

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

Kam Iv Store,

Appellant,

v.

Case Number: C0196802

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 Kam Iv 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 February 2, 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 August through October 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 September 13, 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 September 22, 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 September 22, 2017, and in subsequent correspondence, it was argued that:

1. The store is misclassified and not comparable to other nearby stores. It is not small, although it appears to be; it is akin to a supermarket. Other stores don't have the same customer base. The store is located between two of the largest public housing projects on the island and serves as a small grocery. The majority of customers are Micronesians and

Samoans and come from these housing areas. The store sells convenience foods, specialty items such as Guam Rice, Breadfruit, coconut milk, sunflower tuna, coco tuna, red sunflower mackerel, assorted Assam tea and assorted kimchee, along with regular groceries such as chips, milk, butter, cheese, eggs, etc. These items sell frequently and require replenishment monthly. Appellant cites USDA's Profile of Households for the 1st Congressional District of Hawaii and notes various demographic figures.

2. Food costs are higher in Hawaii than in the mainland and Hawaii one of the most expensive places to live. Costs for groceries in Hawaii are higher than that on the mainland. To complicate matters further, the store caters to immigrants from other Pacific islands, which subjects the items to import taxes.
3. Appellant states that the ALERT system data employed by the ROD Office in the present case is over-utilized, has limitations and has created the false believe that it is wildly accurate. The system relies upon transaction types that are too old. The system does not identify trafficking and the evidence provided by it should be viewed in this light. There is no evidence that trafficking has occurred. Appellant notes that appropriate comparison stores should be used in conjunction with the analysis of ALERT data. To do that the ROD Office would have to use a store in another location, which would then fail to account for the dense population of residents around the Appellant's store.
4. Appellant cites case law in support of contentions 6 and 7 above and notes that the General Counsel's Office should be consulted for an analysis of its applicability.
5. Regarding multiple transactions (Attachment 1 to the Charge Letter): all transactions in Attachment 1 are done in the beginning of the month. The Owner of the firm memorizes prices of items; also, the register functions as a calculator and thus items can be rung up quickly. Families shopping together also generate repeat transactions. Secondary transactions are often just a couple of items. Additionally, items purchased from the storage room are rung up before being retrieved/brought to the register/customer. Customers are not sure of their SNAP balances and conduct a small test transaction first and then purchase the remaining items in their order. Appellant cites a study referencing co-shopping in regard to Attachment 1 transactions. Different household members shop separately and/or will travel to the store together but make separate purchases, the latter of which is the most common practice at the Appellant store. This results in a higher number of transactions that occur in a shorter time; some of the transactions in the Charge Letter are the result of this type of shopping behavior. All of the transactions in Attachment 1 are the result of co-shopping. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). These transactions are the result of experienced clerks and bulk item purchases. Transaction sets with the shortest elapsed time (set 1, 2, 3, 4, 6, 7, 9, 11 and possibly 12) involve large primary purchases with small secondary purchases which are easily processed within the stated timeframes. Transaction two likely involved the sale of one gallon of ice cream (\$13.00), one bag of Guam rice (\$16.00) and one drink (\$1.45). In set 5, the simple answer is that the secondary transaction included a case of lamb (\$110.00), a package of breadfruit (\$7.00) and a drink (\$1.45), 5 U.S.C. § 552 (b)(6) & (b)(7)(C); a second possibility would involve the purchase of a case of Gold Sunflower Mackerel (\$68.40), turkey wings (\$45.00). A 5 U.S.C. § 552 (b)(6) & (b)(7)(C).
6. Regarding large transactions (Attachment 2 to the Charge Letter): customers bring their own wagons and load purchased items directly into them, so transporting items is not a problem for every household; those that don't have wagons typically make multiple

