

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

M & R Deli Grocery Corp,

Appellant,

v.

Case Number: C0199805

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 M & R Deli Grocery Corp (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 June 26, 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 February 28, 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 March 5, 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 568 SNAP transactions 5 U.S.C. § 552 (b)(6) & (b)(7)(C) ended in same-cents values (Attachment 1).
 - A series of 180 SNAP transactions 5 U.S.C. § 552 (b)(6) & (b)(7)(C).
 - A series of 330 SNAP transactions 5 U.S.C. § 552 (b)(6) & (b)(7)(C).
 - A series of 58 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.
- A series of 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, and in its written request for review dated March 5, 2018, it was argued that:

1. Regarding Attachment 1: Many products are sold in even-dollar amounts such as \$1.00 and \$2.00; also fruit and vegetables are sold by the pound, such as \$1.00 to \$2.00 per pound. Cold cuts are requested by dollar amount. Sandwiches are priced ending in \$.00 and \$.50. Some customers ask for discounts and totals are then rounded off.
2. Regarding Attachment 2: Families share benefits during a single visit to get separate receipts. The firm uses a calculator to add up totals prior to being processed through the SNAP terminal, so transactions are processed faster. Also credit account payments cause these transactions; customers pay off a credit account balance and then make an additional purchase. Appellant did not know that accepting SNAP benefits as payment

on credit accounts was counter to rules and regulations and has ceased this payment method. Appellant provides a letter of support from a non-profit organization, copies of customer statements, of customer purchase/sales records/receipts and of credit records.

3. Regarding Attachment 3: the store has a full range of groceries; it is easy for customers to expend benefits there. Food prices are higher than ever. Very few businesses in the neighborhood accept SNAP benefits due to the businesses having closed or to ownership changes. As a result, Appellant's SNAP redemptions have increased. Most transactions in Attachment 3 were due to credit payments. Appellant provides product purchase invoices, inventory photos, letter of support from a non-profit organization, customer statements, copies of customer purchase/sales records/receipts and credit records.
4. The firm has been in business for almost four years and has never had problems with any licenses.
5. Appellant holds quarterly training sessions.
6. Appellant would not jeopardize its SNAP authorization. A disqualification would force the firm to close.

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 April 10, 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:

- Estimated 1248 square feet of store space.
- No optical scanners used.
- 2 shopping baskets available.
- No shopping carts available.
- No night window.
- No evidence of wholesale business.
- Prices in standard retail variations of \$.x9. Photos: 2, 5, 6, 10, 11, 13, 15, 18, 19, 26, 27 and 44.
- One checkout area.
- One cash register.
- One card reader.
- No food stored outside public view.
- Storage coolers or freezers used.
- No food stored offsite.
- Telephone orders taken.
- Delivery offered.
- Store does not round transaction totals up or down.
- Four most expensive SNAP-eligible items:
 - Deli meat - \$8.99 per pound.
 - Deli cheese - \$5.99 per pound.
 - Rice - \$6.99 for 10 pounds.

- Sausage - \$5.99 for 14-ounces.
- All above questions were answered in collaboration with store personnel.
- The firm also sold alcohol, tobacco products, mobile phones and/or accessories, automotive products, health and beauty products, paper goods, cleaning products, laundry detergent, over-the-counter medicines, housewares and other non-food items.
- Food preparation area/kitchen present. Marquee advertised prepared food entrees. Outdoor signage advertised prepared foods. Photos: 12, 16, 19, 24, 29, 33, 40, 41, 45 and 46.
- Hot food sold.
- No dining area.
- Deli section present.
- Store stock used for prepared foods.
- No meat/seafood bundles/specials and/or fruit/vegetable boxes.
- Empty or sparsely-stocked shelves. Photos: 4, 5, 7, 8, 27, 30, 31, 39 and 43.
- The firm was a typically-stocked convenience store in all relevant respects. Photos: 3, 6, 8, 14, 15, 18, 26, 34, 35, 37 and 42.
- Checkout area approximately 2 X 2 feet behind a Plexiglas barrier and surrounded by candy, ice cream, over-the-counter medicines and other non-food items. Photos: 15, 26, 28, 32, 38 and 47.

The documentation presents no indication of advertised specials, promotions, 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 2 by 2 feet of useable space) but was otherwise surrounded by candy, ice cream, over-the-counter medicines and other non-food items. There were no shopping carts 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 New York during the analysis period was \$8.98, reflecting that large purchases are not routinely made in such stores.

