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

Kwik Stop,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0196085

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 Kwik Stop (hereinafter "Appellant") by the ROD (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 January 9, 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 June through November 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 March 6, 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 17, 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 452 SNAP 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) were debited from individual benefit accounts in unusually short time frames

(Attachment 2).

- A series of 1219 excessively large SNAP transactions 5 U.S.C. § 552 (b)(6) & (b)(7)(C) were debited from recipient accounts (Attachment 3).

APPELLANT'S CONTENTIONS

In Appellant's reply to the Charge Letter, in its written request for review dated March 17, 2017, and in subsequent correspondence, it was argued that:

1. The firm accepted SNAP benefits as payment on credit accounts; payments were made at one time for charges accumulated over time. Counsel instructed Appellant that this was counter to SNAP regulations. Appellant later stated that the firm extends such credit only to non-SNAP customers.
2. 10% discounts applied at the end of the transactions were for customer appreciation. Each week the firm offered a different promotion where the customer would know which items would qualify for a 10% discount. Also, the discount would be on a certain total amount and for returning customers. The 10% discount would often times round out to a 5 U.S.C. § 552 (b)(7)(E) total which was questioned by the agency.
3. Customers place special orders for a substantial amount of groceries specific to their needs and diet and make payment upon receipt of the special orders, payment of which is sometimes requested to be divided in multiple payments at or about the same time. Appellant provides a list of customers who made such orders and also made payment on same in the manner described. Back to back transactions were due to the meat invoices being separated from the other items. The bookkeeping for the meat department is separate and therefore the invoices were hand written and then rang on the cash register in one large amount as shown on some of the receipts.
4. Customers return to the store because it always has a full stock of groceries and fresh meat. Customers can shop at the store for all of their home needs. Appellant buys meat in bulk from a local butcher. Meat orders would be placed a day in advance for large quantities and upon customer requests. Meat purchases account for the bulk of the transactions appearing in the Charge Letter due to their high prices and the fact that they run them as separate transactions for internal accounting purposes. Appellant provides copies of some of the vendor purchase-orders for the meat. Appellant provides copies of photographs of the firm's inventory, showing that it is a well-stocked store that would support the volume of SNAP transactions detailed in the Charge Letter. Appellant provides register receipts in support of the above. Appellant provides a list of items offered for sale in three departments, a "frozen" department, a "dairy" department and a "meat department." Appellant was not able to upgrade its cash registers to allow scanning of all items or to provide details on receipts. Each store item was placed in a department and rung up accordingly on the register. Certain items have different sizes, so prices were set accordingly. The list is not all

inclusive but just for reference of the items available in the store. Fresh fruits and vegetables were provided upon customer request.

5. The firm was not given a warning that violations could be occurring; had the ROD Office so notified Appellant, it would have had a better opportunity to preserve records and testimony that would alleviate the ROD Office's concerns.
6. The acceptance of SNAP benefits is critical both for the business and for the customers; the Appellant firm is the only SNAP-authorized firm in the area without requiring customers cross a six-lane highway.

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 December 4, 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:

- Optical scanners used.
- No shopping carts or baskets.
- One cash register.
- One card reader.
- Hot food sold.
- No dining area.
- No deli section.
- No meat/seafood bundles/specials or fruit/vegetable boxes.
- Approximately 2200 square feet of retail space.
- Not a delivery route, farmer's market or specialty store.
- The firm sold alcohol, tobacco and tobacco-related products (including glass pipes, hookahs and other paraphernalia), automotive supplies, health and beauty supplies, clothing, over-the-counter medicines, paper goods, pet food, diapers, cleaning products, greeting cards, household items, and other non-food items.
- Empty and sparsely-stocked shelves and coolers noted. Photos: 5, 11, 13, 15, 16, 17, 18, 19, 20, 21, 22, 23, 25, 29 and 30.
- Prices in standard retail variations of $.x9. Photos: 1, 6, 8, 11, 14, 25, 26 and 30.
- The checkout counter was approximately 2 X 2 feet and surrounded/cluttered with snack food items, candy, over-the-counter medicines, tobacco products and lottery tickets. Photo: 10.
- Typical convenience store layout and inventory. Photos: 1, 11 and 24.

