

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

Lions Pizza and Mini Mart,

Appellant,

v.

Case Number: C0200369

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 Lions Pizza and Mini Mart (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 September 27, 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 November 2016 through April 2017. 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 November 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 December 11, 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 855 SNAP transactions **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** ended in a same-cents value (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 written request for review dated December 11, 2017 it was argued that:

1. The Owner of the Appellant firm was not available to provide a reply to the Charge Letter, so an Attorney was hired. The Attorney has now been dismissed and the Owner wishes to present its case for administrative review. The evidence provided by the Attorney was limited due to lack of information provided to him by the Owner's family. Upon returning to the country on November 24, 2017, Appellant was able to access the locked file cabinet containing all documentation and files pertaining to SNAP training and procedures in the store. Appellant provides copies of documentation in support of its request for consideration of a civil money penalty in lieu of a permanent disqualification.
2. The firm caters to a lower income population with large families that eat only Halal/Kosher foods purchased at places that they trust. The firm has been in business 25 years and has established a trusted name for supplying food products that meet the religious needs of the community.
3. The firm provides customers the option of having food cooked in the store that can then be taken home.
4. Appellant provides a financial statement indicating that approximately 85% of the firm's business is done through the sales of groceries.

5. With regard to Attachment 1 to the Charge Letter, these transactions result from the firm's pricing of most items ending in \$.99 or \$.00. Many items ending in \$.99 or purchased along with one of the approximately 120 items priced ending in \$.00. The firm offers specials which many customers purchase, resulting in duplicate transactions ending in \$.99. These transactions account for about 15% of the firm's grocery sales, or 11% of the SNAP transactions for the six-month period at issue.
6. Regarding Attachment 2 to the Charge Letter, these transactions can be explained by the multiple packages the firm offers throughout the year and around holidays. The firm sells groceries and special Middle Eastern groceries, frozen pizzas, frozen chicken, frozen fries and many other items that customers can have baked/fried for a cash fee. Most large sales are generated around holidays. The firm offers chicken or other fresh meats in large quantities. Appellant provides examples of these specials in Attachment 4 to its review request. Appellant also provides photos of some of the authentic Middle Eastern items for sale as well as the bulk chicken offered.
7. Since returning to the store in November Appellant began finalizing the transition to a point-of-sale register that will track sales data and print itemized receipts; the implementation of such a system was delayed due to extenuating circumstances. Currently all of the receipts the firm has on file are handwritten receipts attached to EBT transaction receipts.

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 January 18, 2017, 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.
- No evidence of wholesale business.
- No dining area.
- No meat/seafood bundles/specials or fruit/vegetable boxes.
- Estimated 4600 square feet of store space.
- Storage area contained primarily non-foods. Photo: 4.
- Sparsely-stocked shelves and coolers. Photos: 2, 3, 5, 6, 8, 9, 10, 12, 17, 18, 20, 23, 24, 28, 31 and 32.
- The firm was a marginally-stocked convenience store with a small depth of inventory and small variety of food items. Photos: 7, 22 and 32.
- The firm appeared to operate substantially, perhaps primarily, as a prepared food restaurant/carryout. Outdoor signage advertised chicken, seafood, subs, salads, 100% Halal. Full commercial kitchen/food preparation area. Walk-in freezer with small quantity of commercial-sized food items apparently for use in food preparation. Commercial pizza oven. Photos: 1, 11, 14, 17 and 29.
- Many prices were in standard retail variations of \$.x9. Prepared food entrees advertised on poster/marquee board. Photos: 10, 11, 15 and 16.

- Dust-covered canned goods. Photo: 15.
- The check-out counter was approximately 2 X 3 feet. There were stacks of carryout pizza boxes in the checkout area. On the counter was signage indicating minimum purchase amount of \$5.00 using credit or debit cards and noting that cooked food could be purchased using SNAP benefits. Photo: 30.

Photographs indicate the presence of one 15-pound bag of rice, three 40-pound bags of rice, and five 25-pound bags of rice. Photographs reflect that many visible prices of food and other items were in standard retail variations of \$.x9. 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. It is worth noting that the average SNAP purchase in a convenience store in the state of Michigan during the analysis period was \$6.27, reflecting that large purchases are not routinely made in such stores.

In regard to contention 1 above, with the exception of the contentions that were repeated from Appellant's reply to the Charge Letter, Appellant's review request is considered to constitute the information/documentation in support of Appellant's appeal.

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 September 27, 2017 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, Appellant requested consideration of said sanction. The documentation submitted in support thereof was substantially insufficient to demonstrate that the firm qualified for a civil money penalty in lieu of a disqualification. 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). Appellant presented a request for consideration of a trafficking civil money penalty (TCMP) in its December 9, 2017 request for review, which was postmarked December 11, 2017, 70 days following the firm's receipt of the Charge Letter and far beyond the 10-day timeframe. Though the request cannot therefore be considered, the documentation and evidence provided by Appellant clearly fall short of the standard detailed at § 278.6(i), as noted in the following:

Criterion 1:

- 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).

