

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

Jz Food Mart,

Appellant,

v.

Case Number: C0211852

Retailer Operations Division,

Respondent.

FINAL AGENCY DECISION

The U.S. Department of Agriculture, Food and Nutrition Service (FNS), finds that there is sufficient evidence to support the determination by the Retailer Operations Division to impose a permanent disqualification against Jz Food Mart (hereinafter Appellant) from participating as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP).

ISSUE

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with Title 7 of the Code of Federal Regulations (CFR) § 278.6(a), (c) and (e)(1)(i), when it imposed a permanent disqualification against Appellant on October 18, 2018.

AUTHORITY

According to 7 U.S.C. § 2023 and the implementing regulations at 7 CFR § 279.1, “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

By letter dated September 11, 2018, the Retailer Operations Division charged Appellant with trafficking based on a series of irregular SNAP transaction patterns that occurred in February 2018 through July 2018. The letter noted that the penalty for trafficking is permanent disqualification as provided by 7 CFR § 278.6(e)(1). The letter also noted that the Appellant could request a trafficking civil money penalty (CMP) in lieu of a permanent disqualification within ten days of receipt under the conditions specified in 7 CFR § 278.6(i).

Appellant responded to the charges in a letter dated September 14, 2018, that did not request or provide any documentation in support of a CMP. The Retailer Operations Division notified Appellant by letter dated October 18, 2018, that the firm was permanently disqualified from participation as a SNAP retailer in accordance with 7 CFR § 278.6(c) and 278.6(e)(1) for trafficking violations. This letter also stated that Appellant was not eligible for the CMP because insufficient evidence was submitted to demonstrate that it had established and implemented an effective compliance policy and program to prevent SNAP violations.

By letter dated October 22, 2018, Appellant appealed the Retailer Operations Division's assessment and requested administrative review. The appeal was granted. Counsel for Appellant requested an extension of time to respond that was granted. Subsequent correspondence dated November 13, 2018, and December 7, 2018, was received from counsel.

STANDARD OF REVIEW

In an appeal of an adverse action, Appellant bears the burden of proving by a preponderance of evidence that the administrative action should be reversed. That means Appellant has the burden of providing relevant evidence that a reasonable mind, considering the record as a whole, would accept as sufficient to support a conclusion that the argument asserted is more likely to be true than untrue.

CONTROLLING LAW

The controlling law in this matter is contained in the Food and Nutrition Act of 2008, as amended (7 U.S.C. § 2021), and implemented through regulation under Title 7 CFR Part 278. In particular, 7 CFR Part 278.6(a) and Part 278.6(e)(1)(i) establish the authority upon which a permanent disqualification may be imposed against a retail food store or wholesale food concern in the event that personnel of the firm have engaged in trafficking SNAP benefits.

7 CFR § 278.6(a) states: "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."

7 CFR § 278.6(e)(1)(i) states: "FNS shall disqualify a firm permanently if personnel of the firm have trafficked as defined in § 271.2." Trafficking is defined in part as, "The buying, selling, stealing, or otherwise effecting an exchange of SNAP benefits for cash or consideration other than eligible food". Trafficking includes "Intentionally purchasing products originally purchased with SNAP benefits in exchange for cash or consideration other than eligible food".

7 CFR §278.6(i) states: "FNS may impose a civil money penalty in lieu of a permanent disqualification for trafficking . . . 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.”

7 CFR §278.6(b)(2)(ii) states: “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).” Part 278.6(b)(2)(ii) further states that if a firm fails to request a civil money penalty in lieu of a permanent disqualification for trafficking and submit documentation and evidence of its eligibility within the specified 10 days, the firm shall not be eligible for such a penalty.

SUMMARY OF THE CHARGES

The issue in this review is whether, through a preponderance of evidence, it is more likely true than not true that the questionable transactions were the result of trafficking. The charges on review were based on an analysis of SNAP EBT transaction data during the six month period of February 2018 through July 2018. This involved two patterns of EBT transaction characteristics indicative of trafficking:

1. Multiple transactions were made from individual benefit accounts in unusually short time frames.
2. Excessively large purchase transactions were made from recipient accounts.

