

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

Delancey Food Market,

Appellant,

v.

Case Number: C0200714

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 Delancey Food Market (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 June 28, 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 December 2016 to May 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 August 8, 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 17, 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 replies to the Charge Letter, in its written request for review dated August 17, 2017, and in subsequent correspondence, it was argued that:

1. The firm is located in an economically depressed area.
2. Customers are sharing cards. Clerks cannot verify if customers should have the cards they are using. A photo ID should be required.
3. Many of the transactions are legitimate sales to customers buying food. Just because

computer data shows large transactions in a short period does not prove SNAP trafficking. Appellant keeps a good inventory and treats customers, many who live close to the store, with respect.

4. The transactions in the Charge Letter are due to the acceptance of SNAP benefits as payment on credit accounts. Appellant did not know that doing so was counter to SNAP rules and regulations.
5. Appellant's business record is clean with no prior violations.
6. Appellant requests a lesser disqualification period.
7. Appellant provides a petition signed by customers who note that the firm's disqualification is inconvenient, customers used to come to the store two to three and three to four times per day, the store provides good customer service, the store has everything customers need and the store is the best corner store in the community.

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 16, 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:

- The store Owner was interviewed in conjunction with the store visit.
- One cash register, one card reader. Counter space approximately 1.5 X 1.5 feet and surrounded by tobacco products, candy, snack foods, clothing and other non-food items. Photos: 7, 16 and 31.
- No shopping carts or baskets.
- No optical scanner.
- Highest priced items:
 - Similac formula - \$18.99 for 11.3 ounces.
 - Bacon - \$5.49 for 1 pound.
 - American cheese - \$5.99 for 1 pound.
 - Provolone cheese - \$6.49 for 1 pound.
- Prices in standard retail variations of \$.x9.
- Store accepted telephone orders.
- No delivery offered.
- No transaction rounding.
- The firm also sold tobacco and tobacco-related products, health and beauty products, paper goods, cleaning supplies, housewares, over-the-counter medicines and other non-food items.
- Kitchen/food preparation area present and hot food sold. Prepared food marquee advertised hot/cold prepared food entrees. Photos: 6, 20 and 41.
- No dining area.
- Store deli stock used to prepare menu entrees/items.
- No meat/seafood bundles/specials or fruit/vegetable boxes. Approximately 24 cans of infant formula appeared to be stored behind the register/counter. Photo: 10

- Typical small grocery store. Photos: 11, 14, 18, 25, 28 and 33.

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 1.5 feet of useable space) but was otherwise surrounded by tobacco products, candy, snack foods, clothing 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 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 Pennsylvania during the analysis period was \$10.01, reflecting that large purchases are not routinely made in such stores.

In regard to contention 1 above, the ROD Office points out that at the time of the sanction decision there were 90 SNAP-authorized small, medium and large groceries, supermarkets and super stores within a one-mile radius of the Appellant store. One supermarket was less than one-half mile from the firm; the ROD Office notes that Appellant's customers routinely shopped at nearby super stores and supermarkets and thus were not limited to shopping only at the Appellant firm. In fact, the ROD Office conducted an analysis of several of the households conducting Charge Letter transactions and found that these households were shopping at much better-stocked and very likely more competitively-priced super stores and supermarkets (which are typically the most competitively-priced in a given area) on or about the same day as conducting implausible transactions at the Appellant firm, calling into question what these customers could obtain at the Appellant's small grocery store that they could not obtain at the larger, better-stocked stores.

There were many shopping options in the area and SNAP customers were not restricted to shopping only at the Appellant firm. The ROD Office further notes that the firm's average SNAP transaction amount was dramatically higher compared to five other nearby small grocery stores (all within one-quarter mile of the Appellant firm), despite, as noted, that the Appellant firm was a typically-stocked small grocery store.

Regarding contention 2 above, the ROD Office found that Appellant's number of repetitive transactions (Attachment 1) was multiple times that of the five nearby comparable small grocery stores referenced above; in fact, Appellant conducted more such transactions than the other five stores combined. Thus if customers routinely share SNAP benefit cards, or conduct repetitive transactions for any other reason, there is no compelling rationale to explain why they would do so only when shopping at the Appellant firm, but would not do so at the other similar stores within a quarter-mile radius.

With regard to contention 3 above, 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 or baskets 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. Moreover, as noted above, the record reflects that Appellant's number of repetitive transactions during the analysis period was multiple times that of five nearby SNAP-authorized stores (all small grocery stores within one-quarter mile of the Appellant firm). 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 small grocery store in all relevant respects and provides no plausible bases for customers' unusual attraction to the firm and unorthodox transaction patterns.

