

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

**Ndeze's International Market, LLC,**

**Appellant,**

**v.**

**Case Number: C0193460**

**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 Ndeze's International Market, LLC (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 December 6, 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 February through August 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 March 21, 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 March 31, 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 totaling 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 totaling 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 March 31, 2017, and in subsequent correspondence, it was argued that:

1. The firm sells bananas, baked beans and corn flour in bulk. Some items are costly and sometimes purchased by customers in a one-month supply. Appellant provides copies of

sales receipts and product purchase invoices in support thereof. Appellant drives to New York City to purchase organic foods not sold in many other stores in Central New York; this is why the amounts are high for one purchase. Customers can buy 20 to 30 pounds of flour which costs \$50 to \$60. Fresh goat meat from Australia costs \$172 to \$180 for a 50-pound case. Fresh fish costs from \$65 to \$70 for a 50-pound case; cases of fresh green bananas from Hawaii in 40 to 50-pound cases cost \$40 to \$45 and 50 pounds of red and yellow potatoes cost \$10 to \$15. The firm also sells 50-pound boxes of fresh vegetables. There are other bulk items sold as well. Some customers use SNAP benefits for small purchases and then come back later to buy in bulk. Appellant provides daily register reports in support thereof.

2. Appellant misunderstood how to use the SNAP card-reading equipment; Appellant understood that commercial credit/debit sales over 5 U.S.C. § 552 (b)(6) & (b)(7)(C) may be flagged as unusual. Appellant also believed the same would apply to SNAP card sales; thus when SNAP customers made purchases exceeding 5 U.S.C. § 552 (b)(6) & (b)(7)(C), Appellant separated the purchase into two or three transactions. These transactions were in short timeframes. Other customers come to shop more than once because they live in the neighborhood; for example, the father of the family may come to shop, the mother and others may come to shop at different times. Appellant provides customer statements in support thereof.
3. The Owner stated that he didn't get any SNAP training.
4. A disqualification will work a hardship upon the Appellant firm.

## **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 July 12, 2016, 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.
- One card reader.
- No evidence of wholesale business.
- No hot food sold.
- No dining area.
- No deli section.
- No meat/seafood bundles/specials or fruit/vegetable boxes.
- Approximately 500 square feet of retail space.
- No specials and few bulk/package items. Bulk foods in stock: approximately six 20 kilogram bags of flour, approximately eight bags of rice (appeared to be approximately 20-pound bags), one box of garlic, one box of tomatoes, two bags of potatoes and one box of dried frozen tilapia (which, however, were individually wrapped and priced).
- Comments: "Store somewhat disorganized and messy."

- Firm would have failed to qualify under Criterion A on the day of the store visit.
- Check-out counter approximately 2X3 feet. Photos: 4, 10 and 18.
- Sparsely-stocked and disorganized shelves and coolers noted throughout the store. Photos: 2, 3, 5, 6, 7, 11, 12, 15, 18, 19, 20, 24, 25, 26, 28, 29 and 32.
- Marginally-stocked small store. Photos: 24 and 26.

The documentation presents no indication of advertised specials, promotions and only small amounts of bulk or expensive food items. There were no shopping carts or baskets with which customers could transport large orders to the check-out area or to waiting transportation. This documentation reflects that the firm was a marginally-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 New York during the analysis period was \$13.25, reflecting that large purchases are not routinely made in such stores.

In regard to contention 1 above, the ROD Office notes that the store visit reflected presence of approximately six 20-kilogram bags of flour, approximately eight bags of rice (appeared to be approximately 20-pound bags), one box of garlic, one box of tomatoes, two bags of potatoes and one box of dried frozen tilapia (which, however, were individually wrapped and priced). There were approximately eight 2.2-pound bags of frozen cubed goat-meat, though this does not reasonably appear to be a bulk-sized food item. The shelves and freezers were sparsely-stocked. There were no placards or prices advertising cases or bulk quantities of food items for sale. The store visit reflected that the firm was deficient in the dairy category; thus the firm was not at all likely to be a store to which customers would often return to make large purchases.

The ROD Office further notes that some customers shopped at the store on the day of the store visit (July 12, 2016), although there was very little inventory in the store on that day. **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. The ROD Office notes that there was nothing at this store not available at other nearby better-stocked stores, including stores selling ethnic and Halal items, and more capable of providing a household's complete grocery needs.

The daily register reports provided by Appellant are not itemized and do not reveal what was provided in exchange for SNAP benefits; as such, the information does little to advance Appellant's case that the transactions detailed in the Charge Letter represent the sale of bulk foods or even eligible foods.

Photographs provided by Appellant are undated and as such are unreliable as evidence of inventory held at an earlier time; in addition, most of the items appearing in Appellant's photographs were not present in the store at the time of the store visit.

Appellant contends that large purchases were comprised of bulk sales ranging upward of **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** and weighing from 100 to 250 pounds; yet the firm maintained no shopping carts with which customers could transport such items to the check-out counter or to waiting transportation, or, for walk-in customers, to their places of residence. Even one 50-pound case of bulk foods would pose a challenge for most customers to carry by hand any significant distance.

5 U.S.C. § 552 (b)(6) & (b)(7)(C).

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The ROD Office notes that the firm also provided 21 written statements attesting that customers purchased food items from the Appellant firm on a daily basis and made large multiple purchases because they were told not to conduct transactions exceeding 5 U.S.C. § 552 (b)(6) & (b)(7)(C) using SNAP benefits. The ROD Office notes that 11 of the 21 could not be identified using agency SNAP data resources and thus could not be verified as supportive of Appellant's contentions. Two of the customers signing statements conducted no SNAP transactions at the Appellant firm during the analysis period and thus are likewise unsupportive of Appellant's contentions. Seven of the customers signing statements were identified and found to have conducted SNAP transactions at the Appellant firm. The ROD Office points out that all but one of these households shopped at nearby better-stocked firms, including better-stocked firms selling ethnic/Halal food products, as well as at super store and supermarkets on or about the same day as conducting implausible transactions at the Appellant firm, calling into question what these households could obtain at Appellant's marginally-stocked store that they could not obtain at the better-stocked stores.

The ROD Office notes that several of the invoices provided were dated outside the analysis period of March through August 2016; some were dated as early as April 2015 and some as late as March 2017. Moreover, several invoices did not list the buyer's name.

5 U.S.C. § 552 (b)(6) & (b)(7)(C). Redemptions during the analysis period were multiple times this amount. It is noted for the record as well that the above calculations do not include commercial credit/debit and/or cash sales, of which Appellant surely had some substantial amount; accordingly, the extent by which the invoices fail to justify SNAP redemptions is quite likely understated by this amount.

With regard to contention 3 above, as noted by the ROD Office, Appellant received the same Authorization Kit that is sent to all retail food stores when they are newly authorized in the SNAP, including various information booklets, signs and posters indicating the Dos and Don'ts, rules of the SNAP available in different languages, a copy of the regulations and a training video and/or an internet link to same. Moreover, periodic newsletters have been sent to all retail food stores participating in the SNAP with a reminder in almost every newsletter sent that accepting SNAP benefits in exchange for cash is a serious violation. Moreover, ownership of the Appellant firm signed an FNS-252, *SNAP Application for Stores*, on November 30, 2015, by means of which Appellant acknowledged and agreed to accept responsibility for preventing violations of the program by any and all employees of the firm. Accordingly, Appellant's statement that no training was received is not viewed as accurate or compelling.

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. 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.

### **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 30<sup>th</sup> 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

March 12, 2018