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

Kwik Stop Drive Thru,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0194491

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 Drive Thru (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 November 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 April through

September 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 April 27, 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 May 1, 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, *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 244 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 464 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 April 28, 2017, and in subsequent correspondence, it was argued that:

1. Appellant includes by reference its reply to the ROD Office's Charge Letter. Appellant provided affidavits from two employees and documents supplementing a request for a trafficking civil money penalty, including a store credits policy, florida lottery policy, store beer and cigarette policy, blank employee training acceptance document and the store Owner's 2015 W-2.
2. Appellant cites a 2016 study conducted by Convenience Store News which states small grocery and convenience store customers are among some of the most loyal. Appellant notes its customers make most visits to the store while on the way to work or school or while running errands at night. SNAP customers are more likely to shop regularly at small grocery stores or convenience stores. Appellant cites a study showing that there has been an increase in the number of consumers using a convenience store as a primary grocer.
3. The administrative review branch is permitted to consider new evidence and subsequently render a new decision on whether the additional evidence changes the balance of evidence in the matter. Thus the evidence is limited to the ROD Office's Case Analysis and Appellant's response Brief.
4. Appellant provides arguments regarding the limited applicability of the ALERT system to retailer sanctions.
5. Appellant asserts that the ROD Office did not have appropriate comparison stores upon which to base its analysis.
6. Regarding Attachment 1 transactions (same-cents transactions): the firm sells a variety of food items 5 U.S.C. § 552 (b)(6) & (b)(7)(C); also, pricing is also discounted to prices 5 U.S.C. § 552 (b)(6) & (b)(7)(C) for multiple items, such as two boxes of noodles for $3.50 and sodas which are given a variety of discounts depending on purchase size. The store sells cases of soda and energy drinks and will occasionally sell groups of items to households using the store for convenience purposes rather than shopping at their primary grocer.
7. Regarding Attachment 2 to the Charge Letter (repetitive transactions in short timeframes): it is not uncommon for Appellant's customers to make multiple purchases in a short period of time due to forgetting items or due to deciding to make an additional purchase. In other instances multiple members of a household shop together but make purchases separately using the same benefit card. Customers will also go on a spending spree, making purchase after purchase without leaving the store or after only a brief absence. Appellant cites a 2016 survey regarding the prevalence of co-shopping, in which household members shop at different times. Co-shopping occurs more at the Appellant firm than most given the higher rate of children and elderly living in their households.

   Attachment 2 transactions occurred predominantly between the first and the 23rd days of the month, which correlate with the dates on which participants received SNAP benefits. Many purchases occur 5 U.S.C. § 552 (b)(6) & (b)(7)(C) of benefit issuance, which is supported by a USDA study (Benefit Redemption Patterns in the SNAP, 2009). 5 U.S.C. § 552 (b)(6) & (b)(7)(C). There are only 26 sets of transactions, meaning these

occurred an average of four per month and thus are not common; Appellant believes these are examples of co- shopping.

8. Regarding Attachment 3 to the Charge Letter (excessively large transactions): the firm has a considerable inventory, sufficient to satisfy a 5 U.S.C. § 552 (b)(6) & (b)(7)(C) purchase several times over. In many cases, 5 U.S.C. § 552 (b)(6) & (b)(7)(C) transactions involve a purchase of a case of energy drinks or several packages of soda. The store does not retain detailed receipts, but the transactions can be accounted for in both pricing and inventory. If the firm were trafficking, the firm's sales and inventory data would be inconsistent. In this case, the sales data is less than the average markup, showing a consistent error in over ordering but not detailing anything even close to trafficking. It is more likely that the ROD Office misidentified legitimate transactions because of an errant assumption about the store's inventory and clientele.