In regard to contention 4 above, it should be noted 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 must be 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. Appellant does not provide such documentation; moreover, Appellant's customer statements do not mention credit accounts or having made payments on such accounts using SNAP benefits.

Regarding Appellant's assertion that it did not know the acceptance of SNAP benefits as payment on credit accounts was counter to SNAP rules and regulations, it is noted that the owner, on March 22, 2011, signed a FNS-252, SNAP Application for Stores certifying thereby that the owner read, understood and agreed with the conditions noted therein which included the following statement: "I accept responsibility on behalf of the firm for violations...including...:

- Trading cash for SNAP benefits (i.e. trafficking)
- Accepting SNAP benefits as payment for ineligible items
- *Accepting SNAP benefits as payment on credit accounts or loans* (emphasis added)
- Knowingly accepting SNAP benefit payments from people not authorized to use them.
- Participation can be denied or withdrawn if my firm violates any laws or regulations issued by Federal, State or local agencies..."

Additionally, upon authorization the firm was sent a standard authorization package containing, among other information, a cover letter stating the following:

Training

- The video and booklet in this package explain the Supplemental Nutrition Assistance Program rules.
- As the owner of the store, **you are responsible** for carefully reviewing the Program rules and making sure all of your employees fully understand these rules. Failure to follow the rules can result in disqualification, fines, civil, and/or criminal action.
- The training guide and DVD are available in English and Spanish.
- At the FNS website, you can also view the video in English or Spanish and download training guides: <http://www.fns.usda.gov/snap>
- A copy of current SNAP regulations are available online, at <http://www.fns.usda.gov/snap/retailers/store-training.htm>

Enclosures:

- Supplemental Nutrition Assistance Program Permit
- SNAP Training Guide for Retailers and training video
- Report Abuse of the SNAP Poster – **MUST BE POSTED IN YOUR STORE**
- We Welcome SNAP EBT Customers Window Sticker and Poster
- Using SNAP Benefits Poster
- Do's and Don'ts for Cashiers/Penalties for Violations of SNAP (Double-Sided card)
- EBT Fact Sheet
- List of WIC State Contacts

From the “SNAP EBT Do’s and Don’ts” card (FNS-136, included in the authorization package):
 “Do not accept SNAP benefits(EBT) as payment on credit accounts.”

From the SNAP Training Expectations document provided at authorization:

At a minimum an acceptable SNAP training program includes:

1. **Thorough review of FNS training materials and Program rules.** A SNAP training guide and video have been enclosed with this notice. These materials can also be found on-line at <http://www.fns.usda.gov/snap/retailers-store-training-information>. Program rules are defined under Title 7; Subtitle B; Chapter II; Subchapter C – Food Stamp and Food Distribution Program of the Electronic Code of Federal Regulations, Part 278 and are also found on-line at the link above.

“Using SNAP Benefits” poster:

SNAP benefits may not be used to pay a credit account.

From the SNAP Training Guide for Retailers available in both English and Spanish:

SNAP customers must pay for their purchases at the time of sale. You may not accept SNAP benefits as payments on credit accounts. You may not hold your customers’ SNAP EBT cards or card account information at your store for future use.

Thus Appellant was provided multiple and redundant resources through which a thorough knowledge of program rules and requirements could be readily obtained; information noting that SNAP benefits may not be accepted as payment on credit accounts was contained not only in the DVD/CD but in the written materials as well. Nonetheless, Appellant has not provided a preponderance of evidence demonstrating that the transactions contained in the Charge Letter were more likely due to credit account activity; the evidence more substantially supports a conclusion that the transaction activity at issue was due primarily to SNAP benefit trafficking.

Regarding contention 5 above, Appellant implies 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."

With regard to contention 6 above, 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 the Appellant did not provide sufficient evidence 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).

In regard to contention 7 above referencing customer affidavits/statements/signatures, generally, there are two possible customer types: those that have engaged in trafficking and those that have not. Those that have not engaged in trafficking have no reason to claim that they have done so. Those that have would not be expected to admit to SNAP-benefit trafficking against their own self-interest, potentially exposing themselves to administrative and criminal charges. On the contrary, experience has shown that SNAP customer declarations and affidavits *always* attest to irregular transactions being legitimate even when there is other strong, often overwhelming, evidence of SNAP-benefit trafficking. As evidence, such statements/affidavits are not compelling.

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

March 20, 2018