

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

**Esquina Mini Market Inc,**

**Appellant,**

**v.**

**Case Number: C0211431**

**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 Esquina Mini Market 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 August 30, 2018, the Retailer Operations Division charged Appellant with trafficking, as defined in Section 271.2 of the SNAP regulations, based on a two irregular SNAP transaction patterns that occurred during the months of February through June 2018. 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 September 26, 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 October 2, 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)** was debited from the accounts of individual SNAP households within a set time period (Attachment 1).
- A series of excessively large SNAP transactions **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**3 was debited from household accounts.

### **APPELLANT'S CONTENTIONS**

In Appellant's reply to the Charge Letter, and in its written request for review dated October 1, 2018, it was argued that:

1. Appellant denies trafficking.
2. With regard to Attachment 1 transactions, many families have several members and they come in more than once per day to buy more food.
3. Regarding Attachment 2, the store is a large grocery store with 2732 square feet. There are many low income areas nearby. Most customers use SNAP benefits to purchase items.

4. In reply to the Charge Letter, Appellant provided bank statements, receipts from distributors, photos, a prepared food menu, and a CD/DVD showing the purchase of infant formula.
5. The disqualification is/will working/work a hardship upon the firm and customers.

### **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 23, 2018, 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 shopping carts or baskets.
- No night window used.
- No evidence of wholesale business.
- Prices in standard retail variations of \$.x9.
- One check-out area, one register and one card reader.
- Food stored out of public view – approximately 100 square feet.
- No storage coolers/freezers.
- No food stored offsite.
- Firm accepts phone orders; no online or other orders taken.
- No delivery offered.
- No transactions rounded up or down at check-out.
- Four most expensive SNAP-eligible items:
  - \$11.99 –vegetable oil – one gallon.
  - Cereal - \$10 – three boxes.
  - Iced Tea - \$15.00 – 2-four-pound, 6.3-ounce containers.
  - Cookies - \$10.00 – three boxes.
- All above information was obtained in collaboration with store personnel.
- The firm also sold tobacco products, health and beauty aids, paper goods, cleaning products, housewares and other non-food products.
- Kitchen/food preparation area present; prepared food menu on marquee on wall behind deli case. Photos: 20, 34 and 35.
- Deli section present, offering meat/cheese, prepared salads and made-to-order sandwiches.
- No meat/seafood bundles/specials or fruit/vegetable boxes.
- Typically-stocked small grocery store in all relevant respects. Photos: 1, 3, 8, 9, 12, 16, 17, 22, 37 and 40.
- Sparsely stocked shelves/coolers. Photos: 11, 16, 18 and 26.
- Checkout area approximately 1 X 1.5 feet of useable space, surrounded by candy, snack foods, tobacco products, small amount of bananas and frozen staple foods along with ice cream novelties; register behind Plexiglas barrier in convenience store fashion. Photos: 23, 36 and 39.

- The firm stocked nothing that could not also be purchased at nearby comparable SNAP-authorized stores and other SNAP-authorized stores.

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 by 1.5 feet of useable space) but was otherwise surrounded by candy, snack foods, tobacco products, a small amount of bananas and frozen staple foods along with ice cream novelties 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 \$9.38, reflecting that large purchases are not routinely made in such stores.

Concerning contention 1 above, Appellant bears the burden of demonstrating through a preponderance of the evidence that the violations as charged, SNAP-benefit trafficking, in fact did not occur and that the sanction imposed by the ROD Office should therefore be reversed (see page 2 above). Appellant offers statements of denial indicating that the firm did not participate in said violations; such does not constitute compelling evidence that the firm accepted SNAP benefits in exchange for eligible foods only. It is acknowledged that demonstrating that trafficking did *not* occur does indeed place a difficult burden upon Appellant; however, that the burden is considerable does not render invalid the evidence of SNAP benefit trafficking existing in the record or the actions taken by the ROD Office based on that evidence.

Regarding contention 2 above, the ROD Office notes, and the store visit documentation confirms, that Appellant did not offer/provide shopping carts or baskets with which customers could transport large orders to the small checkout counter or to waiting transportation. Attachment 1 includes a series of transactions totaling unusually large amounts (5 U.S.C. § 552 (b)(6) & (b)(7)(C)), yet the firm lacks the logistical wherewithal to assist customers in handling such orders. Also as noted, the checkout counter has approximate 1 by 1.5 feet of usable space and more closely resembles that of a convenience store than a grocery store.

Moreover, 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 baskets or 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. Moreover, the record further reflects that Appellant's number of

repetitive transactions during the analysis period was multiple times that of four nearby SNAP-authorized stores (all small grocery stores from just over one-tenth of a mile to just under one-fifth of a mile from 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.

With regard to contention 3 above, the store meets the agency's standard to be classified as a small grocery store; moreover, the store visit documentation and photographs reflect the firm occupied approximately 500 square feet of store space, not the 2732 square feet cited by Appellant. Appellant provides no further documentation to support or verify its contention. The store visit reflected that the firm sold primarily canned and packaged goods, soft drinks, snack food items and accessory food items and, as noted, was a typical small grocery in all relevant respects.

