

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

Sous Liquor and Market,

Appellant,

v.

Case Number: C0204084

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 Sous Liquor and Market (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 November 30, 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 May through October 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). Appellant did not reply to the ROD Office's Charge Letter. By a letter dated December 18, 2017, Appellant was informed that it was permanently disqualified from participation as a retail store in the SNAP, effective upon Appellant's receipt of

said letter; the letter further instructed Appellant that it may request an administrative review of the decision. On December 27, 2017, Appellant requested an administrative review of the ROD 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 written request for review dated December 27, 2017 it was argued that:

Appellant provided an itemized printout of SNAP sales from May 11 through October 7, 2017.

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, 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 800 square feet of store space.
- No optical scanners.
- No shopping carts or baskets.
- Prices in standard retail variations of \$.x9.
- One checkout counter, one cash register and one card reader.
- No food stored outside public view.
- No food stored offsite.
- No telephone, online or other orders taken.
- No delivery offered.
- No transaction rounding.
- Most expensive SNAP-eligible items priced at \$5.00 or more:
 - Soda - \$7.99 per 12-pack.
 - Coffee - \$6.99 per 11-ounces.
- All above questions were answered in collaboration with store personnel.
- The firm also sold tobacco, alcohol, lottery tickets, mobile phones and/or

cards/accessories, automotive products, laundry detergent, over-the-counter medicines, pet food, health and beauty products, clothing, paper goods and other non-food items.

- No kitchen/food preparation area.
- Microwave oven for customer use.
- No deli section.
- No meat/seafood bundles/specials or fruit/vegetable boxes.
- Check-out counter approximately 10" X 1.5' of useable space, surrounded by snack food items, candy, tobacco and non-food items. Photos: 1, 4, 10, 12, 24, 25, 31, 32 and 33.
- The firm appeared to operate primarily as a liquor store. Photos: 3, 6, 9, 13, 14, 16, 18, 19, 21, 22, 23, 24, 25, 26, 33 and 34.
- Marginal convenience store inventory, inexpensive prepackaged snack and convenience items, such as ice cream, chips, soda and candy. Photos: 3, 7, 11, 20, 21, 24, 27, 28, 29, 33 and 35.
- The firm carried no food inventory that would not be available at any grocery store, supermarket, super store or other convenience store.

The documentation presents no indication of advertised specials, promotions, bulk or expensive food items. As noted above, photographs reflect that several visible prices of food and other items were in standard retail variations of \$.x9. The checkout area was set up in convenience store fashion, utilizing a small check-out area (approximately 10" by 1.5 feet of useable space) but was otherwise surrounded by snack food items, candy, tobacco 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 Contra Costa County, California during the analysis period was \$7.30, reflecting that large purchases are not routinely made in such stores.

In regard to Appellant's documentation, the itemized SNAP sales document included only purported SNAP purchases and only those listed on the ROD Office's Charge Letter attachments. The information is listed in the same order as in the Charge Letter and includes the Charge Letter transaction numbers listed in the right hand margin. Thus the document was clearly created after the firm's receipt of the Charge Letter.

The document reflects the purported sale of several cases of Red Bull. However, no cases of Red Bull were visible on the day of the store visit, despite Appellant having claimed that more than 25 cases were sold during the month of the store visit (July 2017) and over 110 cases during the analysis period. No product purchase receipts/invoices were provided to support these assertions.

5 U.S.C. § 552 (b)(6) & (b)(7)(C).

There are 131 transactions in Attachment 2; Appellant provides documentation which purport to explain the first 30, plus the transactions Appellant listed for Attachment 1 that also appear on Attachment 2, which leaves 78 that are not purported to be documented.

Some of the price totals used in the document are not divisible by the number of items purported

to have been sold, rendering them mathematically impossible and indicate that the figures were contrived to match Charge Letter amounts. Several items listed, such as plastic bags, mouthwash, over-the-counter medicines and what appears to be tobacco, are not eligible food items. There are numerous pricing inconsistencies between the listing and the pricing on the day of the store visit. In sum, the document exhibits many characteristics of one fabricated to appear to explain the transactions as legitimate (although, as noted, some of the items purported to be sold were not SNAP-eligible).

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 convenience 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 17 times that of two nearby SNAP-authorized stores (convenience stores from within a one-mile radius 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 marginally-stocked small 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, at the time of the sanction decision, there were 12 SNAP-authorized stores within a one-mile radius of the Appellant firm, including two supermarkets, two super stores, one medium grocery store, one combination grocery/other store and six other convenience stores. Household analysis conducted by the ROD Office indicates that customers clearly had access to and routinely shopped at better-stocked super stores and supermarkets on or about the same day as conducting implausible transactions at Appellant's marginally-stocked convenience store, calling into question what customers were able to obtain at the Appellant firm that they were not able to obtain at much better-stocked and more competitively-priced stores. Appellant's number of excessively-large transactions was from 12 to 65 times that of the two nearby comparable convenience stores referenced in the foregoing. Thus the information indicates that these customers were conducting implausible transactions only at or primarily at the Appellant firm. The firm's average SNAP redemption was nearly four times that of the store-type average in the Contra Costa County during the analysis period. 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).

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 ROD Office's Charge Letter dated November 30, 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

July 30, 2018