

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

Melo Mania Deli Food Corp,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0199064

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 Melo Mania Deli Food 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 April 24, 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 July through December 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 May 30, 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 June 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 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 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 reply to the Charge Letter, in its written request for review dated June 1, 2017, and in subsequent correspondence, it was argued that:

1. Regarding Attachment 1: SNAP recipients use benefits more than once per day. It is

not the responsibility of store owners to monitor SNAP customer spending. Also, households share benefits with other family members that received benefits on different days. A customer will make a personal purchase and then charge items for another family member separately. The family member will reciprocate when its benefits are received. 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

2. Regarding Attachment 2: of the 110 transactions, 5 U.S.C. § 552 (b)(6) & (b)(7)(C). The store cannot limit the amount of SNAP purchases. The store maintains a full range of groceries, deli, produce, fresh meats, etc. Fresh meat is sold ranging from \$.99 to \$4.99 per pound. The store is one of the only stores that sell specifically to Hispanic Households. Milk and eggs have increased in price exponentially and cold cuts are priced from \$5.99 to \$9.99 per pound. Large transactions result from the accumulation of purchases on credit.
3. The firm has been a SNAP vendor for many years and has no prior incidents.
4. The disqualification will work a hardship upon the firm and may cause the firm to cease operations.
5. Appellant requests a monetary fine and a six-month to one-year suspension in lieu of a permanent disqualification.

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 March 13, 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. Hot food entrees advertised in signage directly to the left of the check-out counter area. Deep fryer and other commercial kitchen equipment present. Signage advertised prepared food items (sandwiches). Photos: 2, 7 and 10.
- No dining area.
- Deli section present.
- No fresh meat sold. No meat/seafood bundles/specials or fruit/vegetable boxes.
- Approximately 700 square feet of store space.
- The firm sold tobacco and tobacco-related products, alcohol, lottery tickets, health and beauty products, cleaning products, kitchen utensils, clothing and other non-food items.
- Comments: "there are close up photos showing prices on some food items as requested. Lunchmeat and cheeses in the deli case were used to make hot and cold sandwiches and are also sold by the pound to customers. Due to narrow aisles some photos show only 2- 3 shelves high. Due to narrow aisles and high shelves I was not always able to show shelving areas 6-8' wide, to shelf to floor Due to narrow aisles and high shelves I was not always able to capture top to bottom photos of the coolers."

- Most visible prices were in standard retail variations of \$.x9. Photos: 1, 5, 6, 8, 9, 11, 12, 15, 17, 18, 20, 23, 25, 27, 28, 29, 30, 31, 36, 37 and 38.
- Dust-covered canned goods. Photos: 6, 11 and 31.
- Small amount of fresh produce. Photos: 18 and 32.
- Check-out counter approximately 1.5 X 3 feet, behind a Plexiglas barrier and surrounded by candy, snack food items, over-the-counter medicines, clothing and other non-food items. Ice cream cooler located directly in front of the counter area. Photos: 2, 21, 36.
- Typical convenience store inventory. Photos: 2, 3, 10, 14, 17, 21, 25, 30, 35 and 36.

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 3 feet of useable space) but was otherwise surrounded by candy, snack food items, over-the-counter medicines, clothing 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 New York during the analysis period was \$8.56 (and \$8.66 in Bronx County), reflecting that large purchases are not routinely made in such stores.

In regard to contention 1 above, it should be noted that Appellant must show by a preponderance of evidence that credit account activity, or activity other than SNAP benefit trafficking, accounts for the transaction data detailed in the SNAP Office's Charge Letter. Such a showing is not possible in the absence of substantial documentary evidence in support thereof; further, a successful contention on Appellant's behalf that the acceptance of SNAP payments on credit accounts adequately explains the transactions detailed in the Charge Letter must be accompanied by substantial and detailed documentation such as ledgers, account books or specific sales records, allowing the agency to reconcile *all* transactions in the Charge Letter attachments with Appellant's records.

