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

Urena Market,

Appellant,

v.

Case Number: C0203415

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 Urena 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 2, 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 April through September 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). The record reflects that the SNAP Office received and duly considered Appellant's reply to the Charge Letter. By a letter dated November 16, 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 November 21, 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).
- In a series of SNAP transactions totaling 5 U.S.C. § 552 (b)(6) & (b)(7)(C), the majority or all of individual recipient benefits were exhausted in unusually short periods of time (Attachment 2).
- A series of excessively large SNAP transactions totaling 5 U.S.C. § 552 (b)(6) & (b)(7)(C) were debited from recipient accounts (Attachment 3).

APPELLANT'S CONTENTIONS

In Appellant's reply to the Charge Letter, and in its written request for review dated November 21, 2017, it was argued that:

1. With regard to Attachments 1 and 2 to the Charge Letter, the amount and number of SNAP transactions conducted by a customer is not controlled by the store owner. If Appellant denied SNAP transactions it would be discriminatory.
2. With regard to Attachment 3, the store is conveniently located for customers to buy their groceries. Appellant provides a list of customers that shop at the store using SNAP benefits.
3. The Appellant firm is a very small business and the owner is the only person handling transactions.
4. Appellant has been in business a long time and has never done anything illegal.
5. Appellant suspects that someone is misinforming the agency against the firm.
6. Appellant can prove that it did nothing illegal and can provide customer affidavits explaining the types of purchases commonly made.
7. Appellant requests that the sanction be reversed so the firm can continue to accept SNAP

benefits.

8. The disqualification is working a hardship on 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 October 1, 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, among other observations, the following:

- 3 shopping baskets, no shopping carts.
- No phone, online or other orders taken.
- Most expensive items:
    - Rice - $18.99 for a 50-pound bag.
    - Nico - $26.99 for 4.85 pounds.
    - Oil - $16.99 for 2.5 gallons.
    - Coffee - $11.99
- Food preparation/kitchen area.
- Prepared, made-to-order sandwiches sold.
- No meat/seafood bundles/specials or fruit/vegetable boxes.
- Some items unmarked and some prices faded. Storage area did not contain food items.
- The store also sold tobacco products, paper goods, cleaning products, housewares, over-the-counter medicines, health and beauty products and other non-food items.

The documentation presents no indication of advertised specials or promotions. The checkout area was set up in convenience store fashion, utilizing a small check-out area (approximately 2 by 3 feet of useable space) but was otherwise surrounded by snack items, candy, over the counter medicines and other non-food items. There were no shopping carts 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 small grocery store in all relevant respects. It is worth noting that the average SNAP purchase in a small grocery store in the Essex County during the analysis period was $11.81, reflecting that large purchases are not routinely made in such stores.

In regard to contention 1 above, the ROD Office notes that the Charge Letter transactions are implausible not because they exceed any limits for use but because they are inconsistent with normal SNAP recipient shopping patterns. 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 typically-stocked small grocery 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 included 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 over three times that of two nearby SNAP-authorized stores (small grocery stores at less than one-half mile from 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 typically-stocked small grocery store in all relevant respects and provides no plausible bases for customers' unusual attraction to the firm and unorthodox transaction patterns.

Attachment 2 contains instances in which SNAP customers depleted SNAP account balances to within pennies of a zero balance and/or depleted balances during the first week following benefit issuance. While it is highly implausible that customers would desire, or be able, to regularly conduct large transactions which deplete balances to within pennies of a zero balance, it is yet more implausible to suppose that they could do so and also arrive at identical, or nearly identical, totals. A particular combination of groceries priced in particular ways is required in order to arrive at preplanned totals, is difficult to do without a calculator and, as such, is very uncommon. The likelihood that these transactions were the result of the legitimate sale of eligible foods only is extremely small. Additionally, a government report on SNAP shopping patterns[1] indicates that after the first day of benefit issuance, on average, 79 percent of a household's allotment remains unspent. After seven days 41 percent of benefits remain unspent. Typically two weeks elapse prior to the average household's depletion of 79 percent of its SNAP benefits while three weeks elapse prior to depleting 90 percent. Depleting one's entire allotment in one or two days during the first week following benefit issuance, in a single large transaction or in a series of high cumulative transactions in a short period of time, especially in a typically-stocked small store, leaving no benefits for the remainder of the month, is inconsistent with the normal shopping behavior of SNAP households. Rather, large single transactions, or multiple and high cumulative transactions which diminish balances over a short period of time soon after benefit issuance, are indicative of SNAP benefit trafficking and attempts to divert attention to signs of same.