purchases. Customers **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** in SNAP benefits per month and prefer and request items that have to be imported and are expensive and consist of canned fish, rice from Guam, cases of biscuits, cases of canned drinks and assorted kimchee products. Such items are purchased by the case or in quantities of less than a case, which costs more since case-pricing is not used. A number of other SNAP stores are social service related, mobile stores or gas stations. Most, though not all, are not direct competitors for Appellant and few carry the imported items Appellant does. The nearby grocery stores/discount clubs do not offer imported goods in bulk as does Appellant. Thus, for these items Appellant has no competition. The store sells food items in bulk. Appellant provides photographs of store inventory in support thereof. The ROD Office's store visit photos focus on a handful of empty shelves and do not reflect the normal inventory level of the store. Most of these items are also seen in the pictures taken by the ROD Office; however, the photos taken by the ROD Office occurred on the 5th when SNAP benefits are issued, thus showing how benefit issuance depletes Appellant's inventory. Appellant provides a list of some bulk items offered at the store. Appellant has provided invoices of product purchases in its reply to the Charge Letter and provides a spreadsheet reflecting a portion of invoices along with its Brief. The store stocks its shelves weekly or more often and has more than enough inventory to justify several substantial purchases by a household. Inventory is marked up 65 to 85%. Appellant provides a list of all items sold in bulk as well as photographs, some of which include descriptions. Such items are also kept in the storage rooms in the back of the store. Local super stores and supermarkets do not carry a lot of these bulk items. Customers prefer to buy bulk items early in the month. Bulk items are expensive imported items and can quickly arrive at large totals. **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. Appellant can easily reconstruct the likely contents of the largest transaction in Attachment 2 (\$430.35): two cases of lamb (\$288.00), a case of mackerel (\$68.40), a package of turkey wings (\$45.00), turkey tails (\$24.00) and a single item priced at \$4.95 or multiple small items. The inventory receipts and expenses support an increase in the amount of food being sold, which is mirrored in the Department's transactions records showing an increase in the redemption of EBT benefits. Appellant provides affidavits in support of the above.

7. There are many households listed in the Charge Letter; it is unlikely that this number are trafficking and more likely that they are buying bulk food as shown in the store visit documentation at the prices listed.

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 September 5, 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.
- Reviewer indicated no food stored outside of public view.

- One cash register and one card reader.
- No hot food.
- No dining area.
- No deli.
- No meat/seafood bundles/specials or fruit/vegetable boxes. Meat inventory consisted of one carton of eggs, baby food, canned meat and canned seafood. What appeared to be six cases of canned fish are seen near the checkout area in photo 25.
- Estimated 600 square feet of retail space.
- The firm sold tobacco and tobacco-related products, health and beauty products, household items, clothing, paper products, cleaning supplies and other non-food items.
- Disorganized and sparsely-stocked shelves and coolers. Photos: 1, 2, 4, 6, 7, 8, 10, 11, 12, 13, 14, 15, 16, 17, 18, 21, 27, 29, 30 and 31.
- Dusty canned goods. Photos: 27, 29 and 31.
- Checkout counter space approximately 1 X 1 foot of useable space surrounded by snack food items, tobacco products and other non-food items.
- Comments: “Bottom of cooler with lemons and milk dirty. Empty spaces on shelves. Items askew on shelves. Low lighting due to the heat outside and small aisle widths.”

The documentation presents little indication of advertised specials, promotions, bulk or expensive food items. Food shelves contained several single containers of canned fish (mackerel, tuna and sardines), canned/potted meat (corned beef, Spam and Vienna sausage), canned coconut milk; there was one unopened case of ramen noodles, a few containers of kimchee, seven 20-pound bags of rice, and a substantial inventory of snack and convenience food items. A small cooler contained 11 cans of Assam tea, 12 cans of another brand of tea, two cans of coffee, one gallon of milk, one carton of eggs, four small packages of cheese slices, two or three small packages of margarine and one small unopened bag and one opened bag of lemons. 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 feet of useable space) but was otherwise surrounded by snack food items, tobacco 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 marginally-stocked combination grocery/other store in all relevant respects. It is worth noting that the average SNAP purchase in a combination grocery/other in the state of Hawaii during the analysis period was \$21.77, reflecting that large purchases are not routinely made in such stores.

In regard to contention 1 above, the store visit, as noted above, reflects that the firm was a marginally-stocked combination grocery/other store in all relevant respects. Numerous empty or sparsely-stocked shelves were indicated in both the photographs and remarked upon by the reviewer. Some photos reflected the presence of dusty canned goods, typically an indication of low turnover. The agency utilizes a comprehensive classification system by which it categorizes stores by type and compares stores to others of the same type. The categorizing of the Appellant store as a supermarket was not possible, nor would it have been appropriate or accurate, under this system, as the firm had virtually none of the characteristics associated with supermarkets. Nor could the firm have been correctly categorized as a large, medium or small grocery store. It

does, on the other hand, have all of the characteristics of a combination grocery/other store, though a poorly/marginally-stocked one.

