

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

3401 Deli & Grocery Corp,

Appellant,

v.

Case Number: C0204782

Retailer Operations Division,

Respondent.

FINAL AGENCY DECISION

It is the decision of the U.S. Department of Agriculture, Food and Nutrition Service (FNS) that the permanent disqualification from the Supplemental Nutrition Assistance Program (SNAP) imposed upon 3401 Deli & Grocery Corp (hereinafter “Appellant”) by the Retailer Operations Division, Investigations and Analysis Branch, hereinafter “ROD Office” is hereby sustained.

ISSUE

The issue accepted for review is whether the ROD Office took appropriate action, consistent with 7 U.S.C. § 2021, 7 CFR § 278.6(a) and 7 CFR § 278.6 (e)(1) and (i) in its administration of the SNAP when it imposed a permanent disqualification upon Appellant.

AUTHORITY

7 U.S.C. § 2023 and the implementing regulations at 7 C.F.R. § 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 December 27, 2017, the Retailer Operations Division charged the Appellant with trafficking, as defined in Section 271.2 of the SNAP regulations, based on a series of irregular SNAP transaction patterns that occurred during the months of June through November 2017. The letter noted that the sanction 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 10 days of receipt under the conditions specified in 7 CFR §278.6(i). The record reflects that the SNAP Office received and duly considered Appellant’s reply to the Charge Letter. By a letter dated January 12, 2018, Appellant was informed that it was permanently disqualified from participation as a retail store

in the SNAP, effective upon Appellant's receipt of said letter; the letter further instructed Appellant that it may request an administrative review of the decision. On January 19, 2018, Appellant requested an administrative review of the ROD Office's decision; the request was granted.

STANDARD OF REVIEW

In appeals of adverse actions an appellant bears the burden of demonstrating by a preponderance of the evidence that the administrative actions should be reversed. That means an appellant has the burden of providing relevant evidence which a reasonable mind, considering the record as a whole, would accept as sufficient to support a conclusion that the matter asserted is more likely to be true than not true.

CONTROLLING LAW

The controlling statute in this matter is contained in the **Food & Nutrition Act of 2008**, as amended, at 7 U.S.C. § 2021 and in Part 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.

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

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

7 CFR § 278.6(a) states, in part:

FNS may disqualify any authorized retail food store ... if the firm fails to comply with the **Food & Nutrition Act of 2008**, as amended, or this part. Such disqualification shall result from a finding of a violation on the basis of evidence that may include facts established through on-site investigations, inconsistent redemption data, **evidence obtained through a transaction report under an electronic benefit transfer system...** (Emphasis added.)

7 CFR § 278.6(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, in part:

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, (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, in part:

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, in part:

FNS may impose a civil money penalty in lieu of a permanent disqualification for trafficking as defined in § 271.2 if the firm timely submits to FNS substantial evidence which demonstrates that the firm had established and implemented an effective compliance policy and program to prevent violations...

7 CFR §278.6(b)(2)(iii) states, in part:

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 a penalty.

SUMMARY OF THE CHARGES

- A series of multiple SNAP transactions totaling 5 U.S.C. § 552 (b)(6) & (b)(7)(C) were debited from individual benefit accounts in unusually short time frames (Attachment 1).
- A series of excessively large SNAP transactions totaling 5 U.S.C. § 552 (b)(6) & (b)(7)(C) were debited from recipient accounts (Attachment 2).

APPELLANT'S CONTENTIONS

In Appellant's reply to the Charge Letter and in its written request for review dated January 19, it was argued that:

1. The business is located in a poor neighborhood and it is very difficult to monitor every transaction. Appellant provided photos of store inventory.
2. Appellant provided credit and debit card sales data and copies of product purchase invoices.
3. Appellant has instituted new measures to keep track of transactions and is trying to follow them very closely.
4. A disqualification will work a hardship upon the firm. Appellant requests a penalty in lieu of a disqualification.

ANALYSIS AND FINDINGS

At the outset it should be noted that the ROD Office ordered a contracted store visit to the Appellant firm as part of its investigation into Appellant's questionable transaction activity; the visit was conducted on November 30, 2017, as a result of which documentation was obtained

including photographs of the interior and exterior of the store, a store layout diagram and a store inventory survey. This documentation reflected the following:

- One checkout counter, one register and one card reader.
- One estimated 50 square-foot storage area holding primarily soft drinks and a small chest freezer (see below). Photo: 32.
- Storage freezer used for prepared food sales. Photo: 32.
- No food stored offsite.
- No telephone, online or other orders taken.
- No delivery offered.
- No transaction rounding.
- Four most expensive SNAP-eligible items:
 - Enfamil - \$21.50 - 12.5-ounce can.
 - Lunchmeat - \$8.99 - per pound.
 - Cheese - \$6.99 - per pound.
 - Cooking oil - \$9.99 - 96 ounces.
- All above questions were completed in collaboration with store personnel.
- Estimated 1000 square feet of store space.
- No optical scanners.
- No shopping carts or baskets.
- No night window.
- No evidence of wholesale business.
- Most prices were in standard retail variations of \$.x9.
- The firm also sold tobacco products, health and beauty products, paper goods, pet food, cleaning supplies and other non-food items.
- Kitchen/food preparation area present. Photos: 6, 8, 19, 24 and 35.
- Hot food sold.
- Deli case food was also used in preparing food entrees.
- No meat/seafood bundles/specials or fruit/vegetable boxes.
- Checkout counter was approximately 2 X 2 feet and surrounded by candy, over-the-counter medicines, cell phone supplies and other non-food items. Photo: 7.
- Typically stocked convenience store in all relevant respects. Photos: 1, 10, 23, 27, 28, 31 and 37.

