

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

**Riverside Grocery,**

**Appellant,**

**v.**

**Retailer Operations Division,**

**Respondent.**

**Case Number: C0197993**

**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 Riverside Grocery (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 March 27, 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 September 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 April 11, 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 19, 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 19, 2017, it was argued that:

1. Appellant noted that the transactions 5 U.S.C. § 552 (b)(7)(E) were not possible; only

transactions 5 U.S.C. § 552 (b)(6) & (b)(7)(C) could be explained by purchases of ribeye steaks. While there is sufficient evidence that fraud was committed by one of the households noted in the Charge Letter, it was not at the Owner's request and ownership did not benefit from it. Appellant believes the violations were committed by one employee that is no longer with the firm. The store should not be barred from the program for something that Ownership had no knowledge of.

2. Appellant has a written procedure for administering the SNAP. Appellant provides copies of the document it uses to train cashiers. Appellant has used this document since its SNAP authorization.

## **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 December 9, 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:

- Optical scanners used.
- No shopping carts or baskets.
- Two cash registers.
- Two card readers.
- Hot food sold.
- Dining area present.
- Deli section present.
- No meat/seafood bundles/specials or fruit/vegetable boxes.
- Approximately 3000 square feet of retail space.
- The firm sold tobacco and tobacco-related products, alcohol, clothing and other non-food items.
- The firm also operated as a prepared food/restaurant/carry-out. Several tables and chairs for dine-in use. Steam table with hot food utilized. Photos: 1, 7, 12 and 28.
- The firm also operated as a gas station and liquor store. Photos: 18, 20 and 28.
- Many sparsely stocked shelves/coolers and deli case. Food items were stocked in small quantities. Photos: 2, 10, 11, 13, 14, 18, 21, 22, 23, 24 and 31.
- Typical convenience store check-out area; approximately 2 X 2 feet of counter space surrounded by snack foods, lottery tickets and tobacco-related items. Photo: 15.
- The firm had a small fresh meat cooler, which is uncharacteristic of convenience stores. However, there were no bulk or expensive items visible or advertised other than two hams and what appeared to be one or two packages of prime rib. Photo: 27.

The documentation presents no 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 2 by 2 feet of useable space) but was otherwise surrounded by snack foods, lottery tickets, tobacco-related 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 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 Arkansas during the analysis period was \$7.20, reflecting that large purchases are not routinely made in such stores.

Regarding contention 1 above, as noted, the store visit did not reflect the presence of bulk quantities of meat items for sale: there was only a small inventory of fresh meat items similar to what grocery stores carry in much larger quantities. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Additionally, no rationale is provided to explain the repetitive nature of the transactions contained in Attachment 1.

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 very large amounts (5 U.S.C. § 552 (b)(6) & (b)(7)(C)). Customers spending such substantial amounts of SNAP allotments in a marginally-stocked convenience store, when there are other food stores in the area carrying 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. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). 5 U.S.C. § 552 (b)(7)(E). 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 Appellant's customers made repetitive visits spending large amounts in short timeframes. The record reflects, as noted above, that the Appellant firm was a marginally-stocked convenience grocery store in all relevant respects and provides no plausible bases the unorthodox transaction patterns.

Moreover, Appellant acknowledges that transactions 5 U.S.C. § 552 (b)(6) & (b)(7)(C) were due to fraud and notes that these were committed by an employee no longer with the firm. Appellant has asserted that the Owner of the firm had no knowledge of violations of the SNAP regulations and implies that the Owner did not personally commit violations of the SNAP Regulations and notes that an employee committed the violations. This contention cannot be accepted as a valid basis for dismissing any of the charges or for mitigating the impact of the violations upon which they are based. Appellant is liable for all violative transactions handled by full or part-time, paid or unpaid store personnel, whether or not ownership is aware of such transactions. Regardless of who the ownership of a store may utilize to handle store business, ownership is accountable for the proper handling of SNAP benefit transactions. To allow store ownership to disclaim accountability for the acts of persons to whom it delegates responsibility to act on behalf of the firm would render virtually meaningless the enforcement provisions of the Food & Nutrition Act of 2008 and the enforcement efforts of the USDA. Additionally, ownership of the Appellant firm signed an FNS-252, SNAP Application for Stores, on July 14, 2010, by means of which Appellant acknowledged and agreed to accept responsibility to prevent violations of the program by any and all employees of the firm. Moreover, case law further confirms that owners may indeed be held accountable for the actions of employees: see *Woodard v. USA* (6th Cir. 1987), upholding a sanction for trafficking regardless of the owner's lack of knowledge of violations,

and *Freedman v. United States Dept. of Agriculture* (3rd Cir. 1991), noting that permanent disqualification of even an "innocent owner" is consistent with the legislative history of the statute and regulations. Furthermore, culpability need not be imputed to an owner through the actions of an employee if the owner was involved in the violative activity, whether accidental or otherwise. Again, to allow store ownership to disclaim accountability for the acts of persons to whom the responsibility to handle store business has been assigned would render inert the enforcement provisions of the Food and Nutrition Act of 2008 and corresponding provisions of the regulations.

5 U.S.C. § 552 (b)(6) & (b)(7)(C).

The SNAP Office notes that, at the time of the sanction decision, there were nine SNAP-authorized stores within a three-mile radius of the Appellant firm, including one super store, one combination grocery/other store and seven other convenience stores. The ROD Office conducted an analysis of the shopping patterns of a sample of Appellant's customers and determined that they clearly had access to and routinely shopped at better-stocked super stores and/or supermarkets on or about the same day as conducting implausible transactions at the Appellant firm, calling into question what these customers were able to obtain at Appellant's marginally-stocked convenience store/gas station that they were not able to obtain at much better-stocked and more competitively-priced stores. The ROD Office presents information 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.

With regard to contention 2 above, Appellant notes that the firm's training document has been used since beginning participation in the SNAP; however, the earliest date on the training documents it provided is October 6, 2015, although the firm was authorized to participate in the SNAP in 2010.

To the extent Appellant may request consideration for a trafficking civil money penalty in lieu of a permanent disqualification, 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 March 27, 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 did not request consideration of said sanction and provided no information/evidence 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). To the extent Appellant includes an implied request for consideration of a trafficking civil money penalty in its April 19, 2017 request for review, the

request was dated 22 days following the firm's receipt of the Charge Letter and was thus beyond the 10-day timeframe. Though the request cannot therefore be considered, 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 with SNAP regulations **5 U.S.C. § 552 (b)(7)(E)**:
  - 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).

**Criterion 3:**

- Appellant did not provide the following:
  - 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 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, as noted, the SNAP Office correctly determined that Appellant did not qualify for a civil money penalty in lieu of a permanent disqualification.

## **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

November 29, 2017