

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

Kinsey Food Market 2 Inc,

Appellant,

v.

Case Number: C0211411

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 Kinsey Food Market 2 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 20, 2018, 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 February through July 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 reply to the Charge Letter. By a letter dated September 25, 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) was debited from household accounts (Attachment 2).

APPELLANT'S CONTENTIONS

In Appellant's reply to the Charge Letter, and in its written request for review dated October 2, 2018, it was argued that:

1. Regarding Attachment 1, Appellant does not itemize sales; there is no regulation limiting the amount of purchases by customers.
2. Regarding Attachment 2, Appellant does not itemize sales; the store has a large variety of food. Appellant provides product purchase invoices, a customer petition, a prepared food and deli menu/price list, photographs of store inventory and a letter from the block captain in support thereof.
3. Appellant will add point of sale equipment.
4. Other stores nearby have lost SNAP licenses so business has picked up.
5. Appellant would provide customer statements but it does not know who cards belong to.
6. The ROD Office should use a reverse investigation and question 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 11, 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 900 square feet of store space.
- No optical scanners.
- 4 shopping baskets, no shopping carts.
- No night window.
- No evidence of wholesale business.
- Prices in standard retail variations of \$.x9.
- One check-out counter, one cash register and one card reader.
- No food stored outside public view.
- Storage freezer in kitchen area.
- No food stored offsite.
- Telephone orders taken.
- No delivery offered.
- No transaction rounding at checkout.
- Four most expensive SNAP-eligible items:
 - Krasdale vegetable oil - \$8.59 - 96-ounces
 - cereal - \$10.00 - three boxes.
 - Similac - \$19.99 - 12.4-ounces.
 - buffalo chicken - \$7.99 - pound.
- All above questions completed in collaboration with store personnel.
- The firm also sold tobacco products, health and beauty products, paper goods, cleaning products, toys, pet food, housewares and other non-food items.
- Empty/sparsely-stocked shelves noted. Photos: 4, 10, 13, 24, 25, 30, 33, 34 and 35.
- Commercial kitchen/food preparation area present. Marquee and posters advertising prepared food entrees. Hot food display case. Photos: 7, 10, 15, 20, 34 and 36.
- Hot food sold; grill, stove and fryer present.
- Deli section present. Deli stock used to make prepared food. Photos: 18, 19, 21 and 34.
- No meat/seafood bundles/specials or fruit/vegetable boxes.
- Typically-stocked small grocery store in all relevant respects; the firm primarily stocked inexpensive canned and packaged goods. Photos: 3, 4, 5, 17, 22, 23, 24, 25, 26, 28, 29, 30, 31, 32, 33, 34 and 41.
- Check-out area approximately one square foot of useable space surrounded by lottery tickets, candy and non-food items. Counter was behind a glass top ice cream cooler; register was behind a Plexiglas barrier. Photos: 38 and 39.

The documentation presents no indication of advertised specials, promotions, bulk or expensive food items, other than infant formula, as noted above. 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 with approximately one square foot of useable space surrounded by lottery tickets, candy and non-food items. There were no shopping carts 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 \$8.49, reflecting that large purchases are not routinely made in such stores.

In regard to contention 1 above, while the regulations do not prohibit large and repetitive transactions, such are regarded in the present case, in the absence of a compelling rationale and documentation to the contrary, to be evidence of SNAP-benefit trafficking. The store visit documentation referenced above reflected the presence of very little expensive bulk or packaged items, the most expensive being infant formula, which SNAP customers do not routinely purchase, preferring instead to use more restrictive WIC benefits to purchase formula.

