

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

Munford Valero,

Appellant,

v.

Case Number: C0189485

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 Munford Valero (hereinafter “Appellant”) by the ROD (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 May 11, 2016, 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 October 2015 through March 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 25, 2016, 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 3, 2016, 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 USC 2018 (b)(7)(e)**

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

- 7 USC 2018 (b)(7)(e):
 - 7 USC 2018 (b)(7)(e).
 - 7 USC 2018 (b)(7)(e).
- A series of multiple SNAP transactions 7 USC 2018 (b)(7)(e) were debited from individual benefit accounts in unusually short time frames (Attachment 2).
- A series of 285 excessively large SNAP transactions 7 USC 2018 (b)(7)(e) 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 June 3, 2016, and in subsequent correspondence, it was argued that:

1. The Owner of the Appellant firm avers that each and every SNAP transaction noted in the Charge Letter was a bona fide purchase for goods and as proof stands ready to provide the corresponding supply purchases that re-stocked the store for the months at issue. The purchases reflect the replacement of merchandise corresponding not only with the store's cash and credit-based transactions but also the merchandise subject to SNAP purchases. Appellant provides SNAP sales receipts for the analysis period of October 2015 through March 2016.

2. Part of the review of the ROD Office's Charge Letter led the store Owner to seek counsel on the revisions of the firm's policy regarding the acceptance of SNAP benefits. Should Appellant be allowed to resume conducting SNAP transactions, the firm's Owner has identified a few account numbers that may have been making purchases outside of those expected in the SNAP benefits context and would seek guidance from USDA as to best practices for restricting individual accounts from being over utilized.
 - a. In response to Attachment 1 to the Charge Letter, the statistical anomaly noted regarding the ending cents-values of certain transactions does not fall outside the expected range when factoring in the actual prices of the items in question.
 - b. In response to Attachment 2 to the Charge Letter, Appellant offers an absolute denial and wants to work within the relevant guidelines to avoid either the appearance of impropriety or any unknowing facilitation his store may have provided to SNAP recipients who sought to abuse the system in any way.
 - c. In response to Attachment 3 to the Charge Letter, Appellant notes that the store carries multiple bulk food items, including bulk vegetables that cost in excess of \$25.00 that were likely the source of some of the larger purchases noted.

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 2, 2016, as a result of which documentation was obtained including photographs of the exterior and interior of the store, a store layout diagram and a store inventory survey. This documentation reflected the following:

- No optical scanners used in store.
- No shopping baskets present.
- Two shopping carts present; the larger one appeared dedicated to stocking and clean-up, as it was filled with liquor cartons.
- Two cash registers and two SNAP-card readers. One check out area appears to be blocked by an ATM/credit card machine. Both areas appear to be crowded with small checkout items
- No hot food sold.
- Dining area present.
- No meat/seafood bundles/specials or fruit/vegetable boxes.
- Approximately 5000 square feet of retail space.
- Not a delivery route, farmer's market or specialty food store.
- Comments: "Valero is posted on the gasoline bays, but Food Mart is what is posted on the structure. In the back corner across from the alcohol coolers, there is a gondola that serves only for storage of alcohol, soda and juice. Both sides of the gondola is used for this purpose. The empty shelf is located in the cooler above where the cold prepared food is merchandised. The bottom portion of the glass barrier at the checkout area is lowered during nighttime hours and raised like the photo during daylight hours. The deli is not operable at this time."
- Majority of square retail footage dedicated to non-food.

- The food stock consisted mostly of canned food and some snack items. Food items found on the shelves consisted of canned food, snacks, bagged beans, bagged rice, sauces, and spices. The store appears to be a typical convenience store.
- No fresh meat.
- No fresh produce.
- No special packages or deals available.
- No ethnic food products.
- Limited dairy items.
- Empty/sparsely-stocked shelving and cooler. Photos: 4, 6, 11, 15, 17 and 28.
- Most visible pricing in standard retail variations of \$.x9. Photos: 5, 6, 10, 16, 17, 18, 23, 24 and 27.
- The firm also operated as a liquor store. Photos: 7, 12, 15 and 29.
- The firm also operated as a gas station. Photos: 18 and 27.
- The firm also maintained five video games and/or slot machines. Photo: 21.
- Firm sold tobacco and tobacco-related products, alcohol, automotive products, clothing, greeting cards, over-the-counter medicines, CDs, small gift items, jewelry and other non-food items.

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 were priced 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 at one register, virtually no counter space at the other register) and was otherwise cluttered/surrounded by candy, lottery tickets and other non-food items. There were no shopping baskets and one shopping cart available 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 Alabama during the analysis period was \$7.54, reflecting that large purchases are not routinely made in such stores.

In regard to contention 1 above, this review encompasses and documents the examination of the primary and relevant information in this case, the purpose of which is, as noted above, to determine whether the Appellant demonstrates by a preponderance of the evidence that the permanent disqualification should be reversed. In this case, therefore, if the Appellant demonstrates by a preponderance of the evidence that trafficking did not occur in Appellant's firm, then trafficking will be considered not to have occurred and the disqualification reversed. If this is not demonstrated the case is to be sustained. Assertions that the firm has not violated program rules, by themselves and without substantial supporting evidence and rationale, cannot constitute valid grounds for dismissal of the current charges of violations. Appellant was provided the opportunity to provide any information it deemed appropriate in reply to the Charge Letter and through the administrative review process. Appellant has provided SNAP purchase receipts corresponding to many of the transactions in the Charge Letter for December 2015 through March 2016 and daily SNAP sales totals for October 2015 through March 2016. This information documents only that SNAP transactions occurred at the times and in the amounts stated in the Charge Letter; it provides no information regarding what was exchanged for SNAP benefits during these transactions. Appellant notes that it has product purchase receipts/invoices

corresponding to the analysis period referenced in the Charge Letter (October 2015 through March 2016), but did not provide them. Thus Appellant provides little compelling information in support of the contention that the transactions contained in the Charge Letter were more likely due to the sale of eligible items than due to SNAP-benefit trafficking.

