

**U.S. Department of Agriculture
Food and Nutrition Service
Administrative Review Branch
Alexandria, VA 22302**

Corner Store,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0194211

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 Corner Store (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 October 31, 2016, 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 April through September 2016. 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 April 26, 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 May 3, 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. There also exist FNS policy memoranda and clarification letters which further explain the conditions necessary in order to permanently disqualify retail stores.

7 U.S.C. § 2021(b)(3)(B) states, *inter alia*:

...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, *inter alia*:

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, *inter alia*:

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, *inter alia*:

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, *inter alia*:

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, *inter alia*:

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 too rapidly to be credible (Attachment 1):
- 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 reply to the Charge Letter, and in its written request for review dated May 3, 2017, it was argued that:

1. Appellant extends credit for some customers who need food after the 15th or 20th of the month, and when they receive their SNAP benefits they pay the store back. Some customers have a balance
5 U.S.C. § 552 (b)(6) & (b)(7)(C) each month. Payments are made multiple times; two charges are made for the purchase – but customers do not mind. The store provides a receipt to the customer once the transaction has been processed. Appellant does not have any account numbers of the customers who were extended credit. Credit was extended only on food items.
2. Appellant ceased accepting SNAP as payment on credit accounts when the firm received the Charge Letter. As the firm has ceased accepting SNAP as payment on credit accounts, Appellant requests another opportunity to participate in the SNAP.

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 August 18, 2016, 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:

- No optical scanners.
- No shopping carts or baskets.
- One cash register and one card reader.
- No hot food sold.
- No dining area.
- No deli section.
- No meat/seafood bundles/specials or fruit/vegetable boxes.
- Approximately 1400 square feet of retail space.
- The firm sold tobacco and tobacco-related products, lottery tickets, cleaning supplies, laundry detergent, paper products, automotive supplies, over-the-counter medicines, pet food and other non-food items.
- The checkout counter was behind a Plexiglas barrier; items had to be

passed through a small window approximately one foot square; checkout counter space was less than one foot square and surrounded by candy, snack foods, lottery tickets, tobacco, over-the-counter medicines and other non-food items. Photos: 24 and 28.

- The firm carried no significant amount of ethnic food products or expensive meat/produce items that would attract customers to make large purchases at the store.
- No expensive items or bulk/packaged items other than cases of water, at least one of which appeared to have been opened and individual bottles sold. One small box of frozen food labeled “Caribbean Crescent” was in an upright cooler.

The documentation presents no indication of advertised specials, promotions or bulk or expensive food items. As noted, 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 Connecticut during the analysis period was \$8.48, reflecting that large purchases are not routinely made in such stores.

In regard to contention 1 above, it should be noted at the outset that Appellant must show by a preponderance of evidence that credit account activity, or activity other than SNAP benefit trafficking, accounts for the transaction data detailed in the SNAP Office’s Charge Letter. Such a showing is not possible in the absence of substantial documentary evidence in support thereof; further, a successful contention on Appellant’s behalf that the acceptance of SNAP payments on credit accounts adequately explains the transactions detailed in the Charge Letter is not possible if the contention is not accompanied by substantial and detailed documentation such as ledgers, account books or specific sales records allowing the agency to reconcile *all* transactions in the Charge Letter attachments with Appellant’s records. In reply to the Charge Letter Appellant noted that it maintained no documentary evidence of its credit account activity; likewise, in the firm’s request for review no such documentation was provided. Additionally, Appellant does not explain why credit payments would be comprised of two transactions instead of one; on the other hand, breaking up large transactions into smaller transactions is a method used to mask SNAP-benefit trafficking. Accordingly, the contention cannot be accepted as a valid rationale to explain the transactions contained in the Charge Letter; as such the evidence in the case preponderates in support of the ROD Office’s conclusion that SNAP-benefit trafficking occurred at the store during the analysis period of April through September 2016.

Regarding Attachment 1 transactions, frequent and large transactions conducted rapidly in order to purchase eligible foods at Appellant’s store are highly unlikely given Appellant’s logistical wherewithal and store stock. The firm does not maintain the logistical wherewithal required to rapidly process these transactions.