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 5 U.S.C. § 552 (b)(7)(E). 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 convenience store in all relevant respects, with sparsely-stocked shelves and coolers, typically an indication of low inventory turnover. It is worth noting that the average SNAP purchase in a convenience store in the state of Florida during the analysis period was $6.92, reflecting that large purchases are not routinely made in such stores.

In regard to contention 1 above, the record reflects that the ROD Office, upon receiving the response from Appellant that the firm accepted SNAP benefits as payment on credit accounts, sent a letter dated February 1, 2017 requesting documentation in support of the claim. Appellant responded that its earlier statement was incorrect and that credit accounts were extended to non- SNAP customers only. Moreover, no documentation has been provided corroborating credit accounts either for SNAP or non-SNAP customers; thus, credit activity is not a viable rationale to explain the transactions detailed in the Charge Letter. No further findings are rendered in this regard. Regarding contention 2 above, Appellant notes that applying a 10% discount explains some of the transactions in the Charge Letter; however, Attachment 1 contains 452 transactions while Appellant provided 23 receipts indicating a 10% discount which caused totals to round-off cents- values 5 U.S.C. § 552 (b)(6) & (b)(7)(C); no explanation/documentation is provided for the remaining 429 transactions.

Moreover, as noted in the foregoing, the firm was a marginally-stocked convenience store carrying typical convenience store inventory consisting primarily of single-serving soda, candy and snack items. No signage, price lists, flyers or other advertisements noted the availability of expensive and/or bulk/packaged food items. No such items were seen to be offered for sale on the day of the store visit. The firm provided no shopping carts or baskets with which customers could transport large orders to the small check-out area or to waiting transportation. Additionally, the store visit conducted at the firm on December 4, 2016 reflected the presence of numerous inexpensive items priced in standard retail variations 5 U.S.C. § 552 (b)(6) & (b)(7)(C), which, when purchased along with items priced in even-dollar amounts, rarely produce 5 U.S.C. § 552 (b)(6) & (b)(7)(C) totals. The transactions in Attachment 1 do not resemble random numbers but rather clearly appear contrived.

With regard to contention 3 above, Appellant provides no documentation to support the contention that special orders explain the transaction activity at issue; it implausible that a substantial amount of the firm’s SNAP business would not generate supporting documentation, such as copies of special orders specifying the items ordered and matching receipts as well as matching the transactions in the Charge Letter.

Appellant notes that meat orders are split out from other items; most of the receipts pertaining to Attachment 2 did indicate that meat purchases were secondary; however, several indicated that grocery purchases were secondary, following meat purchases, and a few indicated that grocery purchases followed other grocery purchases. The rationale given for separating meat purchases (that the firm used handwritten bills for meat purchases) does not apply to purchases of groceries. Moreover, the receipts clearly reflect that the firm's register system had a category for meat, so the contention that meat must be transacted separately does not comport with Appellant's own documentation. As the firm has a separate receipt category for meat items, the system would have been able to accommodate separate bookkeeping for meat items just as it would for frozen and non-tax items. Additionally, many receipts show meat purchases separated from grocery purchases 5 U.S.C. § 552 (b)(7)(E); it is unclear why customers would prefer to have one particular food item separate from other food items and, furthermore, to prefer to also make an additional trip to the store to obtain these items. It is further noted that Appellant receipts are undated. No compelling rational or documentation is provided that would explain the split orders.

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.

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. 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 only 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 small grocery store in all relevant respects and provides no plausible bases for customers' unusual attraction to the firm and unorthodox transaction patterns.

In regard to contention 4 above, as noted, the firm was found on the day of the store visit to be a marginally-stocked convenience store, with typical convenience store items comprising the majority of the firm's inventory. There is no basis for customers attraction to the firm, there being no evidence of bulk/package or otherwise expensive items, ethnic food products unavailable elsewhere in the area, evidence of special pricing or any advertisements noting items on sale.