Regarding contention 2 above, Appellant appears to acknowledge that some transaction activity detailed in the Charge Letter was implausible, or that it merely appeared implausible but in reality was not. The contention is taken to mean that the bullet points under contention 2 above are Appellant's explanations for why this may have occurred.

Accordingly, with regard to contention 2a above, the record reflects that the firm's number of transactions in Attachment 1 is indeed substantially beyond the expected range. The ROD Office notes that the number of Appellant's same-cents transactions during the analysis period was 137 times that of four comparable firms in the area (within three miles); in fact, none of the other firms had any same-cents instances meeting the thresholds used in Attachment 1. Most of the firm's eligible food inventory consisted of inexpensive single-serving items, primarily snack foods and accessory food items (soda, candy, condiments, etc.). As noted in the foregoing, the majority of Appellant's store prices were in standard retail variations of \$.x9; several items so priced rarely produce substantial numbers of same cents-values. Moreover, the record provides no compelling explanation for the activity other than trafficking; Appellant provides no rationale explaining the phenomenon.

In regard to contention 2b above, beyond Appellant's denial of violations, no rationale is offered for the transaction activity contained in Attachment 2. 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. 7 USC 2018 (b)(7)(e). 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. 7 USC 2018 (b)(7)(e). Moreover, the record further reflects that Appellant's number of repetitive transactions during the analysis period were 41 times that of the four nearest comparable stores (convenience stores within three miles of the Appellant firm). There is no compelling rationale to explain why only Appellant's customers made repetitive visits spending large amounts in short timeframes. The record reflects, as noted below, that Appellant's store is a typical convenience store in all relevant respects and provides no plausible bases for customer's unusual attraction to the firm and unorthodox transaction patterns.

Regarding contention 2c above, the store visit documentation, as referenced above, reflected the presence of no bulk sales items, including vegetables priced at or above \$25.00; moreover, the photographs and other documentation reflect no flyers, posters or other signage advertising the availability of bulk food items. Appellant likewise provides no documentation. As noted, store visit documentation indicated that Appellant's eligible food inventory was primarily single-serving snack and accessory items, individual canned and packaged goods and other convenience items. Also as noted, the average SNAP purchase in a convenience store in the state of Alabama during the analysis period was \$7.54, reflecting that large purchases are not typically conducted in such stores. Additionally, similar to Attachment 1 and 2, Appellant's number of excessively

large transactions (Attachment 3) during the analysis period was from 31 to 285 times that of four nearby (within three miles) stores of the same store-type (convenience stores). Again, there is no compelling information in the record which explains why only Appellant's customers, and not those of similar nearby stores, would conduct these implausible transactions.

Moreover, the ROD Office points out that households conducting implausible transactions at the Appellant firm were shopping at super stores and supermarkets on or about the same day, calling into question what these customers were able to obtain at Appellant's typically-stocked convenience store that they could not obtain at the better-stocked and quite likely more competitively-priced stores (super stores, supermarkets and grocery stores are typically the most competitively-priced food stores in a given area). The following are a few examples of many existing in agency data:

7 USC 2018 (b)(7)(e)

The ROD Office notes that, at the time of the sanction decision, there were nine SNAP-authorized stores within a 2.5-mile radius of the Appellant firm, including one super store, two supermarkets and six other convenience stores. Agency data indicates that there are currently 40 SNAP-authorized firms within a five-mile radius, including three superstores, four supermarkets (one at just over two-thirds of a mile from the Appellant firm), three small grocery stores, 12 combination grocery/other stores and 16 other convenience stores. As noted, the data reflected in the examples above indicate many customers clearly have access to and routinely shop at better-stocked super stores and supermarkets in the area, calling into question what customers were able to obtain at Appellant's typically-stocked convenience store/gas station that they were not able to obtain at much better-stocked and more competitively-priced stores. This information further indicates that these customers were conducting implausible transactions only at or primarily at the Appellant 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.

The ROD Office notes that Appellant's SNAP redemptions during the analysis period were over two times that of the state store-type average during the same period. Additionally, the record contains a comparison of Appellant's redemption activity during the analysis period to four nearby SNAP-authorized convenience stores and found that Appellant's SNAP redemptions during the analysis period ranged from over one and one-half to 11 times that of the nearby comparable firms. The firm's average SNAP redemption was over two times that of the store-type average in the state of Alabama during the analysis period.

Furthermore, the ROD Office notes that the numbers of Appellant's SNAP transactions in most transaction bands during the analysis period were multiple times that of the store-type average in the state of Alabama: 7 USC 2018 (b)(7)(e). As noted, the firm is a typical to moderately-stocked convenience store in all relevant respects; there exists in the record no legitimate basis for the nature and level of the firm's transaction and redemption activity.

Lastly, once trafficking is established, there is no latitude to impose a lesser sanction, with the exception of a 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 May 11, 2016, 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), we are 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

March 7, 2017
DATE