

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

Alex Market II Inc.,

Appellant,

v.

Case Number: C0202009

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 Alex Market II 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 September 7, 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 February through July 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 October 10, 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 10/18/2017, 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 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, in its written request for review dated October 18, 2017, and in subsequent correspondence, it was argued that:

1. Appellant accepted SNAP benefits as payment on credit accounts and provides 25 pages of credit ledger entries.
2. Nine of the transaction sets in Attachment 1 were not credited to Appellant's account. Appellant identifies specific transactions for which it did not receive payment.
3. Swiping a card multiple times was only an attempt to protect the customer from suspicion by reducing the dollar amount of the swipe. Most swipes were made prior to the 15th of each month, as Appellant urged customers to pay credit accounts by that deadline since the store had to pay wholesalers.
4. Appellant provides product purchase receipts/invoices and an activity summary of invoices from a primary vendor.
5. The firm has never before been cited for violations or received a warning. Appellant requests a warning letter or a six-month disqualification in lieu of a permanent disqualification.
6. Appellant assures future compliance.
7. The firm operates in an extremely poor neighborhood and a disqualification will put the firm out of business. Appellant provides photographs of the exterior of the store and of nearby low-income housing. Appellant provides a petition signed by customers

requesting that the firm not be disqualified, as the firm offers a variety of staple foods within convenient walking distance to the neighborhood and is open seven days per week from 7:00 AM to 11:00 PM.

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 July 17, 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 650 square feet of store space.
- No shopping baskets or carts.
- The firm operates a checkout counter through a Plexiglas barrier.
- One checkout counter/area.
- No evidence of wholesale business.
- Prices in standard retail variations of \$.x9.
- One cash register.
- One card reader.
- No food stored offsite.
- Not a specialty food store.
- No telephone, online or other orders taken.
- No delivery offered.
- No transaction rounding.
- Four most expensive items:
 - Infant formula - \$17.99 for 12.4 ounce-container.
 - Rice - \$7.99 for a 5-pound bag.
 - Frozen chicken - \$9.99 for 29-ounce box.
 - Ice cream - \$5.99 for 1.5 quart container.
- The firm sold tobacco products, lottery tickets, automotive products, health and beauty aids, paper goods, cleaning products, housewares and other non-food items.
- Poor lighting noted.
- No kitchen or food preparation area.
- No hot food sold.
- Microwave present.
- Deli section present.
- No meat/seafood bundles/specials or fruit/vegetable boxes.
- Checkout counter behind a Plexiglas barrier with approximately 1.5 X 1 feet of usable counter space surrounded by candy, lottery tickets, ice cream and non-food items.

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 1.5 X 1 feet of usable counter space) surrounded by candy, lottery tickets, ice cream and 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 small grocery store in all relevant respects. It is worth noting that the average SNAP purchase in a small grocery store in the state of Massachusetts during the analysis period was \$12.81, reflecting that large purchases are not routinely made in such stores.

In regard to contention 1 above, of the multiple handwritten ledger pages provided by Appellant, only three payment entries match any Charge Letter transaction and two of these match one Charge Letter transaction, so they could not both account for the same transaction. And since the entries are not dated, it is possible that neither accounts for the Charge Letter transaction. The entries do not indicate what was obtained in exchange for credit and later paid for with SNAP benefits. As noted, the entries do not provide the dates of payments. Most entries do not identify the buyer/account holder other than by first name. If credit payments account for Charge Letter transactions, it is implausible that Appellant could provide virtually no credit payment information that corresponds to Charge Letter activity. As such, the contention and documentation are not compelling and do not demonstrate that credit activity explains the Charge Letter data.

Regarding contention 2 above, the ROD Office notes that these transactions were in fact processed at Appellant's store in the exact amounts stated and at the times noted. Agency records confirm the data. Appellant provides no documentary evidence demonstrating that the transactions were not processed.

While there are legitimate reasons why a SNAP recipient or household member might return to a small grocery store during a short period of time, such purchases are more typically in small amounts and for obtaining just a few items. The examples in Attachment 1 indicate a series of repetitive purchases that total large amounts. Customers spending such substantial amounts of SNAP allotments in a typically-stocked small grocery store, when there are other larger food stores nearby which carry substantially larger varieties of food at lower costs, is implausible. Lastly, large transactions for the purchase of legitimate food items (which at this store would have been a substantial number of lower priced items), using no shopping carts and very little checkout-counter space, is additionally implausible. Multiple transactions over a short period of time, especially of high dollar value, are very suspicious because they are typical of stores and SNAP customers which are attempting to diminish attention to signs of SNAP-benefit trafficking. Frequent and large transactions conducted in order to purchase eligible foods at Appellant's store are highly unlikely given Appellant's logistical wherewithal and store stock. The record reflects, as noted above, that the Appellant firm was a typically-stocked small grocery store in all relevant respects and provides no plausible bases for customers' unusual attraction to the firm and unorthodox transaction patterns.

With regard to contention 3 above, Appellant offers an unconvincing rationale and documentation, as noted in the foregoing, for the firm's conducting repetitive transactions in short periods of time. The documentation presents very little evidence that the transactions were being conducted to pay off credit accounts or that large transactions were broken into smaller transactions in order to protect customers from suspicion, versus attempting to avert attention to signs of SNAP-benefit trafficking. If customers were making purchases or paying credit

accounts followed by more purchases or credit payments, the transactions would likely be conducted during one visit to the store; 5 U.S.C. § 552 (b)(6) & (b)(7)(C). That many transactions were conducted early in the month might have supported the credit rationale had the ledger entries matched Charge Letter transactions.

