

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

Ares Market LLC,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0227816

FINAL AGENCY DECISION

It is the decision of the U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS) that there is sufficient evidence to support a finding that the permanent disqualification of Ares Market LLC (Appellant) from participation as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP), as initially imposed by the Retailer Operations Division, was appropriate.

ISSUE

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with 7 CFR § 278.6(a), (c) and (e)(1) in its administration of the SNAP, when it assessed a permanent disqualification against Appellant.

AUTHORITY

7 USC § 2021 and the implementing regulations at 7 CFR § 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 April 29, 2020, the Retailer Operations Division charged 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 2019 through February 2020. The letter noted that the penalty for trafficking is permanent disqualification as provided by 7 CFR § 278.6(e)(1). The letter also noted that Appellant could request a trafficking civil money penalty (CMP) in lieu of a permanent disqualification within ten days of receipt under the conditions specified in 7 CFR § 278.6(i).

In response to the charge letter, on May 5, 2020, Appellant, through counsel, requested documents under the Freedom of Information Act (FOIA). The FOIA Office responded to the request on December 8, 2021. On December 8, 2021, the Retailer Operations Division provided counsel with ten days to provide its final response to the letter of charges. Appellant responded on December 20, 2021. Appellant, through counsel, denied trafficking and explained that the transactions were normal based on the unique circumstances of the store.

After considering the evidence and the retailer's reply, the Retailer Operations Division issued a determination letter dated January 6, 2022. The determination letter informed Appellant that it was permanently disqualified from the SNAP in accordance with 7 CFR § 278.6(c) and § 278.6(e)(1). The determination letter also stated that Appellant was not eligible for a trafficking CMP because Appellant failed to submit sufficient evidence to demonstrate that the firm had established and implemented an effective compliance policy and program to prevent violations of the SNAP.

In a letter dated January 6, 2022, Appellant, through counsel, appealed the Retailer Operations Division's determination and requested an administrative review. The appeal was granted.

STANDARD OF REVIEW

In appeals of adverse actions, the Appellant bears the burden of proving by a preponderance of the evidence, that the administrative action should be reversed. That means the 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 and Nutrition Act of 2008, as amended, 7 USC § 2021 and § 278 of Title 7 of the Code of Federal Regulations (CFR). Part 278.6(a) and (e)(1) establish the authority upon which a permanent disqualification may be imposed against a retail food store or wholesale food concern in the event that personnel of the firm have engaged in trafficking SNAP benefits.

7 USC § 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 § 271.2 defines trafficking, in part, as:

The buying, selling, stealing, or otherwise effecting an exchange of SNAP benefits issued and accessed via Electronic Benefit Transfer (EBT) cards, card numbers and personal

identification 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(a) states:

FNS may disqualify any authorized retail food store . . . if the firm fails to comply with the Food and 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(b)(2)(ii) states, inter alia:

Firms that request consideration of a civil money penalty in lieu of a permanent disqualification for trafficking shall have the opportunity to submit to FNS information and evidence . . . that establishes the firm’s eligibility for a civil money penalty in lieu of a permanent disqualification in accordance with the criteria included in § 278.6(i). This information and evidence shall be submitted within 10 days, as specified in § 278.6(b)(1).

7 CFR § 278.6(e)(1) reads, in part:

FNS shall disqualify a firm permanently if personnel of the firm have trafficked as defined in § 271.2.

7 CFR § 278.6(i) states, inter alia:

FNS may impose a civil money penalty in lieu of a permanent disqualification for trafficking . . . 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 of the Program.

SUMMARY OF THE CHARGES

Appellant was charged and determined to be trafficking based on an analysis of EBT transaction data from September 2019 through February 2020. This involved the following SNAP transaction patterns which are indicative of trafficking:

- Multiple transactions were made from the accounts of individual SNAP households within a set time period.
- The store conducted EBT transactions that were large based on the observed store characteristic and recorded food stock.

The issue in this review is whether, through a preponderance of evidence, it is more likely true than not true that the questionable transactions were the result of trafficking.

APPELLANT'S CONTENTIONS

In its January 6, 2022, administrative review request, and subsequent correspondence submitted on February 2, 2022, Appellant, through counsel, provided the following summarized contentions, in relevant part:

- Appellant sells a variety and quantity of staple food items to the surrounding community providing Halal meats and ethnic spices that are imported from Africa, Asia and the Middle East along with additional food items.
- Appellant has never had a compliance problem with SNAP in the past and has not committed any violations in connection with the transactions set out in the Charge Letter.
- There only five other authorized retailers in the area, despite the presence of a residential area meaning less competition and higher dollar volume.
- The store visit photos identify large, bulk items which are expensive, including several kinds of bags, 20 lb. bags of different rice, and stocked shelves of ethnic food.
- Without being able to identify the stores products the store visit report is inaccurate, incomplete, and worthless.
- Appellant provided bank statements, sales tax, tax return and profit & loss statement from the review period that substantiate its inventory and demonstrate that there were adequate eligible food items to account for the transactions during the review period.
- A confirmation bias exists.
- FNS does not know what the correlation coefficient is between any of the ALERT Scans and trafficking in SNAP benefits.
- Appellant's inventory was more than adequate to account for the transactions.
- Co-shopping is on the rise, where both adults are responsible for the groceries. This is manifested in the SNAP participants that shop at Appellant in the following ways: different household members will shop separately (using the same account) to pick up different needs, and personal needs, on top of the household's list; and different household participants will travel to Appellant together to make purchases, and then separate their purchases to track what amount each party has used from their benefits account.
- Households shop multiple times a day because of convenience often sending their children on separate shopping trips to pick up items from time to time.
- Households make purchases for friends, for large gatherings, or to satisfy needs.
- Telephone orders also result in multiple orders.
- Appellant's inventory is sufficient to account for the transactions as it consists of expensive items, like goat meat; meat packages, 20 pounds of flour, ten pound bags of rice; shortening and oils, along with other foods items.
- There is only one other halal market on the same side of the Willamette River and it is five miles there and back.
- Transportation inconsistency is another reason why Appellant's transactions appear the way they do if the transportation to another store it is not dependable.
- To satiate boredom, unemployed household member swill regularly shops to find something to do.
- The inventory offered by the store is of such a variety that it is reasonable to assume a household could satisfy all their needs on a single shopping trip.