Regarding contention 2 above, the ROD Office notes that there were 65 other SNAP-authorized firms within a one-mile radius of the Appellant store, including two super stores, two large grocery stores (one of which was located directly across the street from the Appellant firm, just over 100 feet away), 13 medium grocery stores (three at less than one-half mile), 20 small grocery stores (nine at under one-half mile), two farmers markets, one bakery/specialty store, seven combination grocery/other stores and 16 convenience stores (seven at less than one-half mile). The ROD Office further notes that several customers conducting implausible transactions at the subject store also shopped at much better-stocked and very likely more competitively-priced super stores and supermarkets on or about the same day, calling into question what the households were able to obtain at the subject store that they could not obtain at the better-stocked

[1] Benefit Redemption Patterns in the Supplemental Nutrition Assistance Program, Final Report. Prepared by Mathematica Policy Research for the Food and Nutrition Service, USDA, February 2011.

SMs and SSs. There is little reason for SNAP households to conduct repetitive, balance-depleting and/or large transactions at a typically-stocked small grocery store while shopping at better-stocked firms during or at about this same period. While SNAP customers are permitted to conduct repetitive, balance-depleting and/or large purchases, this does not routinely occur at typically-stocked small grocery stores. The 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 SNAP Office notes that Appellant's SNAP redemptions during the analysis period were over three times that of the state convenience store average, and over 1.7 times that of the state small grocery store average. Additionally, the record contains a comparison of Appellant's redemption activity during the analysis period to two nearby SNAP-authorized small grocery stores and found that Appellant's SNAP redemptions during the analysis period were over 1.5 times that of the nearby comparable firms. The Appellant firm conducted approximately 3, 3.8 to 8, and 3 times the number of repetitive, balance-depleting and excessively large transactions, respectively, as that of the two nearby comparable stores.

Contention 3 above provides no explanation for the transactions detailed in the Charge Letter and does not disprove the ROD Office's determination that SNAP-benefit trafficking more likely produced the transactions.

With regard to contention 4 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. There is no provision in the Act, regulations or agency policy that reverses or reduces a sanction based upon a lack of prior and/or subsequent violations or assurances of future compliance by a firm and its owners, managers and/or employees; likewise, sanctions for prior violations are not prerequisite to sanctions due to later violations. 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."

In regard to contention 5 above, Appellant provides no evidence of same, nor does the record otherwise contain such evidence.

Regarding contention 6 above, Appellant provides a list of customers that are purported to shop at the firm. Accepted at face value, this list does not constitute evidence that the transactions contained in the Charge Letter were not produced by SNAP-benefit trafficking; the list conveys no information regarding what the individuals listed may have obtained in exchange for SNAP benefits at the Appellant firm.

With regard to contention 7 above, the Food & Nutrition Act of 2008, at §2021, does not allow for discretion in determining sanctions for trafficking and is quite specific in its requirement that "disqualification … shall be permanent upon ... the first occasion of a disqualification based on ... trafficking ... by a retail food store." In keeping with this legislative mandate, 7 CFR §278.6(e)(1)(i) of the regulations states that FNS *shall* (emphasis added) disqualify a firm permanently if personnel of the firm have trafficked. The regulations at 7 CFR § 278.6(e)(7) state that FNS shall send a firm a warning letter if violations are too limited to warrant a disqualification. Thus the regulations provide for a continuum of sanctions, beginning with permanent disqualification for trafficking, term disqualifications from several years to six months for lesser violations and warning letters for firms committing violations less severe than that provided for by the standard for imposing six-month disqualifications. Imposing no sanction in the present case, would be an incorrect determination and in fact at the opposite extreme of the sanctioning continuum: in the present case, the violations at issue consist of SNAP benefit trafficking; as such, the SNAP Office imposed the sanction required by the statute, regulations and agency policy.

In regard to contention 8 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. Appellant was advised of this provision in the SNAP Office's Charge Letter, which also advised that documentation of eligibility for that alternative sanction was to have been provided within a specific time limit. 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 (postmarked 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 was appropriate pursuant to 7 CFR §278.6(b)(1), §278.6(b)(2)(ii), §278.6(b)(2)(iii) and §278.6(i). It is further noted that said provisions specify that no extensions to this time period, in which a firm may provide evidence in support of its request for a civil money penalty, may be granted.

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 July 9, 2018
Administrative Review Officer