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

Hwy 31 Shell,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0195636

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 Hwy 31 Shell (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 February 16, 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 July through December 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 ROD Office received and duly considered Appellant's replies to the Charge Letter. By a letter dated March 14, 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 March 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. 5 U.S.C. § 552 (b)(7)(E).

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 20 transactions 5 U.S.C. § 552 (b)(6) & (b)(7)(C) ended in a same cents value (Attachment 1).
- A series of multiple SNAP transactions 5 U.S.C. § 552 (b)(6) & (b)(7)(C)6 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 debgited from recipient accounts (Attachment 3).

APPELLANT'S CONTENTIONS

In Appellant's reply to the Charge Letter, in its written request for review dated March 24, 2017, and in subsequent correspondence, it was argued that:

1. In its reply to the Charge Letter, Appellant denied that intentional trafficking had occurred at the store, though it did acknowledge that at least one employee had the mistaken belief that the participants' cash benefits could be withdrawn at the store using their SNAP benefits when the ATM machine was down. Appellant's reply is incorporated herein by reference. Appellant believed that the EBT card that contained both SNAP and TANF benefit accounts could both be exchanged for cash. There are a number of receipts in the record that show that many of the transactions cited in the Charge Letter are in fact legitimate purchases of food. Despite this, however, there are a number of transactions that are the result of store clerks who were convinced by a handful of households that cash in exchange for SNAP benefits was permissible because of cash benefits offered through the same card but via TANF benefits. Not every transaction set forth in the Charge Letter was a violation; Appellant previously attached a number of receipts that account for several transactions. There may be other such receipts but, to date, Appellant has not been able to locate them. This documentation shows that a number of these transactions were legitimate and that the households conducting transactions set forth in the Charge Letter were not merely trafficking at their convenience. The majority of transactions were in fact legitimate in nature. The trafficking that occurred was unintentional, believing in error that the cash given to customers in such transactions was cash from the TANF portion of the customer's card benefits. The relevant SNAP statute and regulations imply intent to commit trafficking; in instances in which a clerk is under the belief that TANF benefits are being redeemed for cash there is a lack of such intent to traffic. Because the card contained both forms of benefits, TANF and SNAP, a clerk can be easily misled into believing that cash can be provided to a customer by debiting that customer's SNAP account. Thus, as the trafficking was unintentional it cannot strictly be considered SNAP-benefit trafficking.
2. Appellant cites an FNS study entitled Benefit Redemption Patterns in the SNAP (2011) in which it is noted that a large portion of households redeem nearly all of their benefits within the first two weeks of the month. Most visits to a store the size of the Appellant firm are made while the customer is on the way to work or school, in the morning from 6 to 9 AM or in the evening from 7 to 10 PM.
3. Appellant cites a 2016 study conducted by the Convenience Store News in which it was noted that small grocery/convenience store customers are among some of the most loyal customers when it comes to store selection. The study cites statistics in support thereof. Appellant likewise cites the FMI U.S. Grocery Shopping Trends 2016 Annual Report in which it is stated that limited assortment stores saw an increase in customers who use them as a primary grocery store by three percent over 2015; convenience stores likewise saw an increase of 3% in consumers who used their store as their primary grocer. Ethnic food stores saw a rise of 1% in usage as primary grocers. Appellant notes that the store fits more squarely as a small grocery store than it does a convenience store and is designed to be more than a convenience store.
4. It is not uncommon for Appellant's customers to make multiple purchases in short time frames; often customers forget items after leaving the store and return to purchase them. The more a customer is exposed to promotional devices the more likely the customer is to make impulse purchases and second trips to the store to take advantage of sales or specials. Also multiple members of the same household will shop together and make purchases separately using the same card/SNAP account. In yet other instances,

households go on a shopping spree wherein they make purchase after purchase without leaving the store or by returning after a brief absence.

