

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

Lopez Lucky7 Food Market,

Appellant,

v.

Case Number: C0207328

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 Lopez Lucky7 Food Market (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 March 28, 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 September 2017 through February 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). Appellant did not reply to the Charge Letter. By a letter dated April 12, 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 April 20, 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 totaling 5 U.S.C. § 552 (b)(6) & (b)(7)(C) were debited from the accounts of individual SNAP households within a set time period (Attachment 1).
- A series of excessively large SNAP transactions totaling 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 April 20, 2018, and in subsequent correspondence, it was argued that:

Appellant provided product purchase receipts/invoices and photographs of store inventory in support of its review request. Some of the store's most expensive items are baby formulas that are located at the back of the store to reduce the risk of theft. Four cans of formula at \$17.39 add up to \$69.56. Appellant sells meat packages from \$5.99 to \$21.99 and cold cuts by the pound from \$3.49 to \$7.99 per pound. Cereal is sold at three for \$10 and gallons of milk are sold at \$5.19.

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 17, 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 700 square feet of store space.

- No optical scanners.
- No shopping baskets or carts.
- No night window.
- No evidence of wholesale business.
- One check-out area/counter, one cash register for groceries, one card reader.
- 150 square foot storage area holding soda/soft drinks. Photo: 15.
- No food stored offsite.
- The store takes telephone orders.
- No delivery offered.
- No transaction total rounding.
- Four most expensive SNAP-eligible items:
 - Deli bundle 1 & 2 - \$20.99
 - Deli bundle 5 - \$21.99
 - Deli bundle 3 & 7 - \$19.99
 - Deli bundle 6 - \$18.99
- All above questions answered in collaboration with store personnel.
- Some snacks and cakes had pricing that ended in \$.05 or \$.00. Most prices in standard retail variations of \$.x9.
- The firm also sold tobacco products, lottery tickets, health and beauty products, pet food/supplies, paper goods, cleaning supplies, housewares and other non-food items.
- Empty/broken/unused or sparsely stocked coolers noted. Photos: 6, 18, 19, 21, 38 and 43.
- Kitchen/food preparation area present.
- No hot food sold.
- Deli section present
 - Prices posted for meat/cheese.
 - Prepared salads.
 - Prepared/made-to-order sandwiches.
 - Store stock (meat/cheese and vegetables) used in deli section.
- 14 12.4-ounce cans of formula kept under counter near checkout area. Seven cans of formula on counter near deli area. Photos: 2 and 23.
- The firm also operated as a prepared food restaurant/deli. Photographs: 3, 11, 25, 28 and 35.
- Typical small grocery store in all relevant respects. Photos: 12, 24, 25, 26, 27, 29, 30, 34, 35 and 36.
- Small check-out counter behind ice cream freezer with approximately 1 X 1 foot of useable space, utilizing a Plexiglas barrier and surrounded by tobacco products, candy, snack items, lottery tickets and other non-food items. Photos: 7, 31, 33 and 37.
- Meat/cheese deli specials posted. Photos: 10 and 32.

As noted above, photographs reflect that several visible prices of food and other items were in standard retail variations of \$.x9. The checkout area was set up in convenience store fashion, utilizing a small check-out area (approximately 1 by 1 foot of useable space) but was otherwise surrounded by tobacco products, candy, snack items, 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 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 \$9.61, reflecting that large purchases are not routinely made in such stores.

With regard to Appellant's photographs, there was considerably more infant formula than seen on the day of the store visit; nor was the signage for the formula noted during the store visit. Otherwise the photographs were very similar to those taken on the day of the store visit. Appellant's photographs, while indicating that the firm offered formula and deli packages, provides little insight into the nature and extent of the sale of such items

Regarding the receipts and invoices provided by Appellant, one of the sets of receipts, reflecting a specific vendor, did not identify the buyer and, moreover, was not legibly itemized; thus the receipts were not added to the totals for the store (there were four such receipts totaling 5 U.S.C. § 552 (b)(6) & (b)(7)(C), thus the overall total was not substantially affected). It is also noted that there were no receipts provided for three months (September, October and February) of the analysis period noted in the Charge Letter. Two vendors listed an incorrect address for the Appellant firm; nonetheless, these were counted in the total.

Three receipts reflected the purchase of deli meat and cheese; these were dated November 9, 2017, December 8, 2017 and January 18, 2018. No receipts were provided for September, October or February. Similarly, only three receipts reflected the purchase of infant formula; also in November 2017, December 2017 and January 2018. Moreover, since most SNAP households are likewise eligible for WIC, households typically utilize WIC benefits to purchase infant formula, reserving SNAP benefits for items that cannot be purchased with WIC vouchers. Agency records indicate that the Appellant firm redeemed WIC benefits on a monthly basis that was multiple times Appellant's number of monthly purchases of cans of formula (based on invoices submitted) multiplied by Appellant's stated formula price.

The firm also operated as a prepared food carry-out, selling made-to-order sandwiches. Sales of such items would not routinely produce the transaction activity detailed in the Charge Letter. Appellant provides no sales documentation to distinguish sales of deli packages from sandwich sales; additionally, none of the deli package prices equate to Charge Letter transaction amounts, which were substantially higher (in fact multiple times higher in many cases). It is worth noting as well that the price savings in buying deli packages, compared to Appellants' deli meat and cheese sold by the pound, was minimal, usually only \$1 to \$2 dollars per package. It is not reasonable to accept, without corroborating documentation, that SNAP customers were buying multiple numbers of deli packages.

The total approximate number of pounds of deli products reflected in the invoices was multiplied by the firm's average price per pound of deli products; likewise the number of cans of formula purchased was multiplied by the price at which Appellant stated it sold said products. If all the above-referenced deli products, deli packages and formula were sold to SNAP customers only, such would produce SNAP sales of approximately 5 U.S.C. § 552 (b)(6) & (b)(7)(C) per month; however, Attachment 2 transactions averaged 5 U.S.C. § 552 (b)(6) & (b)(7)(C) per month during the analysis period. Clearly the firm's sales of formula and deli products were not sold

only to SNAP customers; accordingly, the receipts provided by Appellant fall drastically short of demonstrating that the sale of such products could account for the transaction activity detailed in the Charge Letter,

Moreover, as noted by the ROD Office, full-line super stores and supermarkets were located less than one-third of a mile from the Appellant firm. There was virtually nothing offered by the Appellant firm that customers could not also obtain from the better-stocked and typically more competitively-priced stores. The ROD Office further points out that customers conducting implausible transactions at the Appellant firm were in fact shopping at much better-stocked super stores and supermarkets on or about the same day, indicating that these customers clearly had access to other stores and were not limited to shopping only at Appellant's firm.

The ROD Office compared Appellant's numbers of transactions in various 5 U.S.C. § 552 (b)(6) & (b)(7)(C) bands from 5 U.S.C. § 552 (b)(6) & (b)(7)(C) both to the state store-type average and to two nearby comparable stores (both small grocery stores within one-quarter mile of the Appellant firm) and found that Appellant had conducted multiple times more transactions in these bands than the nearby stores and the state store-type average. The ROD Office also notes that the Appellant firm had multiple times the number of repetitive (Attachment 1) and excessively large (Attachment 2) transactions as that of the nearby comparable firms. Appellant's SNAP redemptions and average SNAP transaction were approximately double the state store-type average. However, as noted, the Appellant firm was a typically-stocked small grocery store in all relevant respects.

In further regard to Attachment 1 above, 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 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. 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.

The ROD Office notes that, at the time of the sanction decision, there were 25 SNAP-authorized stores within a half-mile radius of the Appellant firm, including two super stores, one supermarket, two medium grocery stores and 19 other small grocery stores. The Appellant store was clearly not the only store in the immediate area offering food items to SNAP customers; as

noted above, it was clearly not the best-stocked firm in the area and it was clearly not the only store being visited by Appellant's customers.

Lastly, once trafficking is established, there is no latitude to impose a lesser sanction, with the exception of a trafficking civil money penalty. There is provision at 7 CFR §278.6(i) for the imposition of a civil money penalty in lieu of permanent disqualification for trafficking. Appellant was advised of this provision in the ROD Office's Charge Letter dated March 28, 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, 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

October 26, 2018