APPELLANT’S CONTENTIONS

The following may represent a 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:

- The firm is a small store in a depressed rural community that sells a tremendous amount of meat and groceries to the local community with SNAP accounting for 80 percent of sales;
- All of the large and multiple transactions were meat sales. The firm has meat specials from \$34.95-\$195.95. Residents do not have vehicles and visit on foot with most shopping several times each day. Counsel has witnessed shoppers at super stores separate their purchases and while he has no idea why they do it, it is common practice at the firm. Customers call to order specials and sometimes they will shop for other grocery items after they pay for the meat specials. This is why their card number appears more than once. Many times purchasers bring in family members and parse out portions to each. There is no drug, liquor, or criminal activity associated with these transactions;
- The firm is primarily a meat market with the owners purchasing approximately **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** per month of meat and groceries. There are meat

specials that change very often. These specials bring in a tremendous amount of business with consumers making large meat purchases since Mansura has a population of 1,420 with a median per capita income of 5 U.S.C. § 552 (b)(6) & (b)(7)(C) and median household income of 5 U.S.C. § 552 (b)(6) & (b)(7)(C), 59 percent lower than the national average; and,

- Further instruction by USDA would be beneficial rather than disqualification that would be a death blow to the firm. The SNAP households should be the ones questioned regarding their multiple purchases. It would be helpful if the owners could understand the violations so they can correct any policy. The store will close if SNAP is lost.

Appellant submitted five photos of fresh meat, a handwritten monthly purchase report for May-October 2018, and a flyer listing meat packages in support of these contentions.

ANALYSIS AND FINDINGS

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. Nevertheless, transactions having such characteristics are sometimes valid and sufficient evidence that support that they were the result of legitimate purchases of eligible food items is provided. This is why opportunities are afforded to charged retailers to explain the questionable transactions cited and to provide evidence that they are legitimate.

The Retailer Operations Division presented a case that Appellant trafficked SNAP benefits. Each Attachment furnished with the letter of charges represents the questionable and unusual patterns of SNAP transactions indicative of trafficking which were conducted at Appellant's store during the review period. As patterns of unusual transactions appear across multiple Attachments, the case of trafficking becomes more convincing.

Store Background and FNS Store Visit

FNS initially authorized the firm on June 10, 2015. The case file indicates that in reaching a disqualification determination, the Retailer Operations Division considered information obtained during a July 21, 2018, store visit conducted by a FNS contractor to observe the nature and scope of the firm's operation, stock, and facilities. This information was then used to ascertain if there were justifiable explanations for the firm's suspicious SNAP transactions. The store visit documented the following store size, description, and characteristics:

- The firm was a typically sized small grocery store offering a limited quantity and variety of staple foods and carrying no unique items or offering any distinctive services.
- The firm primarily stocked traditional American brands and there were no ethnic or specialty food items.