That the firm caters to Micronesian and Samoan customers residing in the area is acknowledged, although, as the ROD Office notes, there are several stores likewise catering to this same clientele, some of which are within approximately one-quarter mile of the Appellant firm and two of which are likewise located quite close to the housing projects Appellant references. Another store, located just over one-half mile from the Appellant store, also carries both similar and identical products marketed to Micronesians and Samoans. These stores carry very similar inventory, much of which is identical to Appellant's; however, these stores clearly carry superior staple food inventories.

Regarding contention 2 above, high food prices in Hawaii and a substantial population of low-income households in the area are likewise acknowledged. These factors, however, would also apply to the comparable stores in the area identified by the ROD Office.

With regard to contention 3 above, from all indications in the record, the ROD Office obtained the transaction data available via the ALERT system, found it to be suspicious in comparison to other area stores in the area with comparable inventory, as noted in the foregoing, and then undertook a thorough investigation before concluding that trafficking was likely occurring. The implication that the ROD Office merely allowed the ALERT system to declare that trafficking was occurring is not supported by the record.

It should be further noted that the transactions identified in the Charge Letter are not marginally abnormal, but decidedly so. The ROD Office does not contend that the transactions detailed in the Charge Letter are overtly suspicious when they occur on an occasional or intermittent basis, but when such transactions form repetitive and questionable patterns on a consistent basis over a substantial period of time, such activity is considered highly irregular, and a firm's compliance with program regulations is called into question.

In regard to the case law cited by Appellant in contention 4 above, consultation with department legal advisors and with regard to case law occurs routinely and does impact the agency's interpretation of controlling law and the development and interpretation of regulations. However, it is beyond the scope and authority of this review to determine the applicability of case law. This review is limited to consideration of whether or not the ROD Office duly adhered to the **Food and Nutrition Act of 2008**, as amended, and the implementing regulations, and whether or not the action taken is sustainable by a preponderance of the evidence. The application of any judicial precedent to this particular case is better addressed via judicial review. Accordingly, no further findings or conclusions are rendered in this regard.

Regarding contention 5 above, that the sale of cases of products could allow for rapid transactions is acknowledged; however, as noted in the foregoing, there were no case quantity prices advertised at the store, no flyers present and no other signage indicating the availability of cases of food products for sale. The store visit did not reflect the presence of a storage room containing additional inventory. Few cases of any food products were seen at the time of the store visit, despite the visit occurring at noon on the second of two days of SNAP-benefit

issuance in the state (in Hawaii, the 3rd and the 5th of each month). As noted, the store was poorly stocked, with many empty and sparsely-stocked shelves, as well as some dusty canned goods; Appellant provides photos of a store room with several boxes of what are said to be canned seafood and other products, though it is unclear if such was present at the time of the store visit. Why some of the inventory said to be in storage was not used to restock the retail area of the store on one of the likely two busiest SNAP-sales days of the month, and why the firm would choose to maintain the bulk of its inventory out-of-sight from retail customers in another room behind closed doors, is unclear. As noted, the store visit commenced at 12:15 PM on Monday, September 5, 2016. Further, it is unclear how the firm could keep track - again, during the busiest SNAP sales days of the month - of the amounts of the various case items available for sale that it purported to maintain out of sight in another room; Appellant provides no inventory tracking records to support the unorthodox system it was said to have used. Moreover, the photos provided by Appellant were clearly taken at some point following the firm's receipt of the Charge Letter and are not a reliable indicator of inventory held at an earlier time. It is added for the record that neither the store visit documentation provided by the ROD Office, nor Appellant's photos, reflected the presence of cases of turkey or other fresh or frozen meat.

Additionally, there are several transactions in Attachment 1 (transactions 21 through 54) that do not comport with the rationale that expensive items from a storage room are rung up prior to retrieving them from said storage, 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Appellant notes that these are examples of co-shopping or multiple trips made by households without transportation or using hand carts/wagons or other conveyances. Two firms of the same store-type and carrying similar but superior inventory had multiple times fewer repetitive transactions (Attachment 1) during the same period, calling into question why only, or primarily, Appellant's customers would exhibit this unorthodox shopping behavior. Additionally, Appellant provides no itemized sales receipts/records to support its assertions that sales of specific food items bought in specific combinations explain the transactions in Attachment 1.

