

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

New Bergen Gourmet Deli Corp,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0196757

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 New Bergen Gourmet Deli 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 February 22, 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 March 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 April 6, 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. **5 U.S.C. § 552 (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

- 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 and in its written request for review dated April 6, 2017 it was argued that:

1. Many of the transactions deemed to be made in short periods of time are done early in the month, when some customers prefer to do the majority of their shopping. Appellant provides photographs of baskets that the firm provides to customers who prefer to shop in bulk. Appellant also provides copies of customer affidavits and an affidavit from the store Owner.
2. The firm caters to a variety of customers and is located in a densely populated, high cost and high traffic area in Brooklyn, New York. The firm's prices reflect that. The store is a mini supermarket and carries a vast array of groceries, including large packages of coffee, oil, olive oil, nutritional drinks, juices and almond milk; these are high-priced items. A customer could buy a gallon of milk, a pound of turkey and cheese and a few half gallons of juices **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. Thus transactions that may seem excessively large are not in fact large. Additionally, the firm cannot limit how much customers spend with their SNAP benefits. Appellant provides copies of photos of store inventory as well as pricing for some of the items. Moreover, Appellant provides copies of product purchase receipts/invoices that it was able to locate in the short time allowed to reply to the Charge Letter. Appellant is currently seeking additional receipts that it will provide at a later date.
3. The allegedly suspicious transactions are a small fraction of the firm's SNAP transactions.
4. Appellant requests a civil money penalty in lieu of a disqualification; the firm qualifies pursuant to Section 278, as it has instilled precautions to prevent SNAP trafficking, it has placed signs indicating the rules of SNAP, it counsels employees about the SNAP and the prohibition against trafficking and neither the firm nor the Owner has benefited from trafficking as it is not permitted at the store. The firm has a program to educate its customers and employees regarding the rules of the SNAP; the firm has taken affirmative steps to ensure violations do not occur. The store has a large sign that advises customers that hot food is not eligible for purchase using SNAP benefits. There is also a sign at the register that advises against trafficking of SNAP benefits. Appellant strictly enforces SNAP rules and goes out of its way to educate customers. Appellant provides photographs of the referenced signs.
5. The firm has never had a problem with the SNAP.

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 November 17, 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.
- Hot food sold. The firm also operated as a prepared food carry-out and utilized commercial food preparation/kitchen equipment. A marquee over the food preparation area advertised prepared food entrees as well as meat and cheese by the pound. Photos: 2, 4, 5, 11, 12, 27, 30 and 34.
- The firm was a small convenience store with prepared food and deli products; the firm is a moderately-stocked convenience store. Photo: 5.
- No dining area.
- No meat/seafood bundles/specials or fruit/vegetable boxes.
- Approximately 600 square feet of store space.
- The firm utilized a night/drive-up window.
- Not a farmer's market, delivery route or specialty food store.
- The firm sold tobacco and tobacco-related products, alcohol, automotive supplies, health and beauty products, paper goods, cleaning supplies, cleaning products, housewares, gift items, party supplies, souvenirs, cell phone accessories and other non-food items.
- Ice crystals noted on frozen food, typically an indication of low turnover.
- Comments: "The cashier confirmed the store hours provided, the estimated square footage, that there is only one cash register/checkout area and that there is only one (1) point of sale device used for EBT transactions at this time. The cashier confirmed that this store does not have a storage area out of public view or otherwise, nor are there any meat packages. In the cooler there is pork bacon. This store sells salad items."
- The check-out counter was comprised of approximately 1 X 1 foot of open counter space surrounded by tobacco and tobacco-related products, candy, snack foods, over-the-counter medicines, health and beauty items and other non-food items.

The documentation presents little indication of advertised specials, promotions or bulk or expensive food items. The checkout area was set up in convenience store fashion, utilizing a small check-out area, approximately 1 X 1 foot of open

counter space surrounded by tobacco and tobacco-related products, candy, snack foods, over-the-counter medicines, health and beauty items 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 moderately-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, reflecting that large purchases are not routinely made in such stores.