- The store visit report and photos showed three shopping carts and five small hand baskets for customer use.
- No food packages, bundles, case sales, or other sales were evident that would explain the unusual transactions and no cased items were available for purchase except for drinks.
- The firm did offer an extremely limited quantity and variety of bulk foods that consisted of two 50 pound bags of rice.
- The store visit report specifically noted that the firm was not a specialty store and that there were meat plans, but no fruit and vegetable boxes for sale.
- There was only one checkout area that was approximately 1.5 feet wide and 2.0 feet deep with many displays and PIN pads taking up space on both sides leaving a very limited area for customers to place their purchases. The very small checkout area would make it problematic to process large orders. The checkout area had two cash registers, two POS terminals, and an optical scanner as confirmed by the store owner.
- The firm had a limited stock of staple foods that also included many single serving and pre-packaged items with a significant portion of inventory in drinks, candy, and snacks as well as many ineligible items.
- The firm had a kitchen/food prep area as well as a meat cutting area. There was a heated foods display case that was nearly empty and a refrigerated display case that primarily contained processed meats and a very limited quantity and variety of fresh meat and poultry.
- The firm had very limited fresh unprocessed meat, no fresh unprocessed seafood, very limited frozen unprocessed meat or seafood (shrimp), a limited selection of processed meats and seafood (canned meat, poultry, fish; hot dogs; two bacon; sausages; and packaged lunch meats), no frozen entrees; no frozen dinners, no jerky, several cartons of eggs, a limited quantity and variety of fresh fruit and vegetables, a limited quantity and variety of frozen vegetables, no frozen fruits, no packaged nuts, several canned soups, a very limited quantity and variety of canned and packaged staple food items, packaged cheese, no yogurt, three sour cream, a very limited stock of butter/margarine, no infant formula, a limited selection of baby foods, bread, tortillas, no tostadas, no pitas, only one package of rolls, corn meal, flour, sugar, rice, hot cereal, cold cereal, single serving cold cereal, single serving Ramen noodle soup, dry pasta, no dry noodles, canned pasta, single serving canned pasta, mac&cheese, pancake mixes, coffee, cocoa, and a limited number of expensive staple food items.
- Although the firm advertised seven different meat plans ranging from \$34.95-\$195.95, the quantity and variety of fresh/frozen meats did not appear to be sufficient to fill these packages.
- Ineligible items included: gasoline, tobacco, alcohol, lottery, hot foods, household products, paper products, auto products, health and beauty items, ATM, phone accessories, sunglasses, hats, clothing, and jewelry while accessory foods included: candy, spices, condiments, cooking oil, sugar, snacks, baked goods, baking mixes, coffee, cocoa, and un/carbonated drinks.
- Signage was in English. There were no SNAP posters (anti-fraud, eligible items, reporting trafficking, etc.) visible in the store.
- The firm's hours of operation were open 6:30 AM-9:00 PM Monday-Saturday and 7:00 AM-8:00 PM Sundays per the store owner. The owner also stated that the firm did take

phone orders, did not take online grocery orders, did not deliver groceries; and did not round transaction totals up/down.

- Most food items were priced and comments on the FNS store visit report that was completed in conjunction with the owner specifically stated that most of the food prices ended in .x9 cents. A price ending in .x9 cents is a common pricing structure for stores of this type.
- The FNS store visit report listed the four most expensive food items costing more than \$5.00 for sale in the store as being a 65 pound meat package priced at \$195.95, a 25 pound beef package priced at \$95.95, a 25 pound BBQ meat package priced at \$75.95, and a boil meat package priced at \$75.95. This listing of the most expensive items was provided by the store owner during the store visit.
- The firm was not a WIC vendor. While the firm did stock a limited selection of baby foods, most SNAP households with infants or small children are WIC participants and therefore would be purchasing these products using WIC vouchers at a WIC vendor, not SNAP EBT at the Appellant firm.
- The store visit photos showed many marginally stocked shelves indicative of a slow turnover of stock.
- The quantity and variety of the store's staple food inventory was also less than that seen during the previous FNS store visit on June 13, 2017.

Multiple transactions in unusually short time frames

This Attachment documents 249 individual transactions in 92 sets of two or more transactions conducted by 46 different households in a short period of time.

5 U.S.C. § 552 (b)(6) & (b)(7)(C). The dollar amounts of subsequent transactions in each set are substantial and nearly equal or exceed the dollar amount of the initial transaction in 58 of the 92 sets. **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. One set is comprised of seven individual transactions, one set is comprised of six transactions, six sets are comprised of five transactions, five sets are comprised of four transactions, and 28 sets are comprised of three transactions while the remaining 51 sets are comprised of two individual transactions. It is not a usual shopping pattern to see so many purchases, in a short period of time, by the same recipients as documented in this Attachment. Multiple transactions conducted by the same household within a short period of time is a method which violating stores use to avoid single high dollar transactions that cannot be supported by store inventory and structure. These sets of transactions appear to be in amounts which are indicative of trafficking.