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 November 21, 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 dining area.
- No shopping carts or baskets.
- No deli section.
- No meat/seafood bundles/specials or fruit/vegetable boxes.
- Approximately 1200 square feet of store space.
- No night window/plastic checkout barrier used.
- Not a delivery route, farmer's market or specialty food store.
- The firm sold tobacco and tobacco-related products, lottery tickets, automotive supplies, health and beauty products, paper goods, cleaning products and other non-food items.
- The firm also operated as a gas station. Photos: 18, 25 and 31.
- Reviewer noted empty shelves and an empty product rack. Photos: 2, 3, 8, 9, 10, 12, 15, 16, 17, 20, 21, 23, 28 and 29.
- Prices in standard retail variations of $.x9. Photos: 2, 7, 10, 13, 15, 20, 22, 24, 25, 26, 27 and 30.
- Comments: "Road construction on Shields Rd. where traffic was at a stand still for 5 minutes."
- The store's inventory focused primarily on tobacco products, individual serving-sized beverages and snack foods. The firm maintained a typical convenience store inventory and layout. Photos: 7, 14, 15, 17, 19, 25, 26, 28 and 30.
- Dust-covered canned goods. Photos: 16, 21, 23 and 29.
- Check-out counter was approximately 2 X 2 feet and surrounded by tobacco and tobacco-related products, candy, incense and single-serving ice-cream novelties. Photos: 22 and 26.

The documentation presents no indication of advertised specials, promotions or 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 2 by 2 feet of useable space) but was otherwise cluttered/surrounded by tobacco and tobacco-related products, lottery tickets, candy, incense and ice-cream. There were no shopping carts or baskets with which customers could transport large orders to the small check-out area or to waiting transportation. Photos reflected dusty canned goods and sparsely-stocked/empty

shelves, typically an indication of low inventory turnover. This documentation reflects that the firm was a marginally-stocked convenience store in all relevant respects. It is worth noting that the average SNAP purchase in a convenience store in the state of Alabama during the analysis period was $6.91, reflecting that large purchases are not routinely made in such stores.
In regard to contention 1 above, Appellant acknowledges that cash was exchanged for SNAP benefits. It is noted for the record that neither the Food & Nutrition Act of 2008 nor the regulations issued pursuant thereto cite any minimum dollar amount of cash or SNAP benefits, number of occurrences or number of personnel or customers involved for such exchanges to be defined as trafficking. The Act reads, in part, that disqualification shall be "permanent upon ... the first occasion of a disqualification based on ... trafficking ... by a retail food store." In keeping with this legislative mandate, section 278.6(e)(1)(i) of the SNAP regulations states that FNS shall disqualify a firm permanently if personnel of the firm have trafficked SNAP benefits.

Appellant contends that receipts were provided demonstrating that several of the transactions contained in the Charge Letter were the result of the legitimate sale of eligible food items in exchange for SNAP benefits; the record reflects that said receipts were not provided to the ROD Office in Appellant's replies to the Charge Letter. Nor were they provided in support of Appellant's request for review. The record further reflects that Appellant was given ample opportunity following the firm's receipt of the Charge Letter and during the administrative review process to provide any documentation it deemed relevant to the case. As such, the probative value of the referenced receipts cannot be accurately assessed or their existence verified.

Appellant lists 61 Charge Letter transactions for which register receipts purportedly exist (though, as noted, no documentation thereof is found in the record); there are 124 total transactions contained in the Charge Letter. This leaves 63 transactions for which no evidence of legitimacy is purported to exist.

Appellant contends that these transactions were due to a misunderstanding on behalf of store clerks who exchanged cash for SNAP benefits thinking they were exchanging cash for TANF benefits. (It is noted for the record that TANF benefits cannot be used to purchase tobacco or lottery tickets, items which were prominently displayed and offered at the Appellant firm.) Appellant further argues that SNAP-benefit trafficking must involve intent and that this view is supported by the statute and regulations.

