

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

Family Cigarette And Grocery Store #1,

Appellant,

v.

Case Number: C0202397

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 Family Cigarette And Grocery Store #1 (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 September 20, 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 March through August 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 October 19, 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 October 24, 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 reply to the Charge Letter, in its written request for review dated October 24, 2017, and in subsequent correspondence, it was argued that:

1. The firm did not commit violations.
2. Appellant provided itemized sales receipts corresponding to transactions in the Charge Letter.
3. Expensive transactions come from very large food purchases by customers. Some buy food for the entire month. Some buy food in bulk. Two customers buy several boxes of Ramen noodles and boxes of soft drinks. Some customers request two large orders during the month. The firm sells varieties of canned food, snacks, bread, vegetables, fruits, dairy products, seafood, chicken and beef. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Food mark-up is between 25-38%, but sometimes changes.
4. Appellant provided sales receipts reflecting customers using debit cards in a manner similar to SNAP benefits - 5 U.S.C. § 552 (b)(6) & (b)(7)(C). The receipts are dated September 22 and 29, 2017.
5. Appellant provided product purchase receipts/invoices. The firm does not normally keep a full record of such documents. The firm's cash register machines were stolen and with them most of the records; the loss due to the theft was approximately

5 U.S.C. § 552 (b)(6) & (b)(7)(C); a police case number is provided by Appellant.

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 9, 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 400 square feet of retail space.
- No optical scanners.
- No shopping carts or baskets.
- No evidence of wholesale business.
- Prices in standard retail variations of \$.x9.
- 1 checkout area/counter and 1 cash register; 1 card reader.
- No food stored outside public view.
- No storage coolers/freezers.
- No food stored offsite.
- Not a specialty food store.
- No telephone, online or other orders.
- No delivery offered.
- Transaction totals not rounded at checkout.
- Most expensive items:
 - Pickle chips (jar of pickle slices) - \$7.49 for 64 ounces.
- All above questions answered in collaboration with store personnel.
- The firm also sold tobacco products (glass pipes, hookahs, lighters and other items), automotive products, incense, housewares, health and beauty products and other non-food items.
- No kitchen/food preparation area.
- The firm was marginally/sparsely-stocked with very little food on hand and appeared to operate primarily as a smoke/tobacco shop. Outdoor advertisements focused on tobacco products. Photos: 1, 2, 5, 6, 8, 9, 10, 11, 13, 15, 16, 18, 19, 20, 21, 22 and 25.
- No hot food sold; no dining area.
- No deli section.
- No meat/seafood specials/bundles or fruit/vegetable boxes.
- Check-out counters approximately 1 X 1.5 feet and 4 X 1.5 feet of useable space and surrounded by tobacco and tobacco-related products. Photos: 1, 3, 6, 15 and 23.
- No meat inventory seen during the store visit.

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 surrounded by tobacco, tobacco-related 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 poorly-stocked convenience store in all relevant respects; the firm would have failed to qualify under Criterion A, and quite likely Criterion B also, at the time of the store visit. The store owner told the store visit contractor that the store was under renovation; however, there were no signs of construction or remodeling. The firm appeared to be a tobacco/smoke shop with very little food inventory.

In regard to contention 1 above, Appellant bears the burden of demonstrating through a preponderance of the evidence that the violations as charged, including SNAP-benefit trafficking, in fact did not occur and that the sanction imposed by the SNAP Office should therefore be reversed (see page 2 above). Appellant offers a statement of denial indicating that the firm did not commit trafficking violations; this 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 SNAP Office on the basis of that evidence.

Regarding contention 2 above, the ROD Office calls attention to numerous anomalies present in the documentation provided by Appellant. Receipts for 94 of the 96 Charge Letter transactions were provided. No transaction times were listed on the receipts. The firm used the last four digits of the household number provided in the Charge Letter; however, customers use SNAP benefit cards to spend their benefits, which utilize unique card numbers, apart and distinct from household numbers, the latter of which are typically not provided to or known by retailers. This suggests that the receipts were produced solely in response to the Charge Letter and are not a reliable reflection of legitimate retail activity. Also, there were duplicate receipts for some transactions which showed different food items "purchased." 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

The store visit conducted on August 9, 2017 reflected the presence of only 1-5 units of cheese, 1-5 units of canned vegetables, 1-5 units of bread and snacks available for sale. The ROD Office reviewed the sales receipts for August 8, 2017 and August 10, 2017; some of the food items listed, such as fruit, milk, chicken, beef, shrimp, and lamb shanks, were not available for sale on August 9, 2017. Above are a few examples of inconsistencies in the documentation. The receipts do not explain the suspicious transaction patterns at the Appellant firm.

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 marginally-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. The firm's small inventory of food could not support such transactions. 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. The record reflects, as noted above, that the Appellant firm was a poorly-stocked convenience 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 visit did not reflect a food inventory sufficient to support large food purchases; there was no evidence of bulk or expensive items. In fact, the firm likely would have failed to qualify to participate in the SNAP at the time of the store visit. There were no cases of Ramen noodles or cases/boxes of soda/soft drinks for sale. It is worth noting that the average SNAP purchase in a small grocery store in the state of Colorado during the analysis period was \$7.38, reflecting that large purchases are not routinely made in such stores. Attachment 2 to the Charge Letter contains numerous transactions **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**, multiple times the state store-type average, yet the firm maintained very little food inventory.

In regard to contention 4 above, this documentation is not relevant to the analysis period of March through August 2017; no further findings related to this documentation are rendered.

Regarding contention 5 above, the ROD Office analyzed the product purchase invoices/receipts provided by Appellant and noted that several could not be used because they were illegible, had no date, were dated outside the analysis period and/or were not invoices. Using Appellant's stated 38% mark-up, the firm would have had only **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** in inventory during the analysis period. SNAP redemptions during the same period were multiple times this amount. The police report/case number documentation is not dated, contains no details of the purported crime and does not explain the transaction activity.

The ROD Office notes that, at the time of the sanction decision, there were two super stores, two supermarkets and 18 other convenience stores within a one-mile radius of the subject store. The ROD Office conducted an analysis of household shopping activity and found that customers shopped at super stores and supermarkets on or about the same day as conducting implausible transactions at the Appellant firm, calling into question what these customers could obtain at Appellant's poorly-stocked convenience store that they could not obtain at the much better-stocked and very likely more competitively-price stores (supermarkets and super stores are typically the most competitively-priced firms in a given area).

The SNAP Office notes that Appellant's SNAP redemptions during the analysis period were over two times that of the state store-type average during the same period. **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. As noted, the firm was reflected to be a poorly-stocked convenience store in all relevant respects; there exists in the record no legitimate basis for the nature and level of the firm's transaction and redemption activity.

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 September 30, 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
Administrative Review Officer

June 8, 2018