Appellant contends the large and multiple transactions in this Attachment are due to meat sales. The firm has meat specials from \$34.95-\$195.95. Residents do not have vehicles and visit on foot with most shopping several times each day. Counsel has witnessed shoppers at super stores separate their purchases and while he has no idea why they do it, it is common practice at the firm. Customers also call to order specials and sometimes they will shop for other grocery items after they pay for the meat specials. This is why their card number appears more than once. Many times purchasers bring in family members and parse out portions to each. There is no drug, liquor, or criminal activity associated with these transactions;

SNAP households have no limit on the number of times they may use their benefits or the dollar value of eligible food they may purchase. The SNAP transactions listed in this Attachment 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 a small grocery store's stock and facilities and are thus indicative of trafficking. These transaction sets do not contain the characteristics associated with a household purchasing a forgotten item right after checking-out or of household members/friends shopping together and making separate purchases as 78 of the 92 sets 5 U.S.C. § 552 (b)(6) & (b)(7)(C). The transaction sets also do not contain the characteristics of a household returning later in the day or sending their child to purchase a forgotten item or two as all of the sets have subsequent transactions in amounts 5 U.S.C. § 552 (b)(6) & (b)(7)(C), far more than the cost of a forgotten item or two.

It is certainly not unusual for a small number of SNAP households to conduct multiple transactions in a short period of time. However, it is unusual that subsequent transaction dollar amounts are substantial in these transaction sets and that all of the sets in this Attachment 5 U.S.C. § 552 (b)(6) & (b)(7)(C) when the comparable average small grocery store SNAP transaction amount in Avoyelles County during the review period was \$21.06. These multiple transactions indicate that the amounts were contrived in an attempt to avoid suspiciously high transactions that would be indicative of trafficking by breaking them into multiple, smaller amounts. FNS transaction data shows that this same pattern of multiple transactions in unusually short time frames is not evident at other nearby like type grocery stores further supporting that trafficking was occurring at the Appellant firm during the period under review. For example, there is a medium grocery store located within walking distance of the Appellant firm that offers a considerably greater quantity and variety of staple foods, including a much larger selection of fresh meats. This firm also has its own butcher shop and a variety of meat plans available.

Given the limited staple food stock at the Appellant firm, it is unlikely that any SNAP household would use the firm as their primary grocery store. This was confirmed by the Retailer Operation Division's analysis of the shopping patterns for households listed in this Attachment. Their analysis shows that households have ready access to transportation as evidenced by their shopping at a variety of larger food stores located nearby and at a distance from Appellant's location, including a variety of super stores and supermarkets. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Other households had similar shopping patterns which brings-up the question of why would households who are regularly shopping at numerous larger and better stocked stores, both nearby and at a distance, that offer the same types of foods elect to conduct multiple purchases at a minimally stocked grocery store that carries no unique foods or offers any special services. Appellant's contentions fail to offer any explanation or rationale for these unusual and suspicious shopping patterns.

Common sense dictates that it is improbable that households with limited cash resources would choose to travel these distances if their purchases consisted solely of eligible food items that could be purchased at any of the super stores, supermarkets, or other larger stores they were already regularly shopping at and therefore more likely than not that these households were trafficking SNAP benefits at the Appellant business and the multiple transactions were attempts by to obscure trafficking by dividing a large dollar value transaction into a series of smaller

dollar value transactions. This is a method used by stores to avoid high dollar transactions that cannot be supported.

As previously mentioned, this Attachment contains 10 transaction sets with both swiped and manually key entered individual transactions made using the same EBT card. Manually keyed transactions are those in which the magnetic strip on the back of the EBT card is not being read by the store's POS device and the clerk must manually key enter the lengthy EBT card number. When the magnetic strip on an EBT card fails, it can no longer be swiped and replacement cards contain different identification numbers. On-site investigations into trafficking have found it is not uncommon for retailers to have a SNAP recipient's PIN and EBT card number in order to facilitate trafficking SNAP benefits in exchange for cash without the need for the recipient to be physically present. The retailer enters the card number manually as the recipient has the actual EBT card and then enters the PIN. A review of EBT transactions on the dates of these manual transactions shows that the Appellant firm's POS device was functioning properly as there were swipe transactions before and after the manual transactions. Since these households had both swiped and manually keyed transactions, their EBT card does not have a worn or malfunctioning strip leaving trafficking as the only other possible reason for the manually keyed transactions.

