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

**Bingo Grocery & Deli Inc-,**

**Appellant,**

**v.**

**Case Number: C0203314**

**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 Bingo Grocery & 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 December 28, 2018, 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 May through October 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 February 21, 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 February 27, 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 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 February 27, 2018, and in subsequent correspondence, it was argued that:

1. The ROD Office's Determination did not say exactly what Appellant had done wrong or explain why the information Appellant provided in reply to the Charge Letter was not sufficient.
2. Appellant replied to the Charge Letter and provided product purchase invoices/receipts, inventory, photographs and customer affidavits. Appellant includes by reference its replies to the Charge Letter and adds a 2016 Form 1120 Corporate Income Tax Return, as well as bank statements covering the period January through November 2017. Appellant provides additional invoices in its request for administrative review. Appellant provided an inventory list and notes that it sold more than 600 grocery items.
3. The firm is a grocery store with more than 50% of inventory in food and beverage items. SNAP sales for the analysis period were approximately 35% of total sales; as noted, Appellant provides product purchase receipts/invoices in support thereof. If Appellant were involved in trafficking, it would have earned more money; during the last two years, Appellant could not make a profit exceeding 5 U.S.C. § 552 (b)(6) & (b)(7)(C) through SNAP sales.

4. Last summer (during the analysis period), Appellant did a substantial amount of business due to the sales of water and other beverage items; because of these sales, there were some large transactions. In 2017 Philadelphia added a beverage tax so most of Appellant's customers traveled to other cities to buy soda. Some of the customers bought cases of water and Gatorade to resell on the roadside. To provide better service, Appellant made daily and/or weekly purchases from supermarkets to resell at its store at low prices. This is largely the reason for the sales spike in May through October 2017 and why there were large and repetitive transactions. Cases of Red Bull were sold at $72.00, Monster Energy at $60.00 and Gatorade at $25.00. The firm conducts large SNAP as well as large cash and commercial credit/debit transactions. Appellant purchased approximately 300 cases of soda and other beverages.
5. There are many stores nearby to which the Appellant firm can be compared.
6. Appellant has never previously been accused of violations by any state or local authorities.

## 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 September 26, 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 500 square feet of store space.
- No optical scanners.
- No shopping carts or baskets.
- No night window.
- No evidence of wholesale business.
- Many snacks and cakes sold at prices ending in $.x5 and $.00.
- One checkout counter.
- One cash register and one card reader.
- Food stored outside of public view - approximately 400 square feet.
- Coolers and freezers used.
- No food stored offsite.
- No telephone, online or other orders taken.
- No delivery offered.
- No transaction-total rounding.
- Four most expensive SNAP-eligible items:
    - Monster java - $6 - two cans.
    - Monster Energy Drink - $5 - two cans.
    - Coffee Mate - $7.99 - 35.3-ounce.
    - Lipton Tea Mix - $5.99 - 199-kilogram.
- All above questions were answered in collaboration with the store Owner.
- The firm also sold tobacco products, lottery tickets, health and beauty products, paper goods, over-the-counter medicines, cleaning products, housewares and other non-food

items.

- Empty and/or sparsely-stocked shelves and coolers noted. Photos: 2, 15, 22 and 37.
- No hot food sold; no dining area.
- No deli section.
- No meat/seafood bundles/specials or fruit/vegetable boxes.
- Basement used for soda inventory storage; storage cooler in the back of the store that is currently being used to store soda (photo 27). Separate register for the lottery machine.
- Typically-stocked convenience store in all relevant respects. Photos: 5, 13, 18, 20, 21, 25, 26, 30, 33, 34, 38 and 39.
- Outdoor signage advertises the firm as a lottery and cigarette outlet. Photos: 12 and 25.
- Check-out counter approximately 1 X 1 foot, using a Plexiglas barrier and surrounded by candy, tobacco products (including glass pipes), over-the-counter medicines and other non-food items. Photos: 10 and 14.
- There was no fresh meat or fresh produce. No expensive bulk or packaged food. No shopping carts or baskets provided. In fact there would likely not be adequate space to move a shopping cart around the small store. Very limited checkout space - not room for more than a few items on the counter. No ethnic or specialty 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 X 1 foot, using a Plexiglas barrier and surrounded by candy, tobacco products (including glass pipes), over-the-counter medicines 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 Pennsylvania during the analysis period was $7.99, reflecting that large purchases are not routinely made in such stores.

In regard to contention 1 above, The Appellant contends that there is no information provided by the ROD Office explaining why the information and documentation it provided by Appellant to the Retailer Operations Division was not accepted as adequate. Appellant also contends that the ROD Office did not convey what Appellant had done wrong.