While there are legitimate reasons why a SNAP recipient or household member might return to a small grocery store during a short period of time, such purchases are more typically in small amounts and for obtaining just a few items. The examples in Attachment 1 indicate a series of repetitive purchases that total large amounts. Customers spending such substantial amounts of SNAP allotments in a typically-stocked small grocery store, when there are other larger food stores nearby which carry substantially larger varieties of food at lower costs, is implausible. Lastly, large transactions for the purchase of legitimate food items (which at this store would have been a substantial number of lower priced items), using no shopping carts 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 two nearby SNAP-authorized stores (both also small grocery stores from just under one-quarter mile to just over one-half 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.

While itemized receipts may have provided evidence that the transactions at issue were legitimate, such documentation was not presented; that the firm does not maintain the wherewithal to provide such documentation does not constitute evidence on Appellant's behalf.

Regarding contention 2 above, while the regulations do not prohibit excessively large transactions, such are regarded in the present case, in the absence of a compelling rationale and documentation to the contrary, to be evidence of SNAP-benefit trafficking. The store visit documentation referenced above reflected the presence of very little expensive, bulk or packaged items, the most expensive being infant formula, which SNAP customers do not routinely

purchase, as noted above, preferring instead to use more restrictive WIC benefits to purchase formula.

The prepared food menu/entrée list/deli price list provides little rationale to explain the transaction activity detailed in the Charge Letter; like most of Appellant's other offerings, this reflects no single item priced above \$6.99; moreover, hot food is not a SNAP-eligible item under most typical small-grocery store circumstances.

Appellant's photos reflect a similar inventory to that observed and documented during the ROD Office's contracted store visit, though the shelves and the deli case in Appellant's photos were stocked more fully, whereas in the contracted store visit several shelves were empty or sparsely-stocked, as noted above. Photos provided by Appellant were undated and cannot constitute reliable evidence of inventory levels held at an earlier time. Invoices provided by Appellant, though they reflected that the firm likely had enough stock to support redemptions, were questionable in some respects: several were outside the analysis period and thus irrelevant; eight had no date on them; many did not identify the buyer or seller; some invoices were for purchases by stores/entities other than the Appellant store (5 U.S.C. § 552 (b)(6) & (b)(7)(C)), thus were not relevant and appeared intentionally misleading. Additionally, the invoices further reflect the purchase primarily of inexpensive package/canned goods and convenience/snack items; such items do not routinely comprise large and/or repetitive transactions at a typically-stocked small grocery store.

Additionally, as the ROD Office points out, the firm was not charged based on excessive redemptions but upon implausible SNAP transaction activity. A firm may well conduct a substantial retail food business and also engage in SNAP-benefit trafficking; it is not the case that a trafficking firm must rely solely on trafficking in order to realize a profit. In fact, virtually all trafficking firms conduct some level of legitimate business in order to maintain eligibility to participate in the SNAP. Thus a case in which a firm presents insufficient invoice documentation reflects evidence of trafficking, while a case in which a firm presents sufficient invoice documentation lacks this kind of evidence of trafficking but does not necessarily lack other sufficient evidence of trafficking. Invoices can present evidence of trafficking as well as evidence of compliance, but in themselves are not sufficient proof of either. In short, invoices alone do not determine the outcome of a case. Moreover, with regard to the present case, the invoices provided, though reduced in value in demonstrating compliance due to the questionable nature of many of them, do not outweigh or rebut all other evidence of trafficking.

Moreover, as noted, the firm did not provide shopping carts to assist customers in transporting large purchases to the small check-out area. The information in the record reflecting the firm's business operations does not explain the transaction activity; information in the record regarding the firm's inventory, including the store visit referenced above, reveals no legitimate basis for SNAP customers' attraction to the firm, there being no superior selection of staple foods, no evidence of a price advantage, no compelling evidence of package, bulk or promotional items, no extensive variety of otherwise unavailable ethnic food items and no evidence of custom or special services rendered.

Similar to Attachment 1, the ROD Office noted that Appellant's number of excessively large transactions (Attachment 2) was also multiple times that of two nearby comparable firms (from under one-quarter to just over one-half mile from the Appellant firm). Moreover, Appellant's numbers of transactions in several transaction bands 5 U.S.C. § 552 (b)(6) & (b)(7)(C) were multiple times that of the store-type average in Philadelphia County during the analysis period.

