

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

Meridian Deli & Convenience,

Appellant,

v.

Case Number: C0201659

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 Meridian Deli & Convenience (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 August 31, 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 February through July 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 October 2, 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 October 7, 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 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 made from recipient accounts (Attachment 2).

APPELLANT'S CONTENTIONS

In Appellant's reply to the Charge Letter, and in its written request for review dated October 7, 2017, it was argued that:

1. Customers shop at the store multiple times per day or week.
2. The store is located near a homeless shelter.
3. Customers are low-income and on Section 8 housing.
4. Customers have large families.
5. Transactions are similar to previous years.
6. Most customers make orders and pick them up early in the month.
Customers shop for special occasions and buy things like ribs, meat or cake.
7. The store has good prices – 10-15% mark-up of Costco or Walmart prices. Appellant provides copies of product purchase summaries/reports from three different wholesale clubs. Appellant provides a copy of a letter from a soft drink company dated November 1, 2017 stating that Appellant has been its customer since 2012 and yearly purchases average 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Appellant also provides copies of checking account ledgers for January 2017 through September 2017. Appellant provides customer statements and petitions in support of the above.

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 June 30, 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 300 square feet of store space.
- Optical scanners present at checkout.
- Four shopping baskets present.
- No shopping carts.
- No evidence of wholesale business.
- One check-out counter.
- One cash register.
- No telephone orders.
- No delivery offered.
- No transaction rounding.
- Four most expensive SNAP-eligible items:
 - Cereal (double pack) - \$8.99 – for 4 pounds, 6 ounces.
 - Coffee - \$9.99 – for 12 ounces.
 - Rice - \$6.99 – for 32 ounces.
 - Salami - \$9.99 – for 1 pound.
- All questions above were completed in collaboration with store personnel.
- The firm also sold tobacco products, lottery tickets, health and beauty products, cleaning supplies, housewares and other non-food items.

- Shelves were disorganized with several different products types and brands mixed together on the shelves. Photos: 6, 8, 11, 12, 24 and 33.
- Check-out area small (1.5 X 1.5 feet of useable space) and cluttered with numerous snack items, over-the-counter medicines and other non-food items. Photos: 13, 16, 17, 21, 28 and 32.
- Typically to marginally-stocked small convenience store. Photos: 26 and 27.
- No kitchen area, though the firm appears to sell made-to-order sandwiches (see marquee with prices in photos). Photo: 37.
- No meat/seafood bundles/specials or fruit/vegetable boxes.
- Comments: “They are not allowed to post the name of the store on residential building in Virginia.”

The documentation presents no indication of advertised specials, promotions, bulk or expensive food items. The checkout area was set up in convenience store fashion, utilizing a small check-out area (approximately 1.5 by 1.5 feet of useable space) but was otherwise cluttered with numerous snack items, 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 to 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 Virginia during the analysis period was \$6.74, reflecting that large purchases are not routinely made in such stores.

In regard to contention 1 above, as noted in the foregoing, the store visit reflected the firm to be a very small but typically to marginally-stocked convenience store in all relevant respects. There was no indication/advertisement/signage of bulk, special or otherwise expensive packaged items offered for sale. One of the Store Owners was present during the store visit and was consulted in the process of obtaining the information indicating that the store does not offer delivery or take phone orders. Thus, 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 1 indicate a series of repetitive purchases that total large amounts. Customers spending such substantial amounts of SNAP allotments in a marginally-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. Moreover, the record further reflects that Appellant’s number of repetitive transactions during the analysis period was multiple times that of two nearby SNAP- authorized stores (both convenience stores within one-third of a mile of the Appellant firm).

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 to marginally-stocked small grocery store in all relevant respects and provides no plausible bases for customers' unusual attraction to the firm and unorthodox transaction patterns.

Regarding contention 2 above, while there may well be, and may have been, a homeless shelter located near the Appellant store, such customers rarely have access to facilities in which to store large quantities of food. Additionally, as noted in the foregoing, there are other stores in the immediate area, including the two convenience stores referenced above; these other stores do not exhibit, to near the same extent, the implausible transaction activity that the Appellant firm exhibits. There is no reason to believe that customers from homeless shelters would shop differently at one typically-stocked convenience store than at another.

With regard to contention 3 above, similar to contention 2, there is no reason to expect homeless, low-income and/or Section 8 customers to conduct implausible transactions at only one typically or marginally-stocked convenience store but not at the others in the area. Appellant's number of repetitive and excessively large transactions (Attachment 1 and 2) were multiple times that of two nearby comparable convenience stores. Moreover, the ROD Office notes that households conducting Charge Letter transactions were shopping at nearby super stores and supermarkets on or about the same day, calling into question what the customers could obtain at Appellant's typically to marginally-stocked convenience store that they could not obtain at the much better-stocked and quite likely more competitively-priced stores. This further indicates that customers were not limited to shopping only at the Appellant firm but in fact did have routine access to other stores.

In regard to contention 4 above, as noted, the store visit reflected the presence of no bulk/special or specialty items offered or advertised. It is not clear why large SNAP households, with access to much better-stocked and more competitively-priced super stores and supermarkets, would spend large amounts of benefits at a typically to marginally-stocked convenience store.

Regarding contention 5 above, agency data reflects repetitive and excessively large transactions (such as those contained in Attachment 1 and 2) during the same period (February through July), in 2015 and 2016, were a fraction of what they were in 2017; Appellant's statement does not comport with the record and is not viewed as valid or compelling.

With regard to contention 6 above, as noted, there was no indication during the store visit of a special order service; nor was this mentioned by the Owner during said visit when questions about delivery, telephone orders or other special services were asked. There was no inventory related to said service found during the store visit. Appellant provides no documentation in the form of customer orders placed or filled. Appellant provided purchase summaries/reports from wholesale clubs; very few items other than what was seen during the store visit were present on these summaries/reports. The reports reinforced the store visit documentation indicating that the firm operated primarily, and virtually entirely, as a typical convenience store, stocking/selling convenience food items, candy, soda and snack foods and small quantities of staple food items.

In regard to contention 7 above, Appellant did not provide any information demonstrating store pricing compared to other stores in the area. The ROD Office notes that, at the time of the sanction decision, there were 15 other SNAP-authorized firms within a one-mile radius, including two super stores, two supermarkets, one medium grocery, six combination grocery/other stores and four other convenience stores. The ROD Office further notes that there were 56 households listed in the Charge Letter attachments; of these, 52 shopped at supermarkets or super stores 5 U.S.C. § 552 (b)(6) & (b)(7)(C) of conducting implausible transactions at the subject store. Clearly Appellant's customers weren't reliant upon the firm or its pricing or special orders.

The Appellant firm did not provide invoices/product purchase receipts, but, as noted, provided summary statement printouts/reports for wholesale clubs. When the reports for February through April were tabulated and given a 40% mark-up (not the 10-15% asserted by Appellant), the invoices fall just short of the firm's redemption amounts during the same period. Thus the invoice total is possibly over-stated due to the higher (40%) mark-up, and the shortfall of invoices justifying redemptions correspondingly understated. Additionally, the total leaves no inventory for cash or commercial credit/debit sales, of which the firm surely had some substantial amount. The firm provides no support (in the form of order or placement records) of its contentions that special orders account for a substantial amount of the transactions activity. It should be noted for the record that one of the reports does not state the seller or the buyer and the other two indicate only a member number; Appellant is not named as the buyer. Much of the reports pertain to months other than the analysis period (February through July 2017). The summary statements/reports, as evidence that SNAP-benefit trafficking could not have occurred at the store during the analysis period, are not compelling.

Appellant provided a copy of a letter from a drink vendor stating that Appellant had been a customer since 2012 and averaged 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in purchases from this vendor per year; the information lacks specificity regarding what was purchased and in what quantities during the analysis period of February through July 2017.

The customer statements and petitions provided by Appellant do not explain repetitive or large transactions at the store; one letter signed by several customers states that Appellant's prices are better than one other convenience store. Another letter notes that prices are fair and a third letter states that the customer likes the prices and shops there primarily for that reason. Thus while there is some corroborating information regarding the firm's prices, the information is quite general and somewhat sparse. Also, no price comparison data demonstrating that the firm offers a substantial price advantage on its convenience store products has been provided by Appellant; moreover, even a very competitively-priced convenience store is still a convenience store with inventory substantially inferior to that of super stores and supermarkets, which most of Appellant's customers (who were conducting the transaction activity at issue) clearly had access to and at which they routinely shopped. As noted earlier, the pricing issue presents a problem for Appellant, as a low general mark-up results in a low value of inventory, considerably lower than SNAP redemptions.

Appellant provided copies of checking account ledgers/activity for the period December 2016 through September 2017. This information lacks specificity regarding the SNAP transactions at issue and documents only that business activity took place at the firm during the analysis period. As such, it constitutes very weak evidence that SNAP-benefit trafficking did not occur at the firm during the analysis period.

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 SNAP Office's Charge Letter dated August 31, 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, 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

May 30, 2018