In regard to contention 1 above, as noted in the foregoing, most visible prices were in standard retail variations of \$.x9; a combination of several such items rarely produces totals ending in \$.25, \$.50 and \$.75. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Store signage did not provide prices for prepared food entrees such as sandwiches, though, as noted, most other visible pricing was in standard retail variations of \$.x9. Appellant provides no further documentation demonstrating the firm's pricing protocols. Appellant notes that it rounded some purchases, though personnel at the store on the day of the store visit indicated that the firm did not round totals. A high number of same-cents transactions, in the absence of a compelling explanation, is an indicator that transaction amounts are contrived, which in turn indicates SNAP-benefit trafficking.

Regarding contention 2 above, none of the transactions in Attachment 2, having been conducted 5 U.S.C. § 552 (b)(6) & (b)(7)(C), comport with Appellant's rationale that customers are sharing SNAP benefits during a single visit. Moreover, Appellant provides no evidence in support of its contentions, such as cash register receipts, to demonstrate the repetitive transactions were legitimate purchases of eligible food. Similarly, Appellant's rationale, that primary transactions

in Attachment 2 were credit payments and secondary transactions were additional purchases, does not comport with the Charge Letter data; again, the transaction pairs were hours apart and clearly not conducted during single visits to the store.

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 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 other larger food stores nearby which carry substantially larger varieties of food at lower costs, is implausible. Lastly, large transactions for the purchase of legitimate food items (which at this store would have been a substantial number of lower priced items), using no shopping carts and very little checkout-counter space, is additionally implausible. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). 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, 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 convenience store in all relevant respects and provides no plausible bases for customers' unusual attraction to the firm and unorthodox transaction patterns.

Additionally, the letter of support from a non-profit community organization provides no additional rationale which would compellingly explain the transaction activity.

With regard to contention 3 above, as noted, the firm was a typically-stocked convenience store in all relevant respects. The firm maintained no shopping carts with which customers could transport large orders to the small checkout counter or to waiting transportation; the firm stocked no fresh meat or seafood, no bulk, packaged or expensive items. Additionally, the ROD Office conducted extensive analysis of household shopping patterns and noted that customers conducting implausible transactions at the Appellant firm were shopping at much better-stocked and quite likely more competitively-priced super stores and supermarkets on or about the same day, calling into question what customers could obtain at Appellant's typically-stocked convenience store that they could not obtain at the better-stocked stores. Appellant's customers clearly had access to better stocked firms. 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

The ROD Office notes that, at the time of the sanction decision, there were 122 SNAP-authorized stores within a one mile radius of the Appellant firm, including six super stores, nine supermarkets, three large grocery stores, 11 medium grocery stores, 42 small grocery stores and 51 other convenience stores. One supermarket was less than one-half mile from the firm and one super store was just over one-tenth of a mile from the firm. The Appellant store was clearly not the only store in the immediate area offering food items to SNAP customers; as noted above, it was clearly not the best-stocked firm in the area and it was clearly not the only store being visited by Appellant's customers. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). The firm's average SNAP redemption was over 40% larger than that of the store-type average in the state of New York during the analysis period.

Photographs of store inventory provided by Appellant were not clear enough to determine a substantial amount of detail. Invoices provided by Appellant were analyzed by the ROD Office and found to be dramatically short of supporting Appellant's SNAP redemptions during the analysis period (November 2016 through April 2017). Several of the invoices were outside the analysis period and/or were illegible, undated, not itemized or lacked a total and/or a legible total amount, vendor name and/or a buyer name.

Credit account documentation was substantially illegible and did not indicate what was purchased on credit, the dates when amounts were paid, did not provide identifiable customer names and was dramatically short of transaction data to support the contention that credit account payments accounted for a substantial amount of the Charge Letter transactions.

The ROD Office analyzed the 10 customer statements said to represent credit account activity and noted that most/all shopped at much better-stocked super stores, supermarkets or grocery stores on or about the same day as conducting implausible transactions at the Appellant firm, calling into question what households could obtain at Appellant's typically-stocked convenience store that they could not obtain at the much better-stocked and quite likely more competitively-priced super stores. Many of these households conducted few or no Attachment 2 transactions at the Appellant firm during the analysis period, which tends to counter Appellant's rationale. Of 945 Charge Letter transactions, only 10 were matched to client statements.

Appellant provided itemized receipts for 10 households; some of this documentation appeared to reflect contrived information. The ROD Office identified discrepancies in dates that tend to indicate at least some of the receipts were created to match Charge Letter transactions.

5 U.S.C. § 552 (b)(6) & (b)(7)(C).

In regard to contention 4 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 and/or regulations 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 5 above, no documentation in support of the contention was provided. 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 June 26, 2017, 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 provided by Appellant, 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).

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

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

September 10, 2018