With regard to this argument, it should be noted that while the Retailer Operations Division is required to consider and evaluate all evidence and responses that are provided by the Appellant in accordance with 7 CFR § 278.6(c), the agency is under no obligation in the determination letter to expound, point-by-point, on every contention or piece of evidence presented. The determination letter states that consideration was given to the information and evidence available to the Retailer Operations Division and to the reply made by the Appellant. After an evaluation of all information, the Retailer Operations Division determined that the violations cited in the charge letter had occurred at the firm. Implied in the letter is the determination that the evidence or response by the Appellant was either not credible or was insufficient to prove that trafficking had not occurred. While the determination letter may not have been as comprehensive as the Appellant wishes, this review finds that due process was appropriately applied and that there was not any negligence on the part of the Retailer Operations Division in the manner in which it explained its disqualification decision. Moreover, the Charge Letter clearly references SNAP-

benefit trafficking as the basis for the charges; the Determination Letter refers also back to these charges as the basis for the disqualification determination.

Regarding contention 2 above, the ROD Office performed a careful analysis of both the invoices Appellant provided in reply to the Charge Letter and of the additional invoices provided in support of the review request. This analysis has been verified as accurate during the review, and tends to indicate that product purchases were less than would justify SNAP transactions, though Appellant notes it was not able to provide all invoices. Nonetheless, such inability does not mitigate the fact that missing documentation constitutes a failure to provide compelling evidence. Documentation provided by Appellant and analyzed by the ROD Office reflects a shortfall of $4189.09 of available inventory to cover both SNAP and cash/commercial credit/debit sales during the analysis period. The ROD Office used a 40% mark-up in order to calculate the totals. This shortfall constitutes 30% of the amount of SNAP benefits redeemed during the analysis period.

The inventory list provided by Appellant does not provide useful insight into the transaction activity at issue. The list further demonstrates that the firm primarily carried inexpensive items. Some of the prices on the inventory list do not match the prices stated on the day of the store visit, and some of the items, such as the meat items, were not in the store on the day of the visit. The ROD Office provides other examples of discrepancies and provides a compelling argument that the list is not reliable and not an accurate reflection of prices and/or inventory held at the time of the store visit and thus, in turn, within the analysis period.

Regarding the bank/credit card statements, some of the information was dated outside the analysis period; those statements pertaining to the analysis period did not specify what was purchased and thus cannot explain the Charge Letter transactions.

Photographs provided by Appellant reflect the presence of some items that were not present at the time of the store visit, namely meat items, which appear to have been added after the firm's receipt of the Charge Letter. Otherwise the photos reflect typical convenience store inventory and provide little justification for the transactions detailed in the Charge Letter.

Regarding the affidavits provided by Appellant, of the 12 affidavits, two contained names that the ROD Office could not locate on the state SNAP client-eligibility system. At least three of the signers of affidavits did not conduct any of the transactions noted in the Charge Letter and did not conduct any transactions at the store during the analysis period. The remaining affidavits contain little compelling evidence to demonstrate that the signers conducted only legitimate transactions at the store and did not engage in SNAP-benefit trafficking. Several of the signers shopped at better-stocked super stores and supermarkets on or about the same day as conducting implausible transactions at the Appellant firm, calling into question what they were able to obtain at Appellant's typically-stocked convenience store that they could not obtain at the better-stocked and very likely more competitively-priced stores. It is noted that affidavits/customer statements virtually always deny violative activity, though frequently do so when the record contains overwhelming evidence of trafficking. It is noted that the list of affidavits includes only 12 households, while Attachment F alone includes the transactions of 54 households.

With regard to contention 3 above, tax documentation provided by Appellant does not explain the transaction activity at issue, as it does not specify what was purchased or sold and does not distinguish the cost of SNAP-eligible items from ineligible items. Appellant provides no itemized SNAP register-receipts corresponding to any of the Charge Letter transactions. The tax information tends to indicate that mark-up was approximately 37%; the ROD Office allowed a 40% mark-up in its analysis of the invoices provided by Appellant. No further findings are rendered in this regard.