The ROD Office notes that, at the time of the sanction decision, there were 39 SNAP-authorized firms within a one-mile radius of the subject store, including four super stores, two supermarkets, two medium grocery stores and 31 other small grocery stores. The ROD Office points out that customers conducting implausible transactions at the Appellant firm clearly had access to and routinely shopped at better-stocked super stores, supermarkets and medium grocery stores in the area, often on or about the same day, 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. The record indicates, as noted, 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.

The ROD Office further notes that repetitive and excessively large transactions declined precipitously following the firm's receipt of the Charge Letter late in August 2018 from monthly analysis-period averages of 5.16 and 24.5 to 0 (a 100% decline) and 1 (a 96% decline), respectively, in September 2018. Such reflects a marked compliance response to the Charge Letter and a corresponding reduction in violative activity.

With regard to contention 3 above, it is important to clarify for the record that there is no provision in the statute or regulations for waiver or reduction of an administrative penalty on the basis of corrective action implemented subsequent to findings of program violations. The purpose of this review is to determine if the earlier decision of the ROD Office was proper and in compliance with pertinent laws and regulations. Accordingly, this review is limited to considerations relevant at the time such decision was made. It is beyond the scope of this review to consider what subsequent remedial actions, such as changes in store management, procedures, internal controls, employee discipline/training or facility and/or inventory changes and improvements Appellant may propose to take or may have taken in order to comply with program requirements. Therefore, to the extent Appellant implies that it will, or has, implement(ed) corrective and/or remedial actions, though this may have been valuable in preventing program violations at an earlier time, such cannot now apply retroactively and does not provide a valid basis for dismissing the charges or for mitigating the serious impact of the violations upon which they are based. It is further added for the record that, although Appellant claims corrective action has been taken, it offers no documentary evidence of same. As such, the claim carries little weight, and as noted above, corrective action following findings of violations is not relevant in ROD Office sanction decisions.

In regard to contention 4 above, the ROD Office notes that the Appellant firm's redemptions have changed little in relation to the increase in implausible transactions, such that a correlation between the two is not strong; rather, the nature of the firm's transactions, much more than the

firm's SNAP dollar volume, is indicative of SNAP benefit trafficking.

Regarding contention 5 above, Appellant did not provide customer statements, though it provided a petition dated September 27, 2018 with 39 signatures attesting that the signers have never seen any violations of the SNAP at the store. It is noted that there are 45 households represented in Attachment 2 alone. Only one of the petition signers filled in the space allowed to provide a SNAP card number; that signer conducted none of the Charge Letter transactions. Moreover, regarding customer petitions, there are two possible customer types: those that have engaged in trafficking and those that have not. Those that have not have no reason to claim that they have committed trafficking. Those that have would not be expected to admit to SNAP-benefit trafficking against their own self-interest, potentially exposing themselves to administrative and criminal charges. On the contrary, experience has shown that SNAP customer declarations and petitions *always* attest to irregular transactions being legitimate even when there is other strong, often overwhelming, evidence of SNAP-benefit trafficking. The petition provided by Appellant is not, therefore, considered substantial evidence disproving SNAP-benefit trafficking.

With regard to contention 6, the burden of demonstrating that the transaction data contained in the Charge Letter was more likely due to legitimate SNAP purchases than due to SNAP-benefit trafficking rests upon Appellant; conversely, the ROD Office must demonstrate that SNAP-benefit trafficking is more likely the cause of said transaction activity. Accordingly, it is not incumbent upon the ROD Office to contact SNAP customers in order to obtain evidence to support Appellant's contentions. This review finds that the documentation and information in support of the trafficking charges and sanction determination presented by the ROD Office constitute a preponderance of the evidence in the present case.

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 20, 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 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 27, 2018