With regard to contention 6 above, similar to Attachment 1, the ROD Office compared Appellant's number of excessively large transactions (Attachment 2) to two nearby comparable firms (albeit both having superior inventory and also carrying nearly identical Micronesian, Samoan and other ethnic food items) and found that, again, Appellant conducted multiple times the number of such transactions as that of the other nearby firms. It is acknowledged that many SNAP customers receive large allotments and also prefer to purchase expensive imported goods; as noted, many of these same customers did in fact shop at the other comparable stores carrying similar and/or identical items and did not produce the level of highly suspicious transaction activity produced by the Appellant firm.

Appellant provided product purchase invoices/receipts in support of its contentions; the ROD Office conducted an exhaustive analysis of this information; the analysis reflects that, while the invoices/receipts supported the level of SNAP redemptions during the analysis period to a substantial extent, even allowing for a 75% mark-up, receipts were short by approximately 11%. This is viewed as a considerable shortfall; moreover, that the figures do not account for any cash or commercial credit/debit sales, of which Appellant surely had some substantial amount, the shortfall is also very likely considerably understated.

Appellant provided eight customer affidavits in support of its contentions that customers buy case quantities of food products. The ROD Office notes that the affidavits do not provide dates, amounts or descriptions of specific purchases at the store; it is also noted that there is some tension in the competing claims that customers buy case quantities of food products but also buy individual items in large amounts. As noted, the store visit reflected the presence of several single containers of canned fish (mackerel, tuna and sardines), canned/potted meat (corned beef, Spam and Vienna sausage) and canned coconut milk; there was one unopened case of ramen noodles, approximately one dozen small jars of kimchee, seven 20-pound bags of rice, and a substantial inventory of snack and convenience food items. What appeared to be six cases of canned fish were stacked near the check-out area, though no signage advertised their availability for sale or case-quantity pricing. A small cooler contained 11 cans of Assam tea, 12 cans of another brand of tea, two cans of coffee, one gallon of milk, one carton of eggs, four small packages of cheese slices, two or three small packages of margarine and one small unopened bag and one opened bag of lemons. There was no fresh or frozen meat offered in the retail area of the store. 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

The ROD Office notes that one affidavit mentioned the purchase of shrimp, though none was seen during the store visit or in Appellant's invoices or photographs. Another affidavit referenced the purchase of lamb, though none was seen during the store visit or in Appellant's invoices or photographs. Nearly all of the households signing affidavits also shopped at other nearby comparable or better-stocked firms also selling Micronesian and Samoan products. One of the households signing an affidavit was said not to have personal transportation, but the ROD Office found that it traveled up to 8.6 miles from the Appellant firm and shopped at 22 other SNAP-authorized retailer stores during the analysis period. One of the households signing an affidavit conducted no Charge Letter transactions during the analysis period of August through October 2016. In general, the affidavits tend to have been customers of the firm during the analysis period and provide some evidence of purchases of case quantities, though, as noted, no specific transactions or purchases were verified or documented by any of the affidavits.

In regard to contention 7 above, it is not uncommon for trafficking firms to also sell food – it is quite rare that a trafficking firm conducts only trafficking transactions; a firm must maintain a substantial inventory of staple food items in order to maintain its authorization to participate in the SNAP. Thus, while it may be unlikely that all households whose transactions appear in the Charge Letter attachments engaged in trafficking in every transaction, it is very improbable, given the record as a whole, that none of the transactions resulted from SNAP-benefit trafficking.

The SNAP Office notes that, at the time of the sanction decision, there were at least 14 SNAP-authorized stores within a one-mile radius of the Appellant firm, including two super stores, one supermarket, four medium grocery stores, one small grocery store and five other combination grocery/other stores (including, as noted, firms also carrying Micronesian and Samoan products). Also, as noted, the record reflects that many customers clearly had access to and routinely shopped at better-stocked super stores, supermarkets, grocery stores and combination grocery/other stores in the immediate area, calling into question what customers were able to obtain at Appellant's marginally-stocked combination grocery/other 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.

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 2, 2016, 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

May 16, 2018