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 22, 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:

- Small amount of dairy inventory: eight cartons of eggs, five individual-serving sized bottles of milk, six gallons of milk and four half-gallons. Approximately two dozen small containers of ice cream.
- No optical scanners.
- No shopping carts or baskets.
- One cash register.
- One card reader.
- Hot food sold.
- Hot food case held only a few prepared food items. Photo: 10.
- No dining area.
- No fresh meat.
- No deli section.
- No meat/seafood bundles/specials or fruit/vegetable boxes.
- Approximately 1500 square feet of store space.
- Food inventory consisted primarily of snacks, beverages and packaged/canned items.
- The firm sold tobacco and tobacco-related products (including hookahs, glass pipes, etc.), alcohol, clothing, cleaning supplies, laundry detergent, lottery tickets, paper products, pet supplies, automotive supplies and other non-food items.
- Typical convenience store layout and inventory; snack foods, candy, beverages. Photos: 6, 11, 17, 18, 20 and 27.
- Prices in standard retail variations 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Photos: 13, 16, 19, 25, 27 and 28.
- Check-out counter approximately 1.5 X 2 feet, surrounded by candy, cigarette

lighters, snack foods and lottery tickets. Photos: 3 and 23.

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 1.5 by 2 feet of useable space) but was otherwise cluttered/surrounded by candy, lighters, snack foods and lottery tickets 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 typically-stocked convenience store in all relevant respects. It is worth noting that the average SNAP purchase in a convenience store in the state of Florida during the analysis period was $6.90, reflecting that large purchases are not routinely made in such stores.

In regard to contention 1 above, 7 CFR §278.6(i) provides for the imposition of a civil money penalty in lieu of permanent disqualification for trafficking; Appellant was advised of the requirement regarding civil money penalties in lieu of permanent disqualification in the SNAP Office's November 16, 2016 Charge Letter, which further advised that documentation of eligibility for this sanction was to be provided within a given time limit. The SNAP regulations are specific at 7 CFR §278.6(b)(2)(iii) 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, the firm shall not be eligible for such a penalty." The regulations provide no discretion to extend the time within which documentation and evidence in support of a civil money penalty may be submitted. In its reply to the Charge Letter sent to the ROD Office via email on December 12, 2016, Appellant requested consideration of said sanction but did so 15 days beyond the 10-day timeframe (thus 25 days following receipt of the Charge Letter) noted above. Thus the SNAP Office decision not to impose a civil money penalty is found to have been in accordance with 7 CFR §278.6(b)(1), §278.6(b)(2)(ii), §278.6(b)(2)(iii) and §278.6(i). Though the request was untimely and could not be considered, the ROD Office notes that the documentation and evidence provided by Appellant clearly fell short of the standard detailed at § 278.6(i), as noted in the following:

<u>Criterion 1:</u>

- Appellant provided insufficient written and dated documentation to reflect a commitment to ensure that the firm was operated in a manner consistent with SNAP regulations:
    - Documentation of the development and/or operation of procedures/policy to implement corrective action in response to complaints of violations (not provided).
    - Documentation of the development and/or operation of procedures providing for internal review of employees' compliance (not provided).
    - Documentation must establish that the policy statements were provided to violating employees prior to the commission of the violation(s). One employee affidavit was signed prior to the analysis period and one signed during the analysis period. Moreover, the firm's compliance program and

policy consisted only of a reference to "Food Stamp policy" and to a USDA cashiers' "Do's and Dont's" poster.

Criterion 2:

- Appellant did not provide documentary evidence which establishes that the firm's compliance policy and program were in operation prior to the occurrence of the violations at issue (see above).

Criterion 3:

- Appellant did not provide the following:
  - Records of dates of employment of all firm personnel.
  - Contemporaneous documentation of participation of violating personnel in initial *and* follow-up training prior to violations.
- Appellant provided insufficient documentation to demonstrate that its training program meets or is otherwise equivalent to the following standards:
  - Training shall be designed to establish a level of competence that assures compliance with program requirements as included in part 278.
  - Training materials shall clearly state that that the following acts are prohibited and are in violation of the statute and regulations:
    - The exchange of SNAP benefits for firearms, ammunition, explosives or controlled substances.
  - Training for all who work in the store within one month of implementing the compliance policy documented in Criterion 1.
  - Any subsequently hired employees are trained within one month of hiring and trained periodically thereafter.

