

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

Los Hermanos Encarnacion Grocery,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0197795

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 Los Hermanos Encarnacion Grocery (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 April 20, 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 September 2016 through February 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 May 19, 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 22, 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 853 SNAP transactions 5 U.S.C. § 552 (b)(6) & (b)(7)(C)

ended in same-cents values (Attachment 1).

- A series of 611 SNAP transactions 5 U.S.C. § 552 (b)(6) & (b)(7)(C).
- A series of 242 SNAP transactions 5 U.S.C. § 552 (b)(6) & (b)(7)(C).
- 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 374 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 May 22, 2017, and in subsequent correspondence, it was argued that:

1. With regard to Attachment 1, this is a business strategy: Appellant does not like dealing with cash change and it is easy to expedite the sale so that people do not need to wait in line. Appellant provides a price list of some popular items; you would need to purchase only a few in order for the balance to add to a high amount.
2. Regarding Attachment 2: 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Sometimes two people are at the counter if the store is busy; this could account for times when transactions occur quickly. In other instances people have something small to purchase and they are still adding up the total so they make a small purchase just to keep it moving and while that goes through they finish adding up the total and swipe the next transaction. There are no supermarkets within walking distance of the store, making it important for customers' daily, weekly and monthly purchases.
3. Regarding Attachment 3: customers do not have vehicles; they live close to the store and thus make multiple trips to the store to get the goods they need since they cannot carry them all at once. There are no supermarkets within walking distance of the store, making it important for customers daily, weekly and monthly purchases.
4. Regarding Attachment 4: owning a business is not easy. If the firm has to start turning people down because SNAP purchases are too big, it will look suspicious and people will stop coming back to the store.
5. Appellant was not aware of the transactions being made since the Owner had an employee running the store. Once the Charge Letter was received and Appellant realized the mistakes being made, that employee was terminated. Customers in the neighborhood share SNAP benefit cards with one another. All of the transactions contained in the Charge Letter were justified purchases of eligible SNAP items. Some customers spend an excessive amount because they do all of their purchasing at the store since it is convenient for them. Appellant provides 29 customer statements in support thereof.

6. The firm is a family-owned business and a lot of people depend on it.
7. This is the first time for the firm to be involved in any kind of issue.
8. Appellant apologizes for the error/mistakes and assures future compliance.
9. Appellant will do whatever it is asked in order to be compliant and has terminated the employment of the person responsible for the store during the analysis period.

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 February 15, 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.
- One cash register and one card reader.
- Hot food sold.
- No dining area.
- Deli section present.
- No meat/seafood bundles/specials or fruit/vegetable boxes.
- Approximately 500 square feet of retail space.
- Not a delivery route, farmers market or specialty food store.
- The firm sold tobacco and tobacco-related products, health and beauty products, paper goods, cleaning supplies, housewares, kitchen utensils and other non-food items.
- Comments: "This store sells hot food, made to order sandwiches, and deli meats and cheeses by the pound, but there are no prices posted; prices are available upon request. There is no menu for the hot food, but burgers, fries, chicken, cheesesteaks, and breakfast items are available. At lunch time, they serve Spanish food from a steam table."
- Several products were priced in standard retail variations of \$.x9. Photos: 10, 11, 20 and 30.
- The check-out counter was approximately 1 X 1.5 feet with register behind a Plexiglas barrier and surrounded by candy, tobacco-products, snack foods, ice cream and clothing. An ice cream freezer was placed directly in front of the check-out area. Photos: 11 and 17.
- Typical small grocery store layout and inventory. Photo: 6.
- No fresh meat offered. Small amount of produce on hand: seven lemons, approximately 20 onions, five heads of lettuce, approximately eight red and green peppers, three tomatoes and approximately two dozen potatoes.
- The firm also operated as a prepared food restaurant/carryout. External

signage shows photographs/images of prepared food entrees. Commercial food preparation/kitchen area on site. Photos: 13 and 29.

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 X 1.5 feet with the register behind a Plexiglas barrier and surrounded by candy, tobacco-products, snack foods, ice cream and clothing. 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 \$9.85, reflecting that large purchases are not routinely made in such stores.

In regard to contention 1 above, the ROD Office notes that 45 of the 56 items in the price list 5 U.S.C. § 552 (b)(6) & (b)(7)(C); moreover, virtually all of the items were inexpensive and when combined with other such items rarely produce totals 5 U.S.C. § 552 (b)(6) & (b)(7)(C). It is noted that the price list included infant formula; however, most households eligible for SNAP benefits are also eligible for WIC benefits, which provides vouchers for infant formula. Thus SNAP households have little incentive to expend limited SNAP benefits on such products.

Appellant asserts that the firm engages in total-purchase price-rounding but provides no corresponding evidence/documentation in support thereof; consequently the contention is not viewed as compelling.

Regarding contention 2 above, the ROD Office notes that Appellant's eligible food inventory is that of a typical small grocery store and not of a nature and extent that would attract customers to make large or repetitive purchases, and provides store visit documentation in support thereof. Appellant offers the rationale that customers waiting in line make rapid purchases and that some customers make two purchases during one trip to the store. However, rapid and sequential purchases by customers waiting in line do not explain the transaction activity contained in Attachment 2; transaction sets range in lapsed time 5 U.S.C. § 552 (b)(6) & (b)(7)(C). 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Appellant provides no documentation or evidence demonstrating otherwise.

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 typically-stocked small grocery store, when there are other larger food stores

nearby which carry substantially larger varieties of food at lower costs, is implausible.