Appellant provided product purchase invoices in reply to the ROD Office's Charge Letter; the ROD Office duly evaluated this information and concluded the following, which is likewise herein affirmed as correct and accurate:
5 U.S.C. § 552 (b)(7)(E)

5 U.S.C. § 552 (b)(7)(E).

Appellant provided customers statements in reply to the Charge Letter; these were duly analyzed by the ROD Office, which found that these households generally had ample access to transportation and commuted from approximately 10 to 90 miles to shop at dozens of other SNAP-authorized firms; most spent a large majority of their SNAP benefits at other stores, including super stores and supermarkets, many on or about the same day as conducting implausible transactions at the Appellant firm, calling into question what these households were able to obtain at the Appellant firm that they could not obtain at the better-stocked and very likely more competitively-priced stores. Most of the households conducted same-cents, repetitive and/or large transactions primarily or only at the Appellant firm. The ROD Office supplemented the record with the analysis of an additional four households, which essentially reflected the same shopping habits as noted above: traveling from three to 56 miles to shop at from three to 55 other stores; households shopped at much better-stocked and very likely more competitively-priced stores on or about the same day as conducting implausible transactions at the Appellant store. The households also conducted all or most same-cents, repetitive and excessively large transactions at the Appellant store.

Appellant also provided copies of photographs of the firm's inventory; however, these photographs are undated and appear to have been taken after the firm's receipt of the Charge Letter; as such the photographs cannot constitute reliable evidence of inventory held at an earlier time. The store visit conducted on December 4, 2016 reflected the presence of canned/potted meat, eggs and meat jerky only in the meat/poultry/fish category. The meat packages shown in Appellant's photographs were not present during the store visit. Appellant also provided a partial listing of products it says it regularly sold; this list included several meat items, including beef, whole chicken, chicken cut (8 pieces), chicken leg quarters, chicken wings, ground beef, whole turkey, shrimp, whole fish, cleaned and cut fish, steak, ribeye and lamb. None of these products were present at the time of the store visit. Appellant's product list moreover does not provide any pricing information.

The ROD Office notes that, at the time of the sanction decision, there were 11 SNAP-authorized firms within a one-mile radius of the Appellant firm, including one super store (at just under one mile from the Appellant firm), one supermarket (at just over one-tenth of a mile), one small grocery store (at just over one-half mile) four combination grocery/other stores and four other convenience stores (from just over 250 feet to just over one-third of a mile). As noted, the household analysis referenced above indicates 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 typically-stocked convenience store that they were not able to obtain at much better-stocked and more competitively-priced stores. As noted, 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.

5 U.S.C. § 552 (b)(7)(E).

5 U.S.C. § 552 (b)(7)(E).

Regarding contention 5 above, it should be noted that a warning letter is not prerequisite to a disqualification: the presence of a prior warning may in some cases increase the sanction imposed on a firm (see §278.6(e)(2), (3)(i) & (ii), (4) and (6)); however, the lack of a warning does not decrease a sanction properly imposed or prevent the imposition of such a sanction.

The statute and regulations allow for no sanctioning discretion in trafficking cases, other than a civil money penalty, as noted below; such provisions are prescriptive in that sufficient evidence of trafficking always warrants permanent disqualification unless a firm qualifies for a civil money penalty. No minimum amount of benefits trafficked or a minimum proportion of cash to SNAP benefits exchanged is required; any amount of cash exchanged for any amount of SNAP benefits is considered SNAP benefit trafficking.

Nonetheless, the record reflects that the firm did in fact receive a warning letter in June 2012 due to findings of violations during an investigation.

With regard to contention 6 above, the issue of hardship worked upon retailers or SNAP clients is not a consideration under the statute or regulations in decisions to disqualify firms due to SNAP-benefit trafficking. As noted, the only alternative to permanent disqualification, once trafficking is established, is to impose a trafficking civil money penalty in lieu of permanent disqualification, as discussed in detail below.

Nonetheless, the ROD Office points out that there are 11 SNAP-authorized firms within a one- mile radius of the Appellant firm, seven of which are located north of the highway referenced by Appellant and include a super store and a supermarket, firms with a much greater inventory of food items and which are quite likely more competitively-priced (such stores are typically the most competitively priced in a given area). The Appellant firm is also located north of the highway. The highway would thus affect customers living south of the highway, and there are two better-stocked firms south of the highway. Additionally, customers traveling north across the highway would have to travel past the better-stocked supermarket to shop at the

Appellant firm. 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, 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 1, 2017