Criterion 4:

- Appellant provided insufficient evidence in support of the following:
  - Ownership/Management was not aware of, did not approve, did not benefit from or was not involved in trafficking. Appellant has provided no records or documentation demonstrating that SNAP benefits used in the transactions noted in the Charge Letter were in fact not deposited into its bank account. Conversely, as noted above, transaction data and other evidence confirms that the violative transactions did in fact result in monetary deposits into the firm's bank account in the exact amounts noted in the Charge Letter. It is noted for the record that the regulations allow an exception to the Criterion 4 language if it is ownership/management's first involvement in SNAP-benefit trafficking.

The statute, regulations and agency policy do not limit the scope of the required compliance policy and program to the prevention of violations other than those caused by error, inadvertence, oversight or lack of management supervision, but rather direct that the policy and program are structured to prevent all violations, regardless of cause. The standard of substantial evidence employed above is difficult to meet, indeed impossible if such policy and program are not implemented and documented prior to the violations, but such is the standard required by the regulations, as noted above, and to which Appellant is held during the course of this review.

Additionally, neither the size of an organization nor the number of its personnel is a

consideration in determining the eligibility of a firm for a civil money penalty in lieu of permanent disqualification for trafficking. Moreover, while significant effort may be required to develop and maintain a compliance policy and program, if such fails to meet the requirements, that level of effort, even if substantial, does not mitigate the insufficiency. Lastly, the criteria for eligibility for a civil money penalty in lieu of permanent disqualification are clearly stated as *minimum* standards below which eligibility is precluded. The regulations at 7 C.F.R § 278.6(i) are purposely prescriptive and require an unequivocal and well-documented commitment to compliance and training. Accordingly, the SNAP Office correctly determined that Appellant did not qualify for a civil money penalty in lieu of a permanent disqualification.

Regarding contention 2 above, ROD does not dispute most of the statistical information provided by Appellant, including the information provided on convenience store customer loyalty or the information provided in the "2016 Know Your Core" article. ROD points out, however, that no evidence has been submitted to show that SNAP customers are more likely to shop at convenience stores than non-SNAP customers, as the study appears to refer to all types of customers; the data did not address SNAP redemptions or customers directly. The article also closely links customer loyalty to firms offering loyalty programs, which there is no indication in the record that the Appellant firm offered. ROD points out that the article notes the most common reason for a convenience store's customer base is the sale of gasoline, immediately consumable snack foods and fountain drinks. Also it states that core shoppers are more likely to purchase lottery tickets, tobacco products and newspapers/magazines, which are not SNAP- eligible items. Additionally, ROD states, despite the article's assertions about customer loyalty, government data indicates that SNAP customers spend the majority of their benefits at super stores and/or supermarkets – 80% of benefits are redeemed at such stores.

With regard to contention 3 above, the ROD Office is provided an opportunity to respond to new information of a substantive nature received in support of a review request that was not provided in reply to the Charge Letter. ROD notes that, in addition to its Charge Letter Reply, Appellant provided in support of its review request a 13-page brief with attached studies; no photos, statements, invoices or receipts were submitted as additional evidence.

In regard to contention 4 above, regarding Appellant's arguments regarding the limited applicability of the ALERT system to retailer sanctions, the ROD Office notes that ALERT does not conclude that trafficking occurred and that the ROD Office must analyze transaction data and patterns with other factors such as observations from store visits, analyses of customer shopping habits and a comparison of other stores in the area. ROD notes that this approach, moreover, is supported by the regulations at 278.6(a).

With regard to the case law cited by Appellant, it is beyond the scope and authority of this review to determine the applicability of same. 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. Therefore, the application of any judicial precedent is better addressed via judicial review. Accordingly, no further findings or conclusions are rendered in this regard.