Criterion 3:

- Appellant did not provide the following:
 - Records of dates of employment of all firm personnel.
- Appellant provided insufficient documentation to demonstrate that its training program meets or is otherwise equivalent to the following standards:
 - 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.

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 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 and regulations 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; the documentation provided by Appellant in support of its review request was not timely and, moreover, also failed to meet the requirements.

Regarding contention 2 above, the firm's inventory of Halal/Kosher food products was quite small on the day of the store visit and insufficient to justify the transaction activity detailed in the Charge Letter. Appellant provides no product purchase/invoices or detailed sales information covering the analysis period (November 2016 through April 2017) to support the contention that the sale of such products substantially explains the transaction activity at issue.

With regard to contention 3 above, the store visit photos reflected a poster/marquee advertising prepared food items. Menu items corresponding to Charge Letter transactions account for approximately 55% of Attachment 1 transactions and 42.5% of the dollar value of Attachment 1, assuming that all such transactions were due to the sale of such items. Appellant's grocery inventory was so sparse that it is very unlikely that it could have accounted for many of the transactions in the Charge Letter. Appellant provides a document showing food packages purportedly offered during the analysis period, though there were no signage/flyers or other information visible during the store visit advertising the packages. Likewise, there was very little frozen food available on the day of the store visit; the walk-in freezer also held very small amounts of food. The result is that a substantial amount of the transactions in the Charge Letter are unexplained.

5 U.S.C. § 552 (b)(6) & (b)(7)(C). As noted, Appellant provides no product purchase receipts/invoices or inventory records to support this level of sales activity and the store stock seen on the day of the store visit likewise does not support the activity. The ROD Office points out that there are several other stores in the area providing groceries, including Halal/Kosher products, most of which are much better-stocked and several of which are very likely more competitively-priced (super stores, supermarkets and large grocery stores are typically the most competitively-priced firms in a given area). Moreover, an analysis of household data conducted by the ROD Office reflects that Appellant's customers in fact shopped at such better-stocked stores on or about the same day as conducting implausible transactions at the Appellant firm, calling into question what these customers could obtain at Appellant's marginally-stocked convenience store that they could not obtain at the better-stocked grocery stores, supermarkets and super stores.

Regarding contention 5 above, the firm's inventory on the day of the store visit did not appear to contain 120 separate food types priced ending in \$.00; moreover, a combination of two or more items ending in \$.99 and additional items priced ending in \$.00 will rarely produce totals ending in \$.99. The firm's sale of hot prepared food may well have produced some of the Charge Letter transactions, though as noted, the majority of the dollar value of the Charge Letter transactions are largely unexplained by the firm's pricing. Very little compelling evidence that the transactions in the Charge Letter resulted from the sale of specials exists in the record. Photos provided by Appellant do not generally comport with the inventory seen in the store on the day of the visit; several of the products photographed by Appellant were not seen in the store or were in very few numbers (seven of the products were not seen in the store, three were seen in quantities of only two to four).

With regard to contention 6 above, as noted, no evidence of packages of goods offered was found during the store visit, other than what appeared on Appellant's hot /prepared food menu. Appellant provides no documentation of cooking fees received. Appellant notes that it sold chicken and other fresh meat in large quantities around holidays, though none was in inventory on the day of the store visit. Also as noted, Appellant provides no invoices/product purchase receipts to support that such items were purchased and offered for sale in quantities that would support the transaction activity detailed in the Charge Letter.

As noted above, store visit documentation reflected that the firm was a marginally-stocked convenience store in all relevant respects, carrying very little ethnic or Halal/Kosher foods. The firm appeared to operate primarily as a pizza restaurant/carryout. The ROD Office compared the firm's SNAP redemption volume and number of SNAP transactions to two nearby similarly-stocked convenience stores (both located at less than one-half mile from the Appellant firm) and found Appellant have to have multiple times the redemption volume and number of transactions as that of the other nearby firms, both of which had a larger selection of staple food items.

The SNAP Office notes that, at the time of the sanction decision, there were 92 SNAP-authorized stores within a two-mile radius of the Appellant firm, including 73 other convenience stores, three large grocery stores (one of which was located at just over 50 feet from the Appellant firm and another of which was just over one-tenth of a mile away), six supermarkets and 10 super stores (one of which was located at under one-quarter mile from the Appellant firm). As noted, Appellant's customers clearly had access to and routinely shopped at better-stocked super stores, supermarkets and grocery stores in the area, calling into question what customers were able to obtain at Appellant's marginally-stocked convenience store that they were not able to obtain at much better-stocked and more competitively-priced stores. The Appellant store was clearly not the only store in the immediate area offering food items (including ethnic and Halal/Kosher foods) 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.

In regard to contention 7 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 would likely 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.

Additionally, it is added for the record that Appellant provided no handwritten or EBT receipts in support of its review request.

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

July 18, 2018