In reply to the Charge Letter Appellant provided no corroborating documentation in support of its contention and, as such, the assertion alone is substantially insufficient to constitute evidence that a significant amount of the transaction activity contained in the Charge Letter was due to credit account activity. Lastly, with a substantial quantity of Appellant's transaction activity purportedly due to the payment of credit bills/accounts, it is implausible that the firm could produce no records of credit accounts for the entire period of July through December 2016. 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

Appellant notes that it is not responsible to limit SNAP customer spending; however, as ROD points out, the transactions are questionable not because they exceed any limits for use but because they are inconsistent with the nature and extent of the store's inventory and are characteristic of trafficking. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Moreover, customers conducting implausible transactions at the subject store were also shopping at super stores,

supermarkets and large grocery stores on or about the same day, calling into question what these customers could obtain at Appellant's typically-stocked convenience store that they could not obtain at the much better-stocked and very likely more competitively-priced stores (super stores, supermarkets and large grocery stores are typically the most competitively-priced stores in a given area); transportation was clearly not an issue for these customers. The firm's inventory provided no compelling rationale for large and/or repetitive transactions. Furthermore, some transactions were conducted outside the firm's stated hours of operation.

The ROD Office further notes that there is no need to conduct separate swipes on SNAP cards, as the cash register could be used to create a record of separate purchases which could both be paid for with one SNAP card swipe. However, breaking up large and implausible SNAP transactions into smaller ones is a common method of attempting to avoid signs of SNAP benefit trafficking. Lastly, the transactions are too large to represent secondary purchases of a forgotten item or two; 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 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.

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, 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 the unorthodox transaction patterns and customers' unusual attraction to the firm.

Regarding contention 2 above, the ROD Office notes that the Appellant firm is not the only store in the area selling Hispanic food products; there were, at the time of the sanction decision, 191 SNAP-authorized firms within one mile of the subject store. Moreover, ROD notes that most households (79%) conducting Charge Letter transactions shopped at a super store, supermarket and/or large grocery store on or about the same day as conducting implausible transactions at the Appellant firm, meaning that most customers not only had access to transportation but also did not rely upon the Appellant firm for food items. 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.

Additionally, as noted, the firm maintained a typical convenience store inventory, offered no carts or baskets to customers and primarily stocked typical convenience store inventory. There was no evidence of fresh meat offered for sale on the day of the store visit; Appellant provides no information/documentation in support of the contention. Photos show dust-covered canned goods, typically an indication of low turnover.

5 U.S.C. § 552 (b)(6) & (b)(7)(C). As noted in the foregoing, Appellant likewise provides no documentation in support of its contention that the transactions contained in the Charge Letter were the result of payments on credit accounts.

With regard to contention 3 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."

In regard to contention 4 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. 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 request consideration for same and did not provide such evidence and, accordingly, this alternate penalty was correctly withheld.

Regarding contention 5 above, the only civil money penalty applicable in the present case is a trafficking civil money penalty, as referenced above (per § 278.6(i)), and for which Appellant did not qualify. The statute and regulations allow for no sanctioning discretion in trafficking cases, other than a civil money penalty; such provisions are prescriptive in that sufficient evidence of trafficking always warrants permanent disqualification unless a firm qualifies for a civil money penalty. No minimum amount of benefits trafficked or a minimum proportion of cash to SNAP benefits exchanged is required; any amount of cash exchanged for any amount of SNAP benefits is considered SNAP benefit trafficking. The regulations at 7 CFR § 278.6(e) provide for a continuum of sanctions, beginning with permanent disqualification for trafficking, term disqualifications from several years to six months for lesser violations and warning letters for firms committing violations less severe than those warranting six-month disqualifications. 7 CFR § 278.6(e)(1)(i) states that FNS shall disqualify a firm permanently if personnel of the firm have trafficked as defined in §271.2. In the present case, the violations at issue include SNAP benefit trafficking; the imposition of a warning letter or lesser sanction

for SNAP-benefit trafficking is counter to said statute and regulations and is therefore incorrect. Accordingly, the record reflects that the ROD Office correctly imposed the sanction required by the statute and regulations.

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 8, 2018