In regard to contention 1 above, there were no shopping carts or baskets present in the store on the day of the store visit; Appellant's photographs are undated and not viewed as a reliable reflection of the store contents and inventory at an earlier time. As noted, likewise, there were no bulk or expensive items present or advertised at the time of the store visit. 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 moderately-stocked convenience store, when there are other larger food stores nearby which carry substantially larger varieties of food at lower costs, is implausible. The ROD Office noted the presence of several super stores and supermarkets in the area, three of which are approximately one-third of a mile from the Appellant store. 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).

There is no compelling rationale to explain why only or primarily Appellant's customers made repetitive visits spending large amounts in short timeframes. Both the store visit documentation and the firm's most recent application to participate in the SNAP indicate that the firm was correctly classified as a convenience store for the purposes of the SNAP. The record reflects, moreover, that the Appellant firm was a moderately-stocked convenience store in all relevant respects and provides no plausible bases for customers' unusual attraction to the firm and unorthodox transaction patterns; the ROD Office notes that the firm carried no fresh meat/poultry/fish and very little fresh produce other than approximately eight bunches of bananas and approximately one dozen apples.

Regarding contention 2 above, as noted, store visit documentation did not reflect the presence of bulk or expensive items offered. Photographs of cooking oil, coffee, baby food and baby formula, drinks, juice and milk were in standard-sized containers with no signage or flyers advertising bulk pricing. Infant formula is typically an expensive item; however, the Appellant firm had one can of infant formula in stock on the day of the store visit. Moreover, nearly all SNAP households with infants are eligible for WIC (Supplemental Nutrition Assistance Program for Women, Infants and Children) benefits which provide for the purchase

of formula and infant food; thus it is unlikely that SNAP customers would routinely spend SNAP benefits for products paid for by the WIC program.

5 U.S.C. § 552 (b)(6) & (b)(7)(C). The ROD Office points out that several of the transactions in both Attachment 1 and 2 were conducted outside the firm's stated hours of operation (7AM to 11 PM), which were confirmed during the store visit; 155 of the 472 transactions in Attachment 2 occurred outside of stated store hours.

The ROD Office carefully analyzed the product purchase receipts and invoices provided by Appellant and found that generally there were enough product purchases to account for SNAP sales, although such analysis is not dispositive of SNAP-benefit trafficking. The ROD Office notes that Appellant stated its markup at 100%, which appears much more typical of convenience store pricing than of super store, supermarket or grocery store pricing; convenience stores typically charge much higher prices than other stores, which is one reason why most SNAP customers do most of their shopping at better-stocked and more competitively-priced super stores, supermarkets and grocery stores. The ROD Office points out that, moreover, a sampling of Appellant's customer shopping habits found that Appellant's customers did in fact shop at these better-stocked super stores, supermarkets and grocery stores on or about the same day as conducting implausible transactions at Appellant's moderately- stocked and premium-priced convenience store, calling into question what these customers could obtain at the Appellant store that they could not obtain at the better-stocked and more competitively-priced stores.

With regard to contention 3 above, the ROD Office notes that the Charge Letter contained 498 transactions **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. Moreover, the statute and regulations specify no minimum number of trafficking transactions or any minimum value thereof in order to warrant permanent disqualification.

5 U.S.C. § 552 (b)(7)(E).

The ROD Office notes that, at the time of the sanction decision, there were 150 SNAP- authorized stores within a one-mile radius of the Appellant firm, including 12 super stores (three from one-third mile to just under one-half mile from the Appellant store), 14 supermarkets (three from just under one-third mile to just under one-half mile), five large grocery stores, 11 medium grocery stores (six from just over one-quarter mile to just under one-half mile), 31 small grocery stores (11 from just over one-tenth of a mile to one-half mile), 22 combination grocery/other stores (three from just under one-third mile to under one-half mile), two seafood specialty stores, two meat specialty stores, three farmers markets and 42 other convenience stores (25 from just over one-tenth of a mile to one-half mile). As noted, ROD analysis reflects that customers clearly have access to and routinely shop at better-stocked super stores, supermarkets and grocery stores in the immediate area on or about the same day as conducting implausible transactions at the Appellant firm, calling into question what customers were able to obtain at Appellant's moderately-stocked

convenience store 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.

