

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

**Bns Hot Deli Corp,**

**Appellant,**

**v.**

**Case Number: C0201388**

**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 Bns Hot Deli 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 August 8, 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 subject firm received the Charge Letter on August 9, 2017 at 10:30 AM and was signed by a representative of the firm using the name “5 U.S.C. § 552 (b)(6) & (b)(7)(C).” Appellant did not reply to the Charge Letter. By a letter dated August 25, 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 August 29, 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 SNAP transactions totaling 5 U.S.C. § 552 (b)(6) & (b)(7)(C), ended in a same-cents values (Attachment 1).
  - A series of 1322 SNAP transactions 5 U.S.C. § 552 (b)(6) & (b)(7)(C).
  - A series of 2226 SNAP transactions 5 U.S.C. § 552 (b)(6) & (b)(7)(C).
- 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 2).
- A series of excessively large SNAP transactions 5 U.S.C. § 552 (b)(6) & (b)(7)(C) were debited from recipient accounts (Attachment 3).

## APPELLANT'S CONTENTIONS

In Appellant's written request for review dated August 29, 2017, it was argued that:

1. Appellant is not aware of any violations.
2. Appellant did not receive the Charge Letter and had no knowledge of any charges against it.

## 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 June 20, 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:

- Estimate 800 square feet of store space.
- No optical scanners.
- No shopping carts or baskets.
- Night window utilized.
- No evidence of wholesale business.
- Prices in standard retail variations of \$.x9. Photos: 3, 5, 16, 21, 22, 26, 29, 31 and 37.
- One check-out area, one cash register and one card reader. Check-out area approximately 1.5 X 2 feet behind a barrier and surrounded by candy, snack foods, lottery tickets, over-the-counter medicines, health and beauty products and other non-food items. Photo: 18
- Storage area outside public view (storing soda). Photo: 10.
- No storage coolers/freezers.
- No food stored offsite.
- No telephone orders or delivery service.
- No transaction rounding.
- Most expensive items:
  - Enfamil infant formula - \$19.99 for 12.4 ounces.
  - Deli pastrami - \$8.99 per pound.
  - Deli turkey - \$7.99 per pound.
  - Beef bacon - \$6.99 per pound.
- All above information obtained in collaboration with store personnel.
- The store sold tobacco products, health and beauty items, cell phone accessories, paper goods, cleaning products, pet food, laundry detergent and other non-food items.
- Kitchen/food preparation area present. Hot food sold. Marquees advertise prepared food entrees and deli items. Prepared food menu posted at the upper left of the check-out area. Photos: 1, 9, 13, 18, 26 and 27.
- Store stock is used in the deli/prepared food section.
- No meat/seafood bundles/specials and/or fruit/vegetable boxes.

- Comments: “Price quoted by Mgr. Bacon is beef. Eggs sold loose. Storage has soda. Microwave is for store use.”
- Typical convenience store layout and inventory. Photos: 2, 4, 5, 9, 18, 24, 37, 38 and 40.

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 1.5 by 2 feet of useable space) but was otherwise cluttered/surrounded by candy, snack foods, lottery tickets, over-the-counter medicines, health and beauty products 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 \$8.83, reflecting that large purchases are not routinely made in such stores.