Regarding contention 5 above, the record reflects that the ROD Office used the four nearest SNAP-authorized convenience stores as comparison stores. The Appellant store had one and one-half times the number of Attachment 1 transactions as one of the nearby stores, while the other three had no such transactions. The Appellant firm had 26 sets of Attachment 2 transactions while none of the comparison stores had any during the same period. Appellant had 464 Attachment 3 transactions; only one of the other stores had any such transactions and this store had only two during the same six-month analysis period. The ROD Office highlights graphical comparisons, such as Appellant's numbers of transactions at specific dollar ranges compared to the four nearby stores, as well as to all convenience stores in the state of Florida, and found Appellant's number of such transactions to be multiple times that of both the nearby stores and the state store-type average. Thus the graphical data reflects very abnormal activity at the store compared to others of the same store type both in the local area and statewide.

With regard to contention 6 above, the record reflects very few store prices 5 U.S.C. § 552 (b)(6) & (b)(7)(C) and that the store visit did not reflect any evidence of discounted pricing or sales of bulk items or cases. No further evidence of same is provided by Appellant. Thus it is not plausible that many of these items purchased together would arrive at totals with cents-values 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Appellant provides no photos, invoices, receipts or any other documentation other than its Brief in support of these contentions.

In regard to contention 7 above, incidental and forgotten items are unlikely explanations as Attachment 2 transactions are large 5 U.S.C. § 552 (b)(6) & (b)(7)(C)). While there are legitimate reasons why a SNAP recipient or household member might return to a convenience store during a short period of time, such purchases are more typically in small amounts and for obtaining just a few convenience 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 typically-stocked convenience store, when there are 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. 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 typically-stocked convenience store in all relevant respects and provides no plausible bases for customers' unusual attraction to the firm and unorthodox transaction patterns.

Appellant mentions a Hartman Group's U.S. Grocery Shopping Trends, 2016, survey report about co-shopping. However, the ROD Office notes that the report doesn't mention the

number of SNAP recipients interviewed, if any, and that the interviewed customers were located in Seattle, Washington; there is no indication of where in the U.S. the 2061 surveyed individuals were located. Appellant states that most of the households with transactions in the Charge Letter are multi-generational, which have different shopping priorities and portion benefits out among members. The ROD Office points out that households with multiple persons who purchase and prepare food separately each receive their own cards and corresponding SNAP-benefits accounts. Thus, multi-generational households would not necessarily portion out benefits among its members.

Moreover, ROD notes that none of the other nearby comparable stores conducted these repetitive transactions, despite that these firms should have a similar level of co-shopping. It does not appear co-shopping occurs at other firms, or the activity at the Appellant firm is not reflective of co-shopping. Appellant provided no register receipts or other documentation to support its claims regarding co-shopping accounting for Attachment 2. This same issue exists with regard to Appellant's other rationales for repetitive transactions, in that they do not occur at nearby SNAP-authorized convenience stores.

Regarding contention 8 above, as has been noted, Appellant provided no sales or inventory data or documentation in the form of invoices/receipts, inventory records or register receipts or other reports. ROD points out that Appellant's inventory consisted mostly of snack foods, beverages and canned/packaged items and the firm had no shopping carts or baskets; the store was not oriented toward grocery shoppers but was in fact a convenience store in all relevant respects. Convenience stores in the state of Florida had an average SNAP transaction of $6.90 during the analysis period, 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

The ROD Office notes that there was both a super store and a supermarket within approximately one-half mile of the Appellant firm and further provided examples of households conducting implausible transactions at the Appellant firm on or about the same day as shopping at super stores and/or supermarkets, calling into question what these customers were able to obtain at Appellant's typically-stocked convenience store that they could not obtain at the much-better stocked and quite likely more competitively-priced stores.

Additionally, the ROD Office points out that Appellant's numbers of repetitive and excessively large transactions declined precipitously following the firm's receipt of the Charge Letter in November 2016 from monthly analysis-period averages 5 U.S.C. § 552 (b)(6) & (b)(7)(C), respectively, in December 2016 through April 2017; in the absence of compelling evidence/information to the contrary, the precipitous decline reflects a compliance response to the Charge Letter and a corresponding cessation of violative activity.

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

January 4, 2018