shows that clients shopping at Dollar Plus Grocery are also shopping at other area grocery stores, as well as full-line supermarkets and super stores that most likely offer customers a much larger quantity and variety of eligible food items for better prices. Based on these shopping patterns, transportation to other stores is not an issue for these SNAP customers. Yet, these customers continue to shop and spend suspicious high dollar amounts in short timeframes at Dollar Plus Grocery, where the eligible staple food stock is limited, 5 U.S.C. § 552 (b)(6) & (b)(7)(C) of their purchases at better stocked stores. This is a strong indicator of trafficking.

Sometimes a firm may have unusual transaction patterns due to a recipient's lack of access to other SNAP authorized stores. However, Agency mapping systems indicate that there are 66 SNAP authorized retailers located within a 2.0 mile radius of Dollar Plus Grocery that can meet the nutritional needs of SNAP customers including 7 small grocery stores, 3 medium grocery stores, 3 supermarkets, and 1 super store. Many of these area SNAP stores are of a comparable size or larger than Dollar Plus Grocery and offer a comparable or greater quantity and variety of food products at comparable or better prices as compared to the subject store. As mentioned above, SNAP customers that shopped at Dollar Plus Grocery during the review period also shopped at other area grocery stores and, therefore, transportation to other stores is not an issue for these customers. Therefore, lack of access to other authorized stores does not appear to be an explanation for Dollar Plus Grocery's abnormally high SNAP transaction amounts conducted within a short timeframe of each other.

The Appellant did not provide any compelling justification as to why SNAP households are conducting multiple transactions at Dollar Plus Grocery or evidence that all of the irregular transactions cited in the Charge Letter were for eligible food items only. Based on the analysis above and in the absence of any other reasonable explanation, the irregular transaction patterns are more likely than not to be a result of trafficking in SNAP benefits.

Excessively Large Purchase Transactions (Charge Letter Attachment 3)

This Charge Letter Attachment documents 1,062 transactions 5 U.S.C. § 552 (b)(6) & (b)(7)(C). These large transactions are not consistent with a convenience store in Washington, D.C. During the review period, the average transaction amount for a convenience store in Washington, D.C. was \$7.72. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). 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 unprocessed meats, poultry, or seafood and the only frozen meats in stock were a few units of processed chicken. Most of the food products in Dollar Plus

Grocery consisted of accessory food items such as candy and soda and inexpensive staple foods such as canned and packaged goods. The frequency of high dollar purchases in the the review period calls into question the legitimacy of these transactions.

The Appellant argues that the SNAP recipient who made the “excessively large” purchase of 5 U.S.C. § 552 (b)(6) & (b)(7)(C) has violated the law by making such a transaction and that person’s identity is already known by SNAP regulators. If the firm has violated the law by allowing the “excessively large” transaction, then there is a lack of clarity in the regulations that would allow the firm to assume that this amount, or any of the other amounts listed, is too high. The *SNAP Training Guide for Retailers* and the regulations speak as to *types* of purchases that are allowed and disallowed, but there is no guidance as to dollar amounts and the frequency to which lawful goods are purchased.

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 excessive nor do the SNAP regulations or training materials disallow such purchases. However, it is rare for a convenience store such as Dollar Plus Grocery to have purchases like those included in Attachment 3 to the Charge Letter. This Attachment cites 1,062 EBT transactions during the three month period of investigation 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

The FNS store visit report and photos of March 11, 2018 show that Dollar Plus Grocery offers a minimal stock of SNAP eligible foods with no fresh meats, poultry, or seafood, only one variety of frozen meats (processed chicken) in a limited quantity, a limited amount and variety of canned fruits and vegetables, no fresh produce, and no frozen fruits or vegetables. The 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 no shopping carts or 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 66 SNAP authorized retailers located within a 2.0 mile radius of Dollar Plus Grocery that can meet the nutritional needs of SNAP customers. Many of these area SNAP stores are of a comparable size or larger than Dollar Plus Grocery and offer a comparable or 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 Dollar Plus Grocery 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 Dollar Plus Grocery 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.