The documentation presents no indication of advertised specials, promotions, bulk or expensive food items. The checkout area was set up in convenience store fashion, utilizing a small check-out area (approximately 2 by 2 feet of useable space) but was otherwise surrounded by candy, over-the-counter medicines, cell phone supplies and other non-food items. There were no shopping carts or baskets with which customers could transport large orders to the small check-out area or to waiting transportation. This documentation reflects that the firm was a typically-stocked convenience store in all relevant respects. It is worth noting that the average SNAP purchase in a convenience store in the state of New York during the analysis period was \$8.36, reflecting that large purchases are not routinely made in such stores.

In regard to Appellant's contention 1 above, the ROD Office duly notes that Appellant does not dispute that violative transactions occurred but rather references the difficulty in preventing them. Appellant's citing of challenges associated with assuring regulatory compliance, whether true or not, does not provide compelling evidence that the sale of eligible food items better explains the transaction activity at issue than SNAP-benefit trafficking, as asserted by the ROD Office. The photos of store inventory provided by Appellant do not differ dramatically from those taken during the contracted store visit arranged by the ROD Office; the photos reflect a store stocked in typical convenience store fashion. If the photos were intended to support Appellant's assertion that monitoring compliance in the store is a difficult proposition, as noted, such does constitute compelling evidence that the transaction activity at issue was more likely due to the sale of eligible foods than to trafficking.

Regarding contention 2 above, the credit/debit documentation provided by Appellant does not reflect what was sold in exchange for credit/debit and/or SNAP benefits; as such it offers little evidence demonstrating that SNAP-benefit trafficking was not occurring at the store.

The record reflects that the invoices/product purchase receipts provided by Appellant were analyzed and found substantially insufficient to justify Appellant's SNAP redemptions during the analysis period of June through November 2017 and, moreover, do not provide a compelling rationale for the transaction activity detailed in the Charge Letter. The ROD Office has provided a comprehensive array of evidence and analytical documentation in support of the charges of SNAP-benefit trafficking.

With regard to contention 3 above, it is important to clarify for the record that there is no provision in the statute or regulations for waiver or reduction of an administrative penalty on the basis of corrective action implemented subsequent to findings of program violations. The purpose of this review is to determine if the earlier decision of the ROD Office was proper and in compliance with pertinent laws and regulations. Accordingly, this review is limited to considerations relevant at the time such decision was made. It is beyond the scope of this review to consider what subsequent remedial actions, such as changes in store management, procedures, internal controls, employee discipline/training or facility and/or inventory changes and improvements Appellant may propose to take or may have taken in order to comply with program requirements. Therefore, to the extent Appellant implies that it will, or has, implement(ed) corrective and/or remedial actions, though this would likely have been valuable in preventing program violations at an earlier time, such cannot now apply retroactively and does not provide a valid basis for dismissing the charges or for mitigating the serious impact of the violations upon which they are based. It is further added for the record that, although Appellant claims corrective action has been taken, it does not specifically note what comprised such action and offers no documentary evidence of same. As such, the claim carries little weight, and as noted above, corrective action following findings of violations is not relevant in ROD Office sanction decisions.

In regard to contention 4 above, the issue of hardship worked upon retailers or SNAP clients is not a consideration under the statute or regulations in decisions to disqualify firms due to SNAP-benefit trafficking. The only alternative to permanent disqualification, once trafficking is established, is to impose a trafficking civil money penalty. Appellant was advised of this

provision in the SNAP Office's Charge Letter, which also advised that documentation of eligibility for that alternative sanction was to have been provided within a specific time limit. The SNAP regulations are specific at 7 CFR §278.6(b)(2)(iii) in that 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 (postmarked within 10 days of receiving the letter of charges), the firm shall not be eligible for such a penalty. As Appellant did not timely request such consideration and, moreover, provided no evidence or information in support thereof, the SNAP Office's decision not to impose a civil money penalty was appropriate pursuant to 7 CFR §278.6(b)(1), §278.6(b)(2)(ii), §278.6(b)(2)(iii) and §278.6(i). It is further noted that said provisions specify that no extensions to this time period, in which a firm may provide evidence in support of its request for a civil money penalty, may be granted.

CONCLUSION

In view of the above, the decision of the ROD Office to permanently disqualify Appellant from participation in the SNAP is hereby sustained. The decision will become final upon the 30th day following Appellant's receipt of this document.

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 provisions of the Freedom of Information Act (FOIA), 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.

DANIEL S. LAY
Administrative Review Officer

August 8, 2018