Firstly, there is no means by which to verify that there was no intent to traffic in the present case; moreover, a clerk would have to overcome certain system safeguards in order to exchange cash for SNAP benefits: virtually all card readers (point-of-sale machines) have a button or option to access the SNAP account and another to access the TANF, or cash, account on any particular card swiped through the machine. If a customer wanted cash from her/his EBT card that had a TANF account, the machine would clearly show the account. If the card contained no such account only the SNAP option would be available. Additionally, knowledge that SNAP benefits cannot be used to obtain cash is perhaps the most widely and commonly known tenet of the program. Given these considerations, a lack of knowledge that cash may be given by accessing a SNAP account on a debit card is quite unlikely. That is, it is not viewed as easy

to mislead even a poorly-trained clerk to believe that cash may be obtained from the SNAP account of either a SNAP-only card or from a combination SNAP/TANF card.

Secondly The Food and Nutrition Act of 2008 at § 2021 and the regulations at 7 C.F.R. § 271.2 (Trafficking definition (1)) and 278.6(e)(1)(i) do not require or imply intent in order to impose a permanent disqualification for SNAP-benefit trafficking.

The record as a whole is sufficient to show that trafficking by the Appellant firm is more likely to have occurred than not to have occurred, the evidentiary standard required in this case and the same as that employed in all agency administrative reviews of adverse actions, as noted above (top of page 2). While a lack of intent to violate cannot serve as a basis to reverse the sanction in the present case, there being no provision in the Act or the regulations permitting/requiring the withholding of an otherwise correct sanction in cases where trafficking can be shown to be unintentional, the record contains substantial evidence that Appellant, either through its ownership, employees or both, willfully engaged in the trafficking of SNAP benefits; SNAP benefit trafficking, being a commonly and widely known violation of the program, typically involves intent.

Regarding contention 2 above, while SNAP customers may redeem a substantial amount of their benefits within the first two weeks following benefit issuance, households do not typically make large purchases at convenience stores but instead do most of their primary shopping at super stores, supermarkets and grocery stores.

With regard to contention 3 above, likewise, even loyal convenience-store customers would reasonably be expected to conduct typical convenience store transactions, the average of which in the state of Alabama during the analysis period was $6.91, reflecting that large purchases are not typically made in such stores. It is acknowledged that, to the extent the FMI study reflects an increase in customers' use of convenience stores as primary food sources, the average SNAP transaction could be pushed upward; however, the $6.91 figure noted above takes into account all SNAP purchases at convenience stores in the state of Alabama during the period July through December 2016 and thus reflects any upward pressure exerted by a change in customer shopping habits during that period. The transactions detailed in the Charge Letter, including many with no purported documentary evidence of legitimacy and which Appellant acknowledges involve the exchange of cash for SNAP benefits, are multiple times the state store-type average.

5 U.S.C. § 552 (b)(6) & (b)(7)(C). As noted, the firm is a marginally-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.

Appellant notes that the firm is much more like a small grocery store; however, the record, including Appellant's application to participate in the SNAP and the recent store visit, confirms that the firm was correctly designated as a convenience store for the purposes of the SNAP.

In regard to contention 4 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 2 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. 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 marginally-stocked convenience store in all relevant respects and provides no plausible bases for customers' unusual attraction to the firm and unorthodox transaction patterns.

The SNAP Office notes that, at the time of the sanction decision, there were 13 SNAP-authorized stores within a one-mile radius of the Appellant firm, including two super stores (one at just over 350 feet from the Appellant store), one supermarket (at just under one-half mile), six combination grocery/other stores (five from just over 350 feet to just under one-quarter mile), one bakery specialty store (at just over one-quarter mile) and three other convenience stores (two at just under one-third mile and just under one-half mile). Analysis conducted by the ROD Office reflects that customers conducting implausible transactions at the Appellant firm were shopping at much better-stocked super stores and supermarkets on or about the same day, calling into question what customers could obtain at Appellant's marginally-stocked convenience store that they could not obtain at the super stores and supermarkets. 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.

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 February 16, 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

November 15, 2017