Similar to Attachment 1, Appellant's number of Attachment 2 transactions was multiple times that of four nearby comparable firms (all small grocery stores from just over one-tenth of a mile to just under one-fifth of a mile from the Appellant firm). These firms are also in the same area as the Appellant firm yet do not conduct the high numbers of implausible transactions, indicating that the concentration of SNAP customers in the area does not explain the transaction activity detailed in the ROD Office's Charge Letter.

The ROD Office notes that, at the time of the sanction decision, there were 57 SNAP-authorized stores within a one-mile radius of the Appellant firm, including a super store, four supermarkets, four medium grocery stores and 57 other small grocery stores. ROD Office analysis reflects that customers clearly have access to and routinely shop, on or about the same day, at better-stocked super stores, supermarkets and medium grocery stores in the immediate area, calling into question what customers were able to obtain at Appellant's typically-stocked small grocery 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.

In regard to contention 4 above, bank statements provided by Appellant do not indicate what was exchanged for SNAP benefits and show only that transactions did occur; as such the information does not disprove SNAP-benefit trafficking. Regarding the product purchase receipts/invoices, the ROD Office conducted an in-depth analysis thereof; it is noted that Appellant provided invoices from two distributors. One involved a purchase summary only and quite likely included the purchase of non-food items, making the figures unreliable. The other invoices reflected the purchase of formula and Appellant is taken to imply that sales of such items explain the transactions detailed in the ROD Office's Charge Letter; however, most SNAP households with

infants are WIC-eligible and prefer to spend more restrictive WIC benefits on formula, saving less restrictive SNAP benefits for other food purchases. Using the invoices pertaining to the analysis period only, the firm's SNAP redemptions were multiple times the total amount of the invoices; the shortfall is greatly understated as well since the analysis did not take WIC or cash/commercial credit/debit sales into consideration, of which the firm surely had some amount during the period in question.

With regard to the photos provided by the Appellant in its reply to the Charge Letter, the ROD Office notes that the store inventory in the photos was relatively similar to that seen during the ROD Office contracted store visit, with the exception that the photos showed a flyer that was not present at the time of the earlier store visit. During that visit, there was no indication that the firm offered bulk or bundled specials or any expensive items other than those noted during the store visit, the most expensive of which were containers of iced tea at \$15.00 for two such containers. The information during the store visit, with regard to bulk or special items, was obtained in collaboration with store personnel. Accordingly, the flyer advertising bulk food specials is not viewed as reliable or relevant to store inventory and offerings at an earlier time.

The ROD Office notes that the DVD/CD provided by Appellant does not clearly show whether the item(s) was/were sold using cash, WIC benefits or SNAP benefits. Appellant labels the video "5 U.S.C. § 552 (b)(6) & (b)(7)(C)," but does not ostensibly reference the date of the transaction in its reply to the Charge Letter; nor does Appellant provide a receipt or any other documentation associated with the transaction. Appellant notes that it sold infant formula for \$20 each, although this is not corroborated by the store visit, which noted, in collaboration with store personnel, that infant formula was not one of the four most expensive items offered in the store; none of the four items it referenced during the store visit were over \$15.00.

5 U.S.C. § 552 (b)(6) & (b)(7)(C). If the items sold and reflected in the DVD/CD were infant formula, as noted, SNAP households, most of whom also qualify for WIC if they include pregnant or post-partum women, infants or young children, typically prefer to retain less restrictive SNAP benefits for other food items and to use more restrictive WIC benefits to buy infant formula. The DVD/CD provides no credible information to dispute the ROD Office's charges of SNAP-benefit trafficking during the analysis period (February through June 2018).

Regarding contention 5 above, 7 C.F.R. § 278.6(f)(1) of the SNAP regulations provides for such assessments in cases where less-than-permanent disqualifications would cause "hardship" to SNAP households because of the unavailability of a comparable participating food store in the area to meet their needs. However, this same provision also stipulates the following specific exception to such considerations: "A civil money penalty for hardship to SNAP households may not be imposed in lieu of a permanent disqualification." Therefore, the "hardship" civil money penalty provision (7 C.F.R. § 278.6 (f) is not applicable in the present case, beyond its stipulation that hardship is not a consideration in permanent disqualifications. Additionally, hardship worked upon retailers is not a consideration in decisions to disqualify firms due to SNAP benefit violations or in decisions to impose civil money penalties in the event disqualified firms are subsequently sold or the ownership thereof otherwise transferred; there are no provisions in the Act, the regulations or in agency policy allowing for hardship worked upon a firm, due to a disqualification, to warrant a civil money penalty.

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 August 30, 2018, 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, the ROD Office did not impose a civil money penalty in lieu of permanent disqualification. 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 ROD 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

December 4, 2018