

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

A & D Food Mart,

Appellant,

v.

Case Number: C0200410

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 A & D Food Mart (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 July 20, 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 January through June 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 replies to the Charge Letter. By a letter dated September 20, 2017, Appellant was informed that it was permanently disqualified from participation as a retail store in the SNAP and was ordered upon receipt of the letter to cease accepting SNAP benefits; consequently, Appellant ceased to accept said benefits. On October 2, 2017, Appellant requested an administrative review of the SNAP 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 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 October 2, 2017, it was argued that:

1. Meat sales are perceived by the ROD Office as trafficking. Appellant's

records document the transactions detailed in the Charge Letter. Meat sales are kept separately and tracked in order to determine profitability.

Appellant provides photographs of meat inventory, of a pricing marquee and copies of itemized sales slips for meat sales.

2. Customers sometimes are unable to shop at other stores and thus make large purchases at the Appellant firm. The subject store is the only store in the area; the next closest store is several miles away.
3. Appellant does not understand what “trafficking” means but assumes it involves a card being used twice in one day. It is not Appellant’s fault if a customer buys a meat box and then gives their SNAP card to some else and then they buy one. Appellant sees people give their cards to other family members. The agency should address this issue with the SNAP recipients.
4. A disqualification will work a hardship upon the business, the store owner and the store manager.

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 May 22, 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:

- Estimated 1400 square feet of store space.
- No optical scanners.
- No shopping baskets or carts.
- No evidence of wholesale business.
- Two check-out counters. One faces the kitchen area and the other faces away from the store entrance. The check-out counter space facing away from the entrance was approximately 2 X 2 feet and surrounded by tobacco products. The counter facing the kitchen area was approximately 2 X 3 feet and also surrounded by tobacco products. Photos: 22, 26, 27 and 35.
- One cash register.
- One card reader.
- Food stored outside of public view – approximately 50 square feet of space.
- Walk-in freezer present. Photo: 42.
- No food stored offsite.
- No telephone or online orders.
- No transaction rounding.
- Most expensive items:
 - Niagara water - \$5.99 – 24-pack
 - Team Real Tree Jerky - \$6.59 – 3.25 ounces
 - Folgers coffee - \$5.89 – 10.3 ounces

- Cheerios Cereal - \$5.29 – 12.25 ounces
- All above information was obtained with the collaboration of store personnel.
- The firm sold tobacco, paper goods, cleaning supplies, automotive products, health and beauty products, DVDs and other non-food items.
- The firm also operated as a gas station. Photo: 4 and 28.
- Food preparation area/kitchen used. Prepared food entrees were advertised on placards by the kitchen area. Full commercial kitchen. Photos: 4, 5 and 14.
- Hot food sold.
- Dining area present. Photos: 13, 21 and 36.
- Deli section present; prices posted on meat/cheese; prepared sandwiches made to order.
- Firm sold meat/seafood bundles.
- Comments: “I asked the price of the Niagara Water; all other HPI’s were priced. Other non-food items: DVD’s and Pets. Meat Bundles – only pork and a little fish currently available.”
- Typically to marginally-stocked convenience store in all relevant respects. Sparsely- stocked shelves; low number of stocking units in many food categories; product pushed to front of shelves. Glass-front display cooler nearly empty and containing only one small box with unknown contents, five cartons of eggs, a few packages of cheese, two packages of bacon and one package of bologna. Photos: 2, 6, 7, 9, 13, 16, 17, 18, 29, 32, 36 and 38.
- The firm sold packaged meat items. Package prices advertised on wall marquee. Prices are from \$239 to \$399. Walk-in cooler appeared to contain a few cases of meat items, mostly pork. Steakhouse steak advertisement/poster near kitchen area. Photos: 8, 10, 11, 12, 15, 26 and 41.

The checkout area was set up in convenience store fashion, utilizing two small check-out counters (approximately 2 by 2 feet of useable space for each) but was otherwise cluttered/surrounded by snack items and tobacco products. There was one cash register used. 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 to marginally-stocked convenience store in all relevant respects. It is worth noting that the average SNAP purchase in a convenience store in the state of Alabama during the analysis period was \$7.18, reflecting that large purchases are not routinely made in such stores.

In regard to contention 1 above, the ROD Office notes that none of the meat bundle prices match any transaction in the Charge Letter; there are 181 transactions in Attachment 2 alone. Even if most meat purchases involved some other small incidental purchase, one could still expect several to match a Charge Letter transaction, yet none do. Moreover, while Appellant states that its records document

the transactions in the Charge Letter, it provides sales slips/receipts for only a small fraction of them.

Photographs provided by Appellant in reply to the Charge Letter reflect considerably more inventory than was found on the day of the store visit, in which the reviewer was told that only pork and a little fish was currently available. The photographs are undated, appear to have been taken at some point following the firm's receipt of the Charge Letter and, as such, cannot be viewed as reliable evidence of inventory held at an earlier time. Appellant provides no product purchase/receipts invoices in support of its contention that meat and meat bundle sales account for the transaction activity detailed in the ROD Office's Charge Letter.

The ROD Office further notes that households conducting implausible transactions at the Appellant store were shopping at much larger stores in cities six or more miles away and thus clearly had access to other and better stocked stores. Also, as noted above, the firm is a marginally-stocked convenience store in all relevant respects; thus the sale of large amounts of groceries, as a rationale for the Charge Letter transactions, is not compelling.

In addition, the record reflects that the numbering of the sales slips/receipts provided by Appellant is questionable. Appellant stated that not all receipts were available, yet there are large transactions with no receipts chronologically between transactions that do have receipts, yet those receipts are in sequence.

5 U.S.C. § 552 (b)(6) & (b)(7)(C). There are 10 other large transactions chronologically in between the above transactions,

5 U.S.C. § 552 (b)(6) & (b)(7)(C), too large to be convenience store purchases; these transactions should involve sales of meat if the meat rationale is valid, but there is no receipt sequence between them. Moreover, Appellant did not provide invoices to justify meat purchases.

Regarding contention 2 above, the ROD Office conducted an analysis of customer shopping habits and found that many conducting implausible transactions at the Appellant firm during the analysis period were also shopping at much better-stocked and very likely more competitively- priced super stores and supermarkets on or about the same day, calling into question what these customers could obtain at Appellant's marginally-stocked convenience store that they could not obtain at the better-stocked stores. Additionally, the analysis shows that customers had access to other firms, despite being located several miles away, and were not generally limited to shopping only at the Appellant firm. The ROD Office notes that at the time of the sanction decision there were 25 SNAP-authorized firms within a 7 mile radius of the Appellant firm, including two super stores, two supermarkets, one medium grocery store and 20 other convenience stores. The Appellant firm was not the only SNAP-authorized firm in the area, it was not the best stocked store in the area and not the only store Appellant's customers visited.

ROD compared the Appellant firm with five nearby convenience stores; the Appellant store had an average SNAP transaction that was multiple times that of the other stores. The firm had multiple times the number of transactions in several transactions bands as that of the other comparable stores. Appellant's average SNAP transaction and number of transactions 5 U.S.C. § 552 (b)(6) & (b)(7)(C) were much higher than the state store type average. With regard to contention 3, as noted above (page 2):

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.

Conducting more than one transaction per day does not constitute trafficking, though to the extent such transactions form inexplicable patterns over a sufficient period of time, the transactions can be an indicator SNAP-benefit trafficking, which is what the ROD Office has determined in the present case, along with the transactions in Attachment 2 and with the other information obtained and analysis that the ROD Office performed.

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 request such consideration and 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

May 18, 2018