5 U.S.C. § 552 (b)(6) & (b)(7)(C). These times are all markedly faster than super stores or supermarkets typically process purchases, yet while the firm does have an optical scanner, it does not have any of the logistical tools such as conveyor belts, rotating bagging platforms, or order separators that are routinely used in rapid throughput operations. The firm also a single checkout area that is very small making it implausible that multiple large dollar transactions could be completed in these short periods of time. The large transaction dollar amounts and the short interval between transactions in this Attachment demonstrate the improbability of these being legitimate eligible food purchases and suggest trafficking as the most likely explanation.

There may be legitimate reasons why a SNAP household might return to a store during a short period of time, but the examples in this Attachment indicate a series of SNAP purchases that total to large dollar amounts. Multiple transactions over a short period of time, especially those of high dollar values, are indicative of attempts to obscure trafficking by dividing a large dollar value transaction into a series of smaller dollar value transactions and are a method which violating stores use to avoid high dollar transactions that cannot be supported.

High Dollar Value Transactions

This Attachment lists 216 individual EBT transactions **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. The substantial number of high dollar transactions is uncharacteristic for a grocery store offering a limited stock of staple foods and calls into question the legitimacy of these transactions. The transactions are also substantially higher than the average SNAP transaction amount of \$21.06 for this store type in Avoyelles County. This is unusual and indicative of trafficking.

The evidence under review shows that SNAP households shopping at the Appellant firm are also shopping at many full-line supermarkets and super stores, located nearby as well as at a distance from Appellant's location, that offer a greater quantity and variety of SNAP eligible foods items

or better prices than customers can find at the Appellant firm. These high dollar transactions remain questionable when considering the proximity of other stores that would be better shopping options for consumers. Based on their shopping patterns, transportation does not appear to be an issue for these households. Yet, these recipients continue to shop and spend suspicious high dollar amounts at the Appellant firm, where the eligible food stock is limited, 5 U.S.C. § 552 (b)(6) & (b)(7)(C) of their purchases at larger food stores.

The difference in the average SNAP transaction amount, the total SNAP transaction dollar volume, and the total SNAP transaction count for Avoyelles County small grocery stores during the review months and at the Appellant firm is significant. 5 U.S.C. § 552 (b)(7)(E). The unusually high number of SNAP transactions combined with the low average SNAP transaction dollar amount is an indication the firm may be dividing larger transactions into multiple smaller transactions in an effort to circumvent detection as previously discussed. A comparison of Appellant's SNAP redemptions to that of nearby like type stores having redemptions for the review period shows that none exhibit the same suspicious transaction patterns listed in the charge letter for the Appellant firm even though all are located in proximity to Appellant's location and would therefore be expected to share the same SNAP customer base and shopping patterns. This is further indication that the transactions in this Attachment do not represent legitimate food purchases. The Retailer Operations Division considered all of these to be indicators of unusual and suspicious activity.

The firm had irregular SNAP transaction data compared to like type stores in Avoyelles County. A comparison of Appellant's redemption data to Avoyelles County small grocery stores using ten dollar increments shows that Appellant's transaction count and dollar volume significantly exceed the average of like type stores in all ranges 5 U.S.C. § 552 (b)(6) & (b)(7)(C) at which point they stop. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). This transaction pattern and the unusual spikes in both transaction numbers and dollar volume do not appear in the transaction patterns or in the transaction count and dollar volume averages for other like type stores. These large dollar transactions are considered to be irregular and suspicious based on the firm's food inventory. The Retailer Operations Division determined there was no credible reason for the firm to have transactions at these dollar levels given the limited stock of staple foods and the lack of any specialty, bulk, or ethnic foods that might sell for large dollar amounts and also considered this to be a strong indication of trafficking. None of Appellant's contentions explain these unusual and suspicious differences.