- The transactions listed in Attachment 1 consisted of innocent transaction explained by either (1) the participant forgetting an item in his/her prior transaction; (2) co-shopping; (3) the participant making a purchase, returning home, and then returning to the Store to make a second purchase; or (4) a reflection of the normal shopping habits of SNAP participants.
- Appellant sells expensive items that they sell very frequently, and there are specialty items not available at other local retailers because of this Appellant is going to have higher sales.
- Appellant was investigated by the USDA's own investigators immediately before the investigatory period and on both occasions refused to sell minor ineligibles.
- Appellant is miscategorized as a small grocer and is more properly identified as a specialty grocer.
- Appellant's expensive items are more than enough to account for the large purchases.
- The transactions are not trafficking and are supported by the substantial inventory and are reasonably explained by co-shopping, Appellant's pricing structure, and the reliance on Appellant as a primary grocery.

In support of its contentions, counsel submitted the following documents:

- Five customer affidavits.
- Twenty-three pages of bank statements.
- Profit Loss Statement
- Thirteen pages of Sales Tax and Tax Return.
- *Know your Core, Protect Your Core*, Convenience Store News for the Single Store Owner April 2016.
- U.S. Grocery Shopping Trends, 2016 by Food Marketing Institute.
- ALERT Correlations Coefficient Calculation.
- Profile of SNAP Households in Oregon.
- *Benefit Redemption Patterns in the Supplemental Nutrition Assistance Program in Fiscal Year 2017 Final Report* by Insight Policy Research issued in September 2020.
- Article from Special Science & Medicine by Jerry Shannon: *What does SNAP benefits usage tell us about food access in low-income neighborhoods?*
- Preventative Medicine Reports article by Alison Gustafson: *Shopping pattern and food purchase differences among Supplemental Nutrition Assistance Program (SNAP) households and non-supplemental Nutrition Assistance Program households in the United States* by Alison Gustafson, PhD, MPH, RD.
- *Food Typically Purchased by Supplemental Nutrition Assistance Program Households* by USDA, Food and nutrition Service, Office of Policy Support November 2016.

The preceding may represent only a brief summary of the Appellant's contentions presented in this matter. However, in reaching a decision, full attention and consideration has been given to all contentions presented, including any not specifically recapitulated or specifically referenced.

ANALYSIS AND FINDINGS

Store Visit

FNS authorized Ares Market LLC as a small grocery on May 29, 2018. The case file indicates that in reaching a disqualification determination, the Retailer Operations Division considered information obtained during a February 24, 2020, store visit conducted by a FNS contractor to observe the nature and scope of the firm's operation, stock, and facilities. This information was then used to ascertain if there were justifiable explanations for the firm's irregular SNAP transactions. The store visit report and photographs documented the following store size, description, and characteristics:

- Appellant is approximately 850 square feet specializing in middle eastern ethnic food items.
- There were three shopping baskets and no shopping carts for customer use.
- There was one cash register and one point of sale (POS) device.
- There was no optical scanner.
- Dairy included milk, cheese, ghee, infant formula, and coconut milk.
- There was no fresh produce.
- There was fresh and frozen Halal meat.
- Other staple foods available for purchase were juice, eggs, bread, cereal, pasta, and a limited selection of canned goods.
- Frozen food included meat, poultry, fish, vegetables, and pita bread.
- Much of the remaining stock consisted of accessory foods such as candy and carbonated and uncarbonated drinks.
- Ineligible items included paper goods, cleaning products, houseware items, and health and beauty aids.

The highest priced items noted included ghee - \$17.99; rice - \$14.99; olive oil - \$12.99; and formula - \$12.99. Given the available inventory, there was very little sign that the firm would be likely to have SNAP redemption patterns that differed significantly from those of similar-sized competitors, especially competitors that sell similar or identical food items.

Charge Letter Attachment

Each attachment furnished with the charge letter represents the questionable and unusual patterns of SNAP transactions indicative of trafficking which were conducted at the Appellant firm during the review period. As there is more than one pattern of irregular transactions, the case of trafficking becomes more convincing.

Charge Letter Attachment 1. Multiple transactions were made from individual benefit accounts in a set timeframe. This attachment documents 15 sets of transactions conducted by 12 households that meet the parameters of this scan. On December 7, 2019, one household conducted two larger than average SNAP transactions within a short period that total \$332.83 in SNAP benefits (transactions #9-#10). On November 1, and November 2, 2019, another household

transacted \$25.04 at Appellant (transactions #25-#26). Multiple transactions conducted by the same household account within a short period of time is a method which violating stores use to avoid single high dollar transactions that cannot be supported by a retailer's inventory and structure.

Although it is not uncommon for customers to have more than one transaction per day, it is not common that such multiple transactions are for large dollar amounts. The SNAP transactions noted in the charge letter are questionable not because they exceed any limits for use, but rather because they display characteristics of use inconsistent with the nature and extent of Appellant's stock and facilities and are therefore indicative of trafficking. The photographs from the store visit offer no explanation as to why SNAP customers would routinely shop at Appellant multiple times during a short period or purchase such a large volume of items, there being no great variety of products, price advantage, profusion of large packages, or significant bulk items for sale. The second and third transