

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

4th Street Deli Inc,

Appellant,

v.

Case Number: C0207601

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 4th Street Deli Inc. (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 April 5, 2018, the ROD Office 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 December 2017 through February 2018.

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 replies to the Charge Letter. By a letter dated May 2, 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 May 9, 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 household benefit accounts within a set time period (Attachment 1).
- A series of excessively large SNAP transactions totaling 5 U.S.C. § 552 (b)(6) & (b)(7)(C) were debited from household benefit accounts (Attachment 2).

APPELLANT'S CONTENTIONS

In Appellant's reply to the Charge Letter and in its written request for review dated May 9, 2018, it was argued that:

1. The transactions are not suspicious because the Appellant maintains a lot of baby formula and merchandise in inventory for sale.
2. SNAP recipients get their benefits at the beginning of the month and spend them in a week or two.
3. The Appellant has been compliant and on time with all documentation and correspondence, but the ROD office was inadequate in providing enough information or assistance in informing the Appellant as to what it needed to provide to respond to the charges.

In addition, in response to the Charge Letter, the Appellant submitted to the ROD office for consideration 136 inventory purchase invoices, dated September 2017 through April 2018. No further evidence was submitted by Appellant for review.

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 March 22, 2018, 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:

- Estimated 900 square feet of retail space.
- No optical scanners.
- No shopping carts or baskets.
- No night window used.
- No evidence of wholesale business.
- Prices in standard retail variations of \$.x9.
- One check-out area, one cash register, one card reader.
- No food stored outside public view.
- Storage coolers/freezers present.
- No food stored offsite.
- Telephone orders taken.
- Delivery offered.
- No transaction rounding at checkout.
- Four most expensive SNAP-eligible items:
 - Enfamil - \$18.99 - 12.5-ounce can.
 - Lunchmeat - \$8.99 per pound.
 - Cheese - \$7.99 per pound.
 - Enfamil - \$5.99 - 8 fluid ounces.
- All above questions answered in collaboration with store personnel.
- The firm also sold lottery tickets, tobacco products, alcohol, health and beauty products, pet food, laundry detergent, clothing, paper goods, cleaning supplies and other non-food items.
- Kitchen/food preparation area present.
- Hot food sold.
- Deli section present.
- Deli stock used to make prepared food.
- No meat/seafood bundles/specials or fruit/vegetable boxes.
- Comments: specialty register used for lottery only, two storage freezers and one cooler containing food for kitchen/food prep sales. Lunchmeat and cheese in deli case used to make hot and cold sandwiches and also sold by the pound. Microwave for staff use only.
- Check-out area approximately 2 X 3 feet and surrounded by over-the-counter medicines, tobacco products, health and beauty products, lottery tickets, infant formula, snack foods, candy and other non-food items. Photos: 1, 2, and 15.
- Typical convenience store in all relevant respects. Small inventory of dairy items. Photos: 4, 8, 10, 14, 16, 21, 22, 23, 24 (large inventory of alcohol), and 30.
- Staple food inventory consisted primarily of canned and packaged foods, deli items

Photos: 6, 8, 11, 12, 16, 20, 22, 23, 29, 30 and 31.

- The firm also operated as a prepared food restaurant/carryout. Menu marquee boards were posted near the kitchen/deli area advertising prepared food entrees. Upright freezers appeared to contain food for restaurant/carryout sales. Photos: 7, 13, 17, 25, 26, 28, 31, and 32.

The documentation presents no indication of advertised specials, promotions, bulk or expensive food items. As noted above, photographs reflect that several visible prices of food and other items were in standard retail variations of \$.x9. The checkout area was set up in convenience store fashion, utilizing a small check-out area (approximately 2 by 3 feet of useable space) but was otherwise surrounded over-the-counter medicines, tobacco products, health and beauty products, lottery tickets, infant formula, snack foods, candy 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 \$9.00, reflecting that large purchases are not routinely made in such stores.

In regard to contention 1 above, Attachment 1 to the Charge Letter shows 34 sets of multiple transactions in a short time period, with almost all of these transactions being excessively large. The Appellant pointed to a large inventory of infant formula for sale as one reason for large transactions. However, nearly all SNAP households with infants are eligible for the Special Supplemental Nutrition Assistance Program for Women, Infants, and Children (WIC) benefits, which provide for the purchase of infant formula and infant food; thus it is unlikely that SNAP customers would routinely spend SNAP benefits for products paid for by WIC. Also, of the 58 different households listed for excessively large transactions in Attachment 2 to the Charge Letter, 41 of these visited a medium grocery, large grocery, supermarket, or super store within three days of conducting the large transactions at the Appellant store. Presumably, these larger grocery venues purchase in bulk and would have better pricing on infant formula and other food products, making it unlikely that households would shop for large quantities of food or infant formula at a convenience store on or about the same day as shopping at a larger grocery venue. Additionally, though many of the invoices were difficult to read, they did not support the contention that the firm sold substantial quantities of infant formula. Moreover, the ROD Office compared Appellant's numbers of repetitive (Attachment 1) transactions to that of four nearby convenience stores within one-third of a mile; Appellant conducted multiple times the number of repetitive transactions compared to the nearby stores. No compelling rationale is provided to explain why only, or primarily, Appellant's customers conducted large and repetitive transactions. Moreover, Appellant's average SNAP transaction was over three times the state store-type average.