In regard to contention 1 above, Appellant has asserted that the Owner of the firm had no knowledge of violations of the SNAP regulations and implies that the Owner did not personally commit violations of the SNAP Regulations. This contention cannot be accepted as a valid basis for dismissing any of the charges or for mitigating the impact of the violations upon which they are based. Appellant is liable for all violative transactions handled by full or part-time, paid or unpaid store personnel, whether or not ownership is aware of such transactions. Regardless of whom the ownership of a store may utilize to handle store business, ownership is accountable for the proper handling of SNAP benefit transactions. To allow store ownership to disclaim accountability for the acts of persons to whom ownership delegates responsibility to act on behalf of the firm would render virtually meaningless the enforcement provisions of the Food & Nutrition Act of 2008 and the enforcement efforts of the USDA. Additionally, ownership of the Appellant firm signed an FNS-252, SNAP Application for Stores, on August 15, 2016, by means of which Appellant acknowledged and agreed to accept responsibility to prevent violations of the program by any and all employees of the firm. Moreover, case law further confirms that owners may indeed be held accountable for the actions of employees: see *Woodard v. USA* (6th Cir. 1987), upholding a sanction for trafficking regardless of the owner's lack of knowledge of violations, and *Freedman v. United States Dept. of Agriculture* (3rd Cir. 1991), noting that permanent disqualification of even an "innocent owner" is consistent with the legislative history of the statute and regulations. Furthermore, culpability need not be imputed to an owner through the actions of an employee if the owner was involved in the violative activity, whether accidentally or otherwise. Again, to allow store ownership to disclaim accountability for the acts of persons to whom the responsibility to handle store business has been assigned would render inert the enforcement provisions of the Food and Nutrition Act of 2008 and corresponding provisions of the regulations.

Regarding contention 2 above, as noted in the foregoing, the subject firm received the Charge Letter on August 9, 2017 at 10:30 AM and was signed for by a representative of the firm using the name “5 U.S.C. § 552 (b)(6) & (b)(7)(C).” Such constitutes ample notice to the firm of the charges against it. Appellant was notified by a letter dated September 11, 2017, which Appellant received on September 12, 2017, that additional information could be provided in support of its review request and was provided an additional three weeks in which to do so. No further information has been received to date. Appellant offers no rationale to explain the transactions contained in the Charge Letter and provides no information or evidence to demonstrate that these transactions were the result of the sale of eligible items in exchange for SNAP benefits and not the result of SNAP-benefit trafficking. As a result, the evidence in the case preponderates in favor of the ROD Office’s conclusion that SNAP-benefit trafficking produced the transaction activity at issue.

In the absence of any data or information providing further explanation or rationale, the number of large transactions ending in same cents values was inordinate and formed patterns indicative of SNAP benefit trafficking. As noted above, Appellant’s firm is typically-stocked convenience store. It is noted that items were individually priced. There is no reason to believe that numerous customers could purchase large combinations of inexpensive eligible food items that would routinely arrive at totals ending in same-cents values.

In regard to Attachment 2 to the Charge Letter, while there are legitimate reasons why a SNAP recipient or household member might return to a convenience 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 2 indicate a series of repetitive purchases that total large amounts. Customers spending such substantial amounts of SNAP allotments in a typically-stocked convenience 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. There is no compelling rationale to explain why only, or primarily, Appellant’s customers made repetitive visits spending large amounts in short timeframes. 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 at least 90 SNAP-authorized stores within a one mile radius of the Appellant firm, including three super stores, four supermarkets, three large grocery stores, six medium grocery stores, 38 small grocery stores and 36 other convenience stores. ROD’s analysis indicates many customers clearly had access to and routinely shopped at better-stocked super stores and supermarkets in the immediate area on or about the same day as conducting implausible transactions at the Appellant firm, 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. This information further indicates that 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.

The SNAP Office notes that Appellant's SNAP redemptions during the analysis period were multiple times that of the state store-type average during the same period. Additionally, the record contains a comparison of Appellant's redemption activity during the analysis period to five nearby SNAP-authorized convenience stores and found that Appellant's SNAP redemptions during the analysis period were likewise multiple times that of the nearby comparable firms. Furthermore, ROD notes that the numbers of Appellant's SNAP transactions in several transaction bands during the analysis period were multiple times that of the store-type average in the state of New York. Additionally, Appellant's numbers of same-cents, repetitive and excessively large transactions were likewise multiple times that of the five nearby comparable stores.

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 SNAP Office's Charge Letter dated August 8, 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 30<sup>th</sup> 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

April 3, 2018