5 U.S.C. § 552 (b)(6) & (b)(7)(C).

In regard to contention 4 above, 7 CFR §278.6(i) provides for the imposition of a civil money penalty in lieu of permanent disqualification for trafficking; Appellant was advised of the requirement regarding civil money penalties in lieu of permanent disqualification in the SNAP Office's June 21, 2016 Charge Letter, which further advised that documentation of eligibility for this sanction was to be provided within a given time limit. The SNAP regulations are specific at 7 CFR §278.6(b)(2)(iii) 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, the firm shall not be eligible for such a penalty." The regulations provide no discretion to extend the time within which documentation and evidence in support of a civil money penalty may be submitted. In its reply to the Charge Letter, Appellant requested consideration of said sanction but provided insufficient written documentation in support thereof. Thus the SNAP Office decision not to impose a civil money penalty is found to have been in accordance with 7 CFR §278.6(b)(1), §278.6(b)(2)(ii), §278.6(b)(2)(iii) and §278.6(i). The documentation and evidence provided by Appellant clearly fall short of the standard detailed at § 278.6(i), as noted in the following:

Criterion 1:

- Appellant provided insufficient written and dated documentation to reflect a commitment to ensure that the firm was operated in a manner consistent **5 U.S.C. § 552 (b)(7)(E)**:
 - Documentation of the development and/or operation of a policy to terminate violating employees (not provided).
 - Documentation of the development and/or operation of procedures/policy to implement corrective action in response to complaints of violations (not provided).
 - Documentation of the development and/or operation of procedures providing for internal review of employees' compliance (not provided).
 - Documentation must establish that the policy statements were provided to violating employees prior to the commission of the violation(s) (not provided).

Criterion 2:

- Appellant did not provide documentary evidence which establishes that the firm's compliance policy and program were in operation prior to the occurrence of the violations at issue.

Criterion 3:

- Appellant did not provide the following:
 - Documentation of dated training curricula and dates of training sessions prior to the violations.
 - Records of dates of employment of all firm personnel.
 - Contemporaneous documentation of participation of violating personnel in initial and follow-up training prior to violations.
- Appellant provided insufficient documentation to demonstrate that its training program meets or is otherwise equivalent to the following standards:
 - Training shall be designed to establish a level of competence that assures compliance with program requirements as included in part 278.
 - Written materials, which may include FNS publications and program regulations available to all authorized firms, are used in the training program.
 - Training materials shall clearly state that the following acts are prohibited and are in violation of the statute and regulations:
 - The exchange of SNAP benefits for cash.
 - The exchange of SNAP benefits for firearms, ammunition, explosives or controlled substances.
 - Training for all who work in the store within one month of implementing the compliance policy documented in Criterion 1.
 - Any subsequently hired employees are trained within one month of hiring and trained periodically thereafter.

Criterion 4:

- Appellant provided insufficient evidence in support of the following:
 - Ownership/Management was not aware of, did not approve, did not benefit from or was not involved in trafficking. Appellant has provided no records or documentation demonstrating that SNAP benefits used in the transactions noted in the Charge Letter were in fact not deposited into its bank account. Conversely, as noted above, transaction data and other evidence confirms that the violative transactions did in fact result in monetary deposits into the firm's bank account in the exact amounts noted in the Charge Letter. It is noted for the record that the regulations allow an exception to the Criterion 4 language if it is ownership/management's first involvement in SNAP-benefit trafficking.

5 U.S.C. § 552 (b)(7)(E). The standard of substantial evidence employed above is difficult to meet, indeed impossible if such policy and program are not implemented and documented prior to the violations, but such is the standard required by the regulations, as noted above, and to which Appellant is held during the course of this review.

Additionally, neither the size of an organization nor the number of its personnel is a consideration in determining the eligibility of a firm for a civil money penalty in lieu of permanent disqualification for trafficking. Moreover, while significant effort may be required to develop and maintain a compliance policy and program, if such fails to meet the requirements, that level of effort, even if substantial, does not mitigate the insufficiency. Lastly, the criteria for eligibility for a civil money penalty in lieu of permanent disqualification are clearly stated as *minimum* standards below which eligibility is precluded. The regulations at 7 C.F.R § 278.6(i) are purposely prescriptive and require an unequivocal and well-documented commitment to compliance and training. Accordingly, the SNAP Office correctly determined that Appellant did not qualify for a civil money penalty in lieu of a permanent disqualification.

Regarding contention 5 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. **5 U.S.C. § 552 (b)(7)(E)**. 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."

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

November 20, 2017