The record shows that the Retailer Operations Division compared the Appellant firm, a convenience store, to two area SNAP authorized convenience stores that carry similar eligible foods but are better stocked than Dollar Plus Grocery. During the review period, Dollar Plus Grocery conducted considerably more suspicious SNAP transactions (i.e., an unusual number of transactions ending in a same cents value, multiple transactions made from individual benefit accounts within a set period of time, and excessively large purchase transactions made from recipient accounts) as compared to the two comparable convenience stores located less than 1.5 mile from the subject firm. Dollar Plus Grocery's total SNAP transaction count, dollar volume, and ALERT rank were considerably higher as compared to the two area convenience stores. Dollar Plus Grocery also conducted significantly higher numbers of SNAP transactions **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** when compared to the comparison convenience stores.

In addition, the average SNAP transaction amount for Dollar Plus Grocery was 71.3% higher than the average for convenience stores in Washington, D.C. during the review period. Similarly, the subject firm's total SNAP purchase count and total dollar volume were also much larger as compared to the average for convenience stores in Washington, D.C. **(5 U.S.C. § 552 (b)(7)(E))**. These are all indicators that trafficking is more likely than not occurring at Dollar Plus Grocery.

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 Dollar Plus Grocery 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 Dollar Plus Grocery often **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** at the larger stores where they conducted much smaller SNAP purchases. It is highly unlikely that a convenience store with limited 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 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 3 are more likely than not the result of trafficking in SNAP benefits.

Denial of Violations

Regarding the Appellant's contention 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.

Unaware of Violations

The Appellant argues that if SNAP violations occurred at Dollar Plus Grocery, they were mistakenly conducted by two employees who were taking care of the store while the Appellant was out of the country the past two years for treatment. If SNAP violations occurred, they were done so without the Appellant's knowledge or approval.

This contention cannot be accepted as a valid basis for dismissing any of the charges, or for mitigating the impact of those charges. As owner of the store, the Appellant is liable for all violative transactions that occur at Dollar Plus Grocery. Regardless of whom the ownership of a store may utilize to handle store business (i.e., regardless of whether a store owner, store manager, store clerk, family member, etc. was involved in the violative transactions), ownership is accountable for the proper handling of SNAP benefit transactions.

Prior to becoming authorized to participate in the SNAP on July 16, 2007, the Appellant completed and submitted a SNAP Application for Retail Stores. The SNAP Application contained a section indicating that the person(s) signing the Application understood and agreed to ensure that store employees follow the SNAP rules and regulations and that the person(s) accepts responsibility for any SNAP violations that may occur at the store that were committed by any of the store's employees---paid, unpaid, new, temporary, full-time, part-time, etc. The SNAP Application also included a section that contained a statement which acknowledged that the person(s) signing the Application was aware that violations of Program rules could result in fines, legal sanctions, withdrawal, or disqualification of the store. In addition, the Appellant was provided with program training and reference materials which reinforced the statements included in the SNAP Application.

The regulations establish that an authorized food store may be disqualified from participating in the program when the store fails to comply with the Act or regulations because of the wrongful conduct of an owner, manager, or someone acting on their behalf. Trafficking is defined in 7 CFR § 271.2 of the SNAP regulations which states that 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... 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 "Disqualification ... shall be permanent upon ... the first occasion of a disqualification based on ... trafficking ... by a retail food store". 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.

The Appellant's implied contention that if SNAP violations occurred, they were committed by store employees without its knowledge, consent, or approval cannot be accepted as a valid basis for diminishing the penalty. To allow store ownership to disclaim accountability for the acts of persons whom the ownership chooses to utilize to handle store business would render virtually meaningless the enforcement provisions of the Food and Nutrition Act and the enforcement efforts of USDA.

Charge Letter

The Appellant argues that USDA did not provide it with the statutory and regulatory authority in the Charge Letter to charge the firm with trafficking as there are no allegations in the letter that money was exchanged for SNAP benefits. The transactions flagged by USDA as evidence of "trafficking" were not defined and the allegations were "vague and/or overbroad".

With regards to this contention, the Appellant appears to be equating non-disclosure of evidence with a lack of evidence. Neither the Food and Nutrition Act of 2008 nor the SNAP regulations pursuant thereto provide for evidentiary proceedings at the administrative level of review, and therefore such proceedings are not included in the administrative review process. Rather, the Act and regulations provide that any firm aggrieved by an administrative review determination may seek judicial review of the determination in Federal court or a state court of record having competent jurisdiction. In such event, trial de novo proceedings ensure the firm of a full evidentiary hearing on the agency action at issue.