Appellant contends the firm is in a depressed rural community and sells a tremendous amount of meat and groceries to the local residents with the large transactions being due to meat sales. The firm is primarily a meat market with the owners purchasing approximately 5 U.S.C. § 552 (b)(6) & (b)(7)(C) per month of meat and groceries. There are meat specials that change very often. These specials bring in a tremendous amount of business with consumers making large meat purchases since Mansura has a population of 1,420 with a median per capita income of 5 U.S.C. § 552 (b)(6) & (b)(7)(C) and median household income of 5 U.S.C. § 552 (b)(6) & (b)(7)(C), 59 percent lower than the national average. Appellant submitted five photos of fresh meat, a handwritten monthly purchase report for May-October 2018, and a flyer listing meat plan specials in support of these contentions.

Appellant's explanation makes no sense as many SNAP retail stores are located in rural areas with large numbers of low income SNAP recipients yet these stores do not exhibit the same unusual patterns as the Appellant firm. The SNAP transactions noted in this Attachment are not presumed to be trafficking because they exceed a set dollar amount; they are questionable because they are inconsistent for this type of store and store stock. A shopping pattern analysis by the Retailer Operations Division shows that households in this Attachment are regularly shopping at much larger stores, and conducting high dollar transactions, yet are conducting comparable or higher dollar transactions at the Appellant firm. It makes no sense for a household that regularly shops at larger stores and apparently has no transportation limitations to spend large dollar amounts at the Appellant firm since its cost of goods is higher than that of larger stores such as supermarkets or super stores.

Information obtained during the FNS store visit on July 21, 2018, shows that the Appellant firm offers a limited quantity and variety of SNAP eligible staple food items, many accessory foods, and many ineligible items. Much of the inventory for sale consists of inexpensive snacks, candy, condiments, and drinks as well as many ineligible items. The fact that gasoline, tobacco, alcohol, lottery, hot foods, household products, paper products, auto products, health and beauty items, ATM, phone accessories, sunglasses, hats, clothing, and jewelry are not eligible for purchase with SNAP benefits also provides no justification for the high dollar transaction amounts. The store visit inventory report and its more than 50 photos show that the quantity and variety of fresh meats, poultry, and fish on display or in storage were limited at the time of the store visit and would not have been sufficient to fill many of the meat plans thus refuting Appellant's contentions that the high dollar transactions are due to meat purchases. It is also noted that the firm's limited staple food stock combined with the lack of any other higher priced foods would mean that the high dollar transactions in this Attachment would have to include at least one of the meat plans. It is not realistic that large numbers of SNAP households would be purchasing multiple meat plans costing hundreds of dollars each month and more likely that the high dollar transactions were due to trafficking. Also, Appellant's listing of meat plan specials was the same as seen in photos from both the July 2018 and the June 2017 FNS store visits indicating that these are not specials that change very often as claimed by Appellant.

Higher food prices make it even more unlikely that SNAP recipients, with very limited food benefits, would want to spend a considerable part of their benefits in a store that does not address all of their food needs when they are already shopping at larger, fully-stocked stores that would offer a greater variety of foods at lower prices. Many of these stores also offer store brand products at lower prices, weekly specials, and have multiple shopping carts and checkouts with built-in scanners and conveyor belts to facilitate processing purchases quickly. Additionally, Appellant furnished no itemized cash register and EBT receipts for the period under review to document the legitimacy of these excessively large transactions and no evidence was provided of SNAP eligible store stock via receipts of products taken into inventory for the relevant months. No supporting documentation was provided for the Monthly Purchase Report and the flyer listing meat plans was the same one seen during the FNS store visits so these are of no evidentiary value. Appellant's four photos show large quantities of meat that greatly surpass what was being offered for sale during both the 2018 and the 2017 FNS store visits making it more likely than not that these photos were staged to support Appellant's contentions in an attempt to avoid permanent disqualification.