In light of the above, consider the time required to process a legitimate purchase and the steps involved: 1) unloading items from a cart or basket (the firm provided neither of which, however; thus it is unclear how customers transport large orders to the register or to waiting transportation), 2) separating eligible from ineligible items, 3) the cashier's handling of individual items to determine the price, which in this case involved manual keying of amounts, 4) weighing individual items if sold by weight, 5) entering prices into a register or adding machine, once for eligible foods and once for ineligible items, which is typical for larger purchases, 6) handling manufacturers cents-off coupons, if applicable, 7) bagging the items for carry out, 8) informing the customer of the totals (one for eligible foods and one for non-eligible items, if applicable, which for large purchases includes most transactions), 9) pressing the "SNAP transaction key" on the point-of-sale device, 10) swiping the card, 11) customer entry of the required PIN, 12) cashier entry of the purchase amount, 13) confirming customer has a sufficient benefit balance, 14) the transaction being processed by the system and receiving approval, 15) printing out receipts, 16) accepting an alternate form of payment for nonfoods and possibly handling cash change and 17) the customer removing products from the checkout area so the next customer in line can begin the next transaction. While such transactions may well be done in succession, one will readily surmise that performing these processes on large transactions is not done rapidly. The amount of time required is generally proportional to the dollar amount of the transaction; typically, the larger the dollar amount transacted the longer the time period between transactions. Limited counter space as well as manually key-entering 19-digit card numbers adds additional time to transactions. The Appellant firm processed orders 5 U.S.C. § 552 (b)(6) & (b)(7)(C), considerably faster than supermarkets typically process them, yet the firm has only one small checkout counter, no optical scanner and none of the logistical tools such as conveyor belts, rotating bagging platforms or order separators that are routinely used in rapid throughput operations. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). 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 carts or baskets and very little checkout-counter space and processed rapidly is implausible. As noted, Appellant's rationale regarding how it may conduct such transactions rapidly (credit accounts) is not compelling.

Regarding large and repetitive transactions (Attachment 2), 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 1 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.

5 U.S.C. § 552 (b)(6) & (b)(7)(C). 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 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.

In regard to the excessively large transactions contained in the Charge Letter (Attachment 3), as noted in the foregoing, the average transaction in a convenience store in the state of Connecticut during the analysis period was \$8.48;

5 U.S.C. § 552 (b)(6) & (b)(7)(C), the ROD Office conducted an analysis of a sample of Appellant's SNAP customers whose transactions appeared in the Charge Letter and found that all shopped at supermarkets and super stores on or about the same day as conducting implausible transactions at the Appellant firm, calling into question what the households could obtain at Appellant's typically-stocked convenience store that they could not obtain at the much better-stocked and very likely more competitively-priced super stores and supermarkets (which are typically the most competitively-priced food stores in a given area).

The SNAP Office notes that, at the time of the sanction decision, there were 28 SNAP- authorized stores within a one mile radius of the Appellant firm, including two super stores, one supermarket and 25 other convenience stores. As noted, customers clearly have access to and routinely shop at better-stocked super stores and supermarkets in the immediate area. 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.

5 U.S.C. § 552 (b)(6) & (b)(7)(C).

With regard to contention 2 above, it is important to clarify for the record that there is no provision in the statute or regulations for waiver or reduction of an administrative penalty on the basis of corrective action implemented subsequent to findings of program violations. The purpose of this review is to determine if the earlier decision of the SNAP Office was proper and in compliance with pertinent laws and regulations. Accordingly, this review is limited to considerations relevant at the time such decision was made. It is beyond the scope of this review to consider what subsequent remedial actions, such as changes in store management, procedures, internal controls, employee discipline/training or facility and/or inventory changes and improvements Appellant may propose to take or may have taken in order to comply with program requirements. Therefore, to the extent Appellant implies that it will, or has, implement(ed) corrective and/or remedial actions, though this would likely have been valuable in preventing program violations at an earlier time, such cannot now apply retroactively and does not provide a valid basis for dismissing the charges or for mitigating the serious impact of the violations upon which they are based. It is further added for the record that, although Appellant claims corrective

action has been taken, it offers no documentary evidence of same. As such, the claim carries little weight, and as noted above, corrective action following findings of violations is not relevant in ROD Office sanction decisions.

Additionally, there is no provision in the statute, regulations or agency policy allowing a probationary period in lieu of a permanent disqualification for trafficking. Likewise, no provision exists which allows assurances of future compliance to reduce or reverse a correctly imposed sanction. 7 CFR § 278.6(e)(1)(i) states that the SNAP Office shall disqualify a firm permanently if personnel of the firm have committed trafficking violations. Accordingly, once trafficking is established, there is no latitude to impose a lesser sanction, with the exception of a trafficking civil money penalty, which the SNAP Office appropriately withheld since Appellant did not request consideration for same and did not provide evidence/documentation to demonstrate that it had established and implemented an effective compliance policy and program to prevent violations of the SNAP, in accordance with 7 CFR § 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

December 6, 2017