Due Process

The Appellant argues that any sanction imposed on Dollar Plus Grocery would be unfair, unjust, and in deprivation of its due process rights. With regard to the Appellant's claim that its due process rights were violated, the Appellant replied to the charges in writing, denying the charge of trafficking and offering various explanations for the questionable transactions. After considering the evidence of the case and the Appellant's reply, the Retailer Operations Division determined that a permanent disqualification was warranted. The action was not arbitrary or capricious as it followed the agency's due process procedures which are two-fold in nature. First, the retailer is afforded an opportunity to reply to the charges as specified by the Retailer Operations Division; the Appellant has availed itself of this first aspect of the due process procedures in the form of a written reply to the Retailer Operations Division. The second level of due process involves an administrative review, of which the Appellant has likewise availed itself and in the process of which the Appellant was granted an additional three weeks within which additional information may be provided in support of the request for review.

The purpose of the administrative review process is to ensure that firms aggrieved by FNS' adverse actions have the opportunity to have their position fairly considered by an impartial reviewing authority prior to that adverse action becoming final. The Appellant has been duly given, and has taken, the opportunity to present to USDA through the administrative review

process whatever evidence and information it deems as pertinent in support of its position that the Retailer Operations Division's adverse action should be reversed. In the instant case the Appellant provided additional materials three weeks following delivery of the letter acknowledging acceptance of the appeal, the additional materials were accepted and included in the administrative review. Therefore, any evidence and information that the Appellant presented to the Retailer Operations Division, as well as any such information submitted subsequently, have now been considered in this administrative review in rendering the final agency administrative decision in this case.

The record does not indicate any departure from established policy or procedures with regard to the Appellant's right to a fair and thorough review. The Appellant has exercised its opportunity to reply to the Charge Letter and its administrative review rights, and by doing so has availed itself of the full complement of the agency's statutory obligations with regard to due process.

No Warning Provided

The Appellant argues that there was no prior warning provided by the Retailer Operations Division to warn it about the possibility that violations were occurring. 7 CFR § 278.6(d)(2) and (3) of the SNAP regulations provides that "The FNS office making a disqualification or penalty determination ... shall consider ... any prior action ... to warn the firm about the possibility that violations are occurring..." The citation simply requires FNS to consider any prior warnings when determining a sanction. It does not require FNS to give such warnings. FNS did not consider prior actions to warn Dollar Plus Grocery about the possibility that violations were occurring because there were no prior warnings during the review period. The evidence considered by the Retailer Operations Division included the raw data of questionable transactions and information obtained during the aforementioned store visit conducted on March 11, 2018.

Corrective Action

The Appellant argues that in order to ensure that SNAP violations do not occur in the future, it will retrain store employees (including itself) on the SNAP regulations and training materials provided on the SNAP website. The Appellant will be more involved in the daily operation of the business and will make and provide an employee handbook for education and training purposes.

With regard to the Appellant's arguments, it is important to clarify for the record that the purpose of this review is to either validate or to invalidate the earlier decision of the Retailer Operations Division. This review is limited to what circumstances were at the basis of the Retailer Operations Division action at the time such action was made. It is not the authority of this review to consider what subsequent remedial actions may have been taken so that the store may begin to comply with program requirements. 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 after-the-fact corrective action implemented subsequent to investigative findings of program violations. Therefore, the Appellant's contention that it has taken/will take corrective actions, though they would have been valuable towards preventing future program

violations, does not provide any valid basis for dismissing the charges or for mitigating the penalty imposed.

Hardship to SNAP Customers

The Appellant argues that most of the store's customers are low-income residents who live in public housing. Due to few options for neighborhood residents in terms of convenience store shopping, a permanent SNAP disqualification of Dollar Plus Grocery would inevitably cause hardship to SNAP households. 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.

Financial Hardship

The Appellant argues that a permanent SNAP disqualification will impose a financial hardship on Dollar Plus Grocery and will destroy the livelihood of the Appellant. Approximately 95% of the store's sales come from SNAP sales. 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.

Reconsideration of Penalty

The Appellant requests that FNS reconsider its decision to permanently disqualify Dollar Plus Grocery from participating 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.

CIVIL MONEY PENALTY

As previously indicated, the June 26, 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 April 26, 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 Dollar Plus Grocery is sustained.

RIGHTS AND REMEDIES

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

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

November 15, 2018