SNAP redemptions at the Appellant firm fluctuated unusually following the store visit on July 21, 2018. The average SNAP transaction dollar amount decreased 12.91 percent from July 2018 to August 2018 while the volume of SNAP redemptions decreased 21.27 percent and the number of SNAP transactions decreased 9.27 percent during this same period. A pronounced decrease in SNAP redemptions following a store visit is a clear indication of trafficking since, if trafficking were not occurring, there would be no abnormal fluctuations in redemption amounts.

Based on this discussion, Appellant did not provide adequate evidence to support the legitimacy of the excessively large transactions in this Attachment.

Other Contentions

The purpose of this review is to either validate or to invalidate the earlier decision of the Retailer Operations Division and is limited to what circumstances were at the basis of the action at the time such action was made. In an appeal of an adverse action, the Appellant bears the burden of proving by a preponderance of evidence that the administrative action should be reversed. That means the Appellant has the burden of providing relevant evidence that a reasonable mind, considering the record as a whole, would accept as sufficient to support a conclusion that the argument asserted is more likely to be true than untrue. 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. When the store owners signed the certification page of the SNAP retailer authorization application to become a SNAP retailer in 2015, they confirmed they understood and agreed to abide by program rules and regulatory provisions. They also agreed to accept responsibility on behalf of the firm for violations of the SNAP including those committed by any of the firm's employees, paid or unpaid, new, full-time or part-time. The certification is clear that store ownership understood by signing the document that violations of program rules can result in administrative actions such as fines, sanctions, withdrawal, or disqualification from the SNAP. Additionally, a record of participation in SNAP with no previously documented instance of violations does not constitute valid grounds for dismissal of the current charges of violations or for mitigating the impact of those charges.

Appellant's claim that the firm is located in a depressed rural community is not contested as many SNAP retailers are located in similar areas. With regards to Appellant's contention that FNS should be looking into the SNAP recipients conducting the transactions listed in these Attachments, no ruling will be rendered as the scope of this review is limited solely to the factors pertaining to the permanent disqualification of Jz Food Mart. Therefore, this contention cannot be used to reverse or mitigate the decision of the Retailer Operations Division.

The owners and the firm were charged with trafficking based on a computer analysis of the firm's transactions for the review period. The charges do not derive from the use of a confidential informant or independent investigator who visited the store and made illegal purchases to support findings of trafficking, but by a computer program used by SNAP Administrators. While traditional undercover operations are still in use by USDA, for many

years federal regulations have also authorized the use of evidence consisting of EBT transaction data in investigations of SNAP retail stores to determine if trafficking is occurring and U.S. District Courts have long upheld the validity of EBT transaction data.

The issue under review involves a charge of trafficking SNAP benefits based on EBT transaction data. EBT transaction data is covered in SNAP regulations at 7 CFR § 278.6(a) and is addressed below. Trafficking is always considered to be the most serious violation even if it is a first offense therefore a temporary suspension or lesser penalty would not be applicable. SNAP regulations at 278.6(e)(1) clearly state that, “FNS shall disqualify a firm permanently if personnel of the firm have trafficked as defined in § 271.2.” SNAP regulations at 7 CFR § 271.2, define trafficking as, “The buying, selling, stealing, or otherwise effecting an exchange of SNAP benefits for cash or consideration other than eligible food”. SNAP regulations at 7 CFR § 278.6(a) clearly state that “FNS may disqualify any authorized retail food store if the firm fails to comply with the Food and Nutrition Act of 2008, as amended, 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”. In the present case, the data presented in the Attachments is solely based on the SNAP EBT transactions conducted at the Appellant firm during the review period. This firm was selected as a result of a series of complex algorithms that make numerous data comparisons with other like type firms during the review period. All of the transactions were then reviewed and analyzed by the Retailer Operations Division staff before the decision was made to issue a charge letter. This investigative process included a detailed examination of information obtained from various sources, including, but not limited to the inventory report and photos from the FNS store visit, a transaction comparison and analysis of like type and larger stores, and analysis of shopping patterns for recipient households conducting transactions at the Appellant firm during the review period. This analysis also included a review of the firm to ensure its store classification was correct and the data comparisons with like type firms valid. Additionally, there are nearby like type stores whose transaction data does not form these suspicious patterns and are therefore not at risk of disqualification for trafficking. There is also no regulatory requirement that trafficking disqualifications be based solely on on-site undercover operations.