In regard to contention 4 above, it is questionable that customers would choose to buy, for home use, large numbers of cases of soda and other drinks from a convenience store (or from any store, for that matter). If the purpose was to resell cases of drinks for cash, as Appellant submits, the customer would have also had access to transportation, as buying cases of drink items and offering them for sale (except at the store from which the drinks were initially purchased) requires logistical wherewithal (the ability to transport cases, or otherwise large numbers of canned/bottled drinks from the place of purchase to the place of resale, most likely by a privately-operated vehicle such as a car or van). As such customers had access to transportation, they would not have been limited to purchasing drinks from a particular convenience store, or from any convenience store, for that matter. Convenience stores typically have the highest prices in any given market. Appellant itself notes that it purchased beverage items from super stores and supermarkets for resale at its store. Customers would likely, if attempting to maximize his/her profit from any resale, visit a super store or supermarket in the area (which typically have the most competitive prices), which also would have provided shopping carts to facilitate moving the items from the store to the customer's means of transportation (typically, as noted, a privately-operated vehicle). The Appellant was a typical convenience store in all relevant respects and, like most other such stores, provided no shopping carts. The record does not demonstrate that the Appellant firm had better case-quantity prices than nearby super stores or that the firm provided shopping carts. No case quantities of drinks/beverages, nor advertising/signage for such products (as noted, other than three cases of cappuccino on the floor near the beverage coolers), were seen on the day of the store visit.

Moreover, a customer with access to transportation would not need to conduct repetitive large transactions at the store, as such customer would buy as many cases of drinks as it could afford at one time and, in turn, sell as many at one time and as quickly as possible, in order to convert them to cash. Likewise, it is typical for convenience stores to primarily sell individual-serving sized convenience items, such as snacks and beverages; thus that the firm purchased substantial quantities of such items during the analysis period does not demonstrate that these were sold in case quantities, in large total transactions or in repetitive transactions, to SNAP customers. Typical convenience stores in fact purchase and resell large quantities of such items; convenience stores typically sell large amounts of snack foods in general, including drinks/beverages. The ROD Office notes that Appellant's numbers of repetitive (Attachment 1) and excessively large (Attachment 2) transactions were multiple times that of four nearby comparable stores (all convenience stores within a one-mile radius).

Additionally, the ROD Office notes that many of the questions appearing in the store visit survey/questionnaire were answered in collaboration with the store Owner. In particular, when answering questions about expensive items, the Owner did not mention case quantities of soda or

other beverages and instead quoted individual-serving sized drink prices, which is common for convenience stores. Moreover, no signage advertising case quantities of such items, nor case quantities of the items themselves, were seen on the day of the store visit, other than a few 12-packs stored at the back of the firm and three cases of cappuccino (not mentioned by Appellant) stored on the floor near the coolers.

Regarding contention 5 above, as noted, the ROD Office did in fact compare the transaction activity of the Appellant firm with nearby stores and noted that Appellant's numbers of repetitive (Attachment 1) and excessively large (Attachment 2) transactions were multiple times that of four nearby comparable stores (all convenience stores within a one-mile radius). The ROD Office further points out that Appellant's volume of SNAP redemptions was also multiple times that of the comparable nearby stores. Appellant's average SNAP transaction during the analysis period was approximately two times that of the nearby stores and just under two times that of the average convenience store in the state of Pennsylvania. There is no compelling rationale to explain why only, or primarily, Appellant's customers made repetitive visits spending large amounts in short timeframes (Attachment 1) or conducted single excessively-large transactions (Attachment 2). The record reflects, as noted above, that the Appellant firm was a typically-stocked convenience store in all relevant respects and provides no plausible bases for customers' unusual attraction to the firm and unorthodox transaction patterns.

The ROD Office notes that, at the time of the sanction decision, there were 137 SNAP-authorized stores within a one-mile radius of the Appellant firm, including two super stores, three supermarkets, two large grocery stores, five medium grocery stores, 89 small grocery stores and 36 other convenience stores. Agency data indicates that there are currently 151 SNAP-authorized firms within a one-mile radius, including two super stores, three supermarkets, two large grocery stores, four medium grocery stores, 70 small grocery stores (22 from just over one-tenth of a mile from the Appellant firm to just under one-half mile), 22 combination grocery/other stores (five from just over one-tenth mile to just under one-half mile), three seafood specialty stores, five meat specialty stores (one at just under one-quarter mile) and 37 other convenience stores (11 from just over one-tenth mile to just under one-half mile). As noted, customers clearly had access to and routinely shopped at better-stocked super stores and supermarkets in the immediate area, calling into question what customers were able to obtain at Appellant's typically-stocked convenience store that they were not able to obtain at much better-stocked and more competitively-priced stores. Also as noted these customers were conducting implausible transactions only at or primarily at the Appellant firm. The Appellant store was clearly not the only store in the immediate area offering food items to SNAP customers; as noted above, it was clearly not the best-stocked firm in the area and it was clearly not the only store being visited by Appellant's customers.

With regard to contention 6 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 and/or regulations 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."

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 December 28, 2017, 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 September 28, 2018
Administrative Review Officer