In reviewing the invoices submitted by the Appellant, the ROD Office concluded that the invoices were insufficient to explain the questionable transactions at the store. Although the invoices showed the purchase of sufficient food inventory to account for the SNAP redemption volume, sufficient inventory does not explain the suspicious patterns of SNAP transactions taking place at the firm. For example, seven transactions **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** were conducted in January and February 2019, with no plausible explanation by the Appellant.

Also, Attachment 2 of the Charge letter contained 142 SNAP transactions **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**; this is multiple times the average purchase amount of \$9.00 for a convenience store in the State of New York. Finally, the Retailer Operations Division compared the Appellant firm's transactions **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** against the same transactions for a larger store type, medium grocery stores, in the same county and found that the Appellant store completed 35 transactions in this price range, compared to an average of 5 transactions in this price range for the medium grocery stores nearby during the same time period. The Appellant provided no plausible explanation for the large transactions at its store, which are clearly more numerous than even larger stores.

The ROD Office noted that, at the time of the sanction decision, there were 46 other SNAP-authorized stores within a one-mile radius, including three supermarkets, two super stores, two large grocery stores, eight medium grocery stores (two under one-half mile), eight small grocery stores (two under one-half mile), four combination grocery/other stores (one under one-half mile) and 17 other convenience stores (five under one-half mile). One small grocery store is just over 50 feet away; another convenience store is just over 100 feet; a small grocery is just over 200 feet; a medium grocery store is just over 300 feet and two medium grocery stores are just over 400 feet away. Evidence cited by the ROD Office indicates that households conducting implausible transactions at the Appellant firm were in fact shopping at much better-stocked super stores, supermarkets and grocery stores on or about the same day, calling into question what these customers could obtain at Appellant's typically-stocked convenience store that they could not obtain at the better-stocked and quite likely more competitively-priced stores (super stores, supermarkets and grocery stores are typically the most competitively-priced stores in a given area).

In regard to contention 2 above, the Appellant contends that SNAP recipients get their benefits at the beginning of the month and spend them in a week or two. However, a government report on SNAP shopping patterns¹ indicates that after the first day of benefit issuance, on average, 79 percent of a household's allotment remains unspent. After seven days 41 percent of benefits remain unspent. Typically two weeks elapse prior to the average household's depletion of 79 percent of its SNAP benefits while three weeks elapse prior to depleting 90 percent. Depleting one's entire allotment in one or two days during the first week following benefit issuance, in a single large transaction or in a series of high cumulative transactions in a short period of time, especially in a typically-stocked convenience store, leaving no benefits for the remainder of the month, is inconsistent with the normal shopping behavior of SNAP households. Rather, large single transactions, or multiple and high cumulative transactions which diminish balances over a short period of time soon after benefit issuance, are indicative of SNAP benefit trafficking and attempts to divert attention to signs of same.

In regard to contention 3 above, in which the Appellant contends that the ROD Office was inadequate in providing enough information or assistance in informing the Appellant as to what was needed to respond to the charges, despite the Appellant being compliant and on time with all documentation and correspondence, it should be noted that the Charge Letter specified the charges against the Appellant and included two attachments that detailed each transaction that

¹ Benefit Redemption Patterns in the Supplemental Nutrition Assistance Program, Final Report. Prepared by Mathematica Policy Research for the Food and Nutrition Service, USDA, February 2011.

the charges were based upon. It further informed the Appellant of the right to reply to the charges and referred the Appellant to program regulations, which also explain the right to reply to the charges and describe the procedures followed in making a decision in the case. The Charge Letter provided that the Appellant had 10 calendar days to present any information, explanation, or evidence with regard to the charges.

In addition to the Charge Letter, from April 6, 2018, through April 27, 2018, the ROD Office spoke to the Appellant by phone eight times. During these phone calls, the ROD Office explained the Charge Letter and the transactions upon which the charges were based, and encouraged the Appellant to send in documentation to rebut the charges. The ROD Office also specified that the Appellant should send in two consecutive months of invoices from the review period, and the Appellant did send in such invoices as well as others outside the review period.

Regardless of the considerable assistance and information provided by the ROD Office, once a Charge Letter is issued, the burden is on the firm to rebut the charges. In this case, after an evaluation of all the information provided, the ROD Office determined that, based upon the information and evidence provided, the violations cited in the Charge Letter had occurred at the firm. This review affirms that determination as correct and appropriate.

Lastly, once trafficking is established, there is no latitude to impose a lesser sanction, with the exception of a trafficking civil money penalty. There is provision at 7 CFR §278.6(i) for the imposition of a civil money penalty in lieu of permanent disqualification for trafficking. Appellant was advised of this provision in the ROD Office's Charge Letter dated April 5, 2018, which also advised that documentation of eligibility for that alternative sanction was to have been provided within a specific time limit. In the absence of any such documentation, a civil money penalty was not imposed in lieu of permanent disqualification by the SNAP Office. 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 (within 10 days of receiving the letter of charges), the firm shall not be eligible for such a penalty." As Appellant did not request such consideration and provided no evidence or information in support thereof, the SNAP Office's decision not to impose a civil money penalty is sustained as appropriate pursuant to 7 CFR §278.6(b)(1), §278.6(b)(2)(ii), §278.6(b)(2)(iii) and §278.6(i).

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

November 14, 2018