Based on this empirical data, and in the absence of sufficient evidence for the legitimacy of such transaction patterns, a conclusion can be drawn, through a preponderance of evidence that the “unusual, irregular, and inexplicable” transactions and patterns cited in the charge letter evidence trafficking as the most likely explanation for the questionable transactions listed. It is herein determined that Appellant did not provide a preponderance of evidence demonstrating that the transactions contained in the charge letter were more likely due to eligible food sales than not. Under review, the evidence more substantially supports a conclusion that the transaction activity in the charge letter Attachments is due primarily to trafficking in SNAP benefits.

The Food and Nutrition Act of 2008, as amended, and the regulations issued pursuant thereto do not cite any minimum dollar amount of cash or SNAP benefits, or number of occurrences, for such exchanges to be defined as trafficking. Nor do they cite any degrees of seriousness pertaining to trafficking of SNAP benefits. Trafficking is always considered to be the most serious violation, even when the exchange of SNAP benefits for cash is dollar-for-dollar or is

conducted by a non-managerial store clerk. This is reflected in the Food and Nutrition Act, which reads, in part, 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, Section 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 and second chances are not an authorized option under existing regulations.

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 for waiver or reduction of an administrative penalty assessment on the basis of possible economic hardship to the firm or to ownership resulting from imposition of such penalty. To allow ownership to be excused from an assessed administrative penalty based on purported economic hardship to the firm would render virtually meaningless the enforcement provisions of the Food and Nutrition Act of 2008, as amended, and the enforcement efforts of the USDA. Furthermore, 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, ownership’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.

CIVIL MONEY PENALTY

A CMP for hardship to SNAP households may not be imposed in lieu of a permanent disqualification as specified in SNAP regulations at 7 CFR § 278.6(f). Trafficking is a permanent disqualification so Appellant is not eligible for a hardship CMP.

The Retailer Operations Division determined that the Appellant was not eligible for a trafficking CMP in lieu of a disqualification under 7 CFR 278.6(i) because Appellant failed to submit any evidence to demonstrate that the firm had established and implemented an effective compliance policy and program to prevent SNAP violations within the specified timeframe. As such, the Retailer Operations Division determined that Appellant was not eligible for a trafficking CMP in lieu of permanent disqualification.

Based on the above discussion and the evidence under review, Appellant failed to meet the regulatory standard for a trafficking CMP as it did not provide substantial evidence that it met all four criteria required by 7 CFR §278.6(i). Based on the above, the Retailer Operations Division’s decision not to impose a CMP in lieu of disqualification is sustained as appropriate pursuant to 7 CFR §278.6(i).

CONCLUSION

The Retailer Operations Division presented a case that Appellant has likely trafficked in SNAP benefits. Their analysis of Appellant's EBT transaction record was the primary basis for its determination to permanently disqualify Appellant. This data provided substantial evidence that the questionable transactions during the review period had characteristics consistent with trafficking violations in SNAP benefits. This is evidenced by: the suspicious patterns in two Attachments of EBT transaction data, the inadequacy of the store's staple food stock as observed during the store visit to support large transactions in short time frames, the lack of adequate evidence for customer spending habits given that there are other SNAP authorized stores located within proximity to Appellant that likely offer a greater selection of eligible food items at competitive prices, and the irregular SNAP transaction data of Appellant as compared to other like type and larger stores in the county and state.

The retailer has not provided sufficient evidence to rebut the case that Appellant most likely trafficked in SNAP benefits. Therefore, based on a review of all of the evidence in this case, it is more likely true than not true that program violations did, in fact, occur as charged. Based on the discussion above, the determination to impose a permanent disqualification against Appellant is sustained. Furthermore, the Retailer Operations Division properly determined that Appellant was not eligible for a trafficking CMP according to Section 278.6(i) of the SNAP regulations.

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.

ROBERT T. DEEGAN
Administrative Review Officer

May 1, 2019