In regard to contention 4 above, Appellant provided two itemized receipts and one itemized “activity summary” containing a combination of food and non-food purchases. Food purchases comprised 66.23% of the total amounts of the documentation. Appellant also provided a summary listing of totals for invoices from the same vendor for the review period (February through July 2017) 5 U.S.C. § 552 (b)(6) & (b)(7)(C); the documentation did not indicate what was purchased. Applying the food percentage from the itemized invoices to the summary listing of totals produces a total of 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in food purchases throughout the analysis period. However, SNAP redemptions during this same period were multiple times this amount. As such, the invoices do not provide compelling support for the SNAP redemptions.

5 U.S.C. § 552 (b)(6) & (b)(7)(C). 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

Regarding contention 5 above, Appellant notes that this case represents the firm’s first and only SNAP violation (or series of same); however, a record of program participation with no previously or subsequently documented violations does not constitute valid grounds for dismissing the present serious charges or for mitigating the impact of the violations upon which they are based. There is no provision in the Act, regulations or agency policy that reverses or reduces a sanction based upon a lack of prior and/or subsequent violations or assurances of future compliance by a firm and its owners, managers and/or employees; likewise, sanctions for prior violations are not prerequisite to sanctions due to later violations. Moreover, prior sanctions may precipitate an increase in the severity of a later sanction (see §278.6(e)(6)). Further, as noted above, the **Food & Nutrition Act of 2008** provides that a store's disqualification "*shall be* (emphasis added) permanent upon ... the first occasion of... trafficking."

The language at 7 CFR §278.6(d) that requires the SNAP Office to consider any prior action by the agency to warn the firm of the possibility that violations are occurring does not establish a requirement that firms must be warned prior to sanctions; a warning is not prerequisite to disqualification: the presence of a prior warning may in some cases increase the sanction imposed on a firm (see §278.6(e)(2), (3)(i) & (ii), (4) and (6)) while the lack of a warning does not decrease a sanction properly imposed or prevent the imposition of such a sanction. Disqualifications for first offenses are both allowed and required by the regulations as stipulated therein and referenced above; whether the violations in question consist of trafficking violations or credit account violations has been considered above.

The statute and regulations allow for no sanctioning discretion in trafficking cases, other than a civil money penalty, as noted above; such provisions are prescriptive in that sufficient evidence of trafficking always warrants permanent disqualification unless a firm qualifies for a civil money penalty. No minimum amount of benefits trafficked or a minimum proportion of cash to SNAP benefits exchanged is required; any amount of cash exchanged for any amount of SNAP benefits is considered SNAP benefit trafficking. With further regard to the contention implying

that a permanent disqualification is an overly harsh sanction in response to trafficking by an authorized firm, the administrative review process does not include an assessment of the laws and regulations under which the agency imposed adverse actions, but rather assesses whether the agency actions undertaken were proper in accordance with those laws and regulations and sustainable by a preponderance of evidence. The regulations at 7 CFR § 278.6(e) provide for a continuum of sanctions, beginning with permanent disqualification for trafficking, term disqualifications from several years to six months for lesser violations and warning letters for firms committing violations less severe than those warranting six-month disqualifications. 7 CFR § 278.6(e)(1)(i) states that FNS shall disqualify a firm permanently if personnel of the firm have trafficked as defined in §271.2. In the present case, the violations at issue include SNAP benefit trafficking; the imposition of a warning letter or lesser sanction for SNAP benefit trafficking is counter to said statute and regulations and is therefore incorrect. Accordingly, the record reflects that the ROD Office correctly imposed the sanction required by the statute and regulations.

With regard to contention 6 above, assurances that no further violations would occur if Appellant were allowed to remain on the program do not constitute valid grounds for dismissal of the charges or for mitigating the impact of the violations upon which they are based. Accordingly, once trafficking is established, there is no latitude to impose a lesser sanction, with the exception of a civil money penalty, which will be discussed in greater detail below

In regard to contention 7 above, an analysis of the activity of a sample of the petition signers reflects that virtually all routinely have access to other SNAP-authorized firms, including super stores and supermarkets, and spent more benefits at those stores than at the Appellant firm. This tends to strongly indicate that these customers were not compelled to rely upon the Appellant firm for the bulk of their food needs. Some of the customers were shopping at these better-stocked stores on or about the same day as conducting implausible transactions at the Appellant firm, calling into question what these customers were able to obtain at Appellant's typically-stocked small grocery that they could not obtain at much better-stocked and very likely more competitively-priced super stores and supermarkets (which are typically the most competitively-priced firms in a given area).

Moreover, 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 in lieu of permanent disqualification. In order for this alternate penalty to be considered, a retailer must provide sufficient evidence demonstrating that the firm had established and implemented an effective compliance policy and program to prevent violations prior to said violations, as stipulated in § 278.6(i). Appellant did not timely request consideration for same and did not provide such evidence and, accordingly, this alternate penalty was correctly withheld.

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

June 6, 2018