Lastly, large transactions for the purchase of legitimate food items (which at this store would have been a substantial number of lower priced items), using no shopping carts and very little checkout-counter space, is additionally implausible. Multiple transactions over a short period of time, especially of high dollar value, are very suspicious because they are typical of stores and SNAP customers which are attempting to diminish attention to signs of SNAP-benefit trafficking. 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.

Appellant states that there are no supermarkets within walking distance; however, the ROD Office notes that, at the time of the sanction decision, there were at least 99 other SNAP- authorized firms within a one-mile radius, including one super store, three supermarkets, three large grocery stores, five medium grocery stores and 87 other small grocery stores. Moreover, the ROD Office conducted an analysis of the shopping habits of SNAP customers at the Appellant firm and found that of those 312 households, 79% shopped at better-stocked super stores, supermarkets and/or large grocery 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 typically-stocked small grocery store that they could not obtain at the better-stocked and very likely more competitively-priced stores (super stores and supermarkets are typically the most competitively-priced firms in a given area). Clearly most households had access to better-stocked stores. Additionally, the information indicates that these customers conducted implausible transactions only or primarily at the Appellant firm, which is, as noted, a typical small grocery store, a strong indicator of SNAP-benefit trafficking.

With regard to contention 3 above, as noted above, a sample of customers conducting implausible transactions at Appellant's store were found to have access to and shop at better-stocked firms; thus lack of transportation as a rationale for the activity is not found to be compelling.

In regard to contention 4 above, there was no Attachment 4 to the Charge Letter; no further findings are rendered in this regard.

Regarding contention 5 above, Appellant has asserted that the Owner of the firm had no knowledge of violations of the SNAP regulations and implies that the Owner did not personally commit violations of the SNAP Regulations and notes that an

employee responsible for managing the firm committed the violations. This contention cannot be accepted as a valid basis for dismissing any of the charges or for mitigating the impact of the violations upon which they are based. Appellant is liable for all violative transactions handled by full or part-time, paid or unpaid store personnel, whether or not ownership is aware of such transactions. Regardless of whom the ownership of a store may utilize to handle store business, ownership is accountable for the proper handling of SNAP benefit transactions. To allow store ownership to disclaim accountability for the acts of persons to whom it delegates responsibility to act on behalf of the firm would render virtually meaningless the enforcement provisions of the Food & Nutrition Act of 2008 and the enforcement efforts of the USDA. Additionally, ownership of the Appellant firm signed an FNS-252, SNAP Application for Stores, on April 10, 2015, by means of which Appellant acknowledged and agreed to accept responsibility to prevent violations of the program by any and all employees of the firm. Moreover, case law further confirms that owners may indeed be held accountable for the actions of employees: see *Woodard v. USA* (6th Cir. 1987), upholding a sanction for trafficking regardless of the owner's lack of knowledge of violations, and *Freedman v. United States Dept. of Agriculture* (3rd Cir. 1991), noting that permanent disqualification of even an "innocent owner" is consistent with the legislative history of the statute and regulations. Furthermore, culpability need not be imputed to an owner through the actions of an employee if the owner was involved in the violative activity, whether accidental or otherwise. Again, to allow store ownership to disclaim accountability for the acts of persons to whom the responsibility to handle store business has been assigned would render inert the enforcement provisions of the Food and Nutrition Act of 2008 and corresponding provisions of the regulations.

Regarding the customer statements provided by Appellant, one would not expect SNAP recipients to admit to trafficking against their own self-interest, potentially exposing themselves to administrative and criminal charges. On the contrary, experience has shown that SNAP customer declarations and affidavits routinely attest to irregular transactions being legitimate even when there is other strong evidence of trafficking. Thus the customer statements are not viewed as reliable evidence that SNAP-benefit trafficking did not occur.

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. The only alternative to permanent disqualification, once trafficking is established, is to impose a trafficking civil money penalty in lieu of permanent disqualification. As noted, in order for this alternate penalty to be considered, a retailer must provide sufficient evidence demonstrating that the firm had established and implemented an effective compliance policy and program to prevent violations prior to said violations, as stipulated in § 278.6(i). Appellant did not timely request consideration for same and did not provide such evidence and, accordingly, this alternate penalty was correctly withheld.

In regard to contention 7 above, Appellant notes that this case represents the firm's first and only SNAP violation (or series of same); however, a record of program participation with no previously or subsequently documented violations does not constitute valid grounds for dismissing the present serious charges or for mitigating the impact of the violations upon which they are based. There is no provision in the Act, regulations or agency policy that reverses or reduces a sanction based upon a lack of prior and/or subsequent violations or assurances of future compliance by a firm and its owners, managers and/or employees; likewise, sanctions for prior violations are not prerequisite to sanctions due to later violations. Moreover, prior sanctions may precipitate an increase in the severity of a later sanction (see §278.6(e)(6)). Further, as noted above, the Food & Nutrition Act of 2008 provides that a store's disqualification "*shall be* (emphasis added) permanent upon ... the first occasion of... trafficking."

Regarding contention 8 above, assurances that no further violations would occur if Appellant were allowed to remain on the program do not constitute valid grounds for dismissal of the charges or for mitigating the impact of the violations upon which they are based. Accordingly, once trafficking is established, there is no latitude to impose a lesser sanction, with the exception of a civil money penalty, which has been discussed above.

With regard to contention 9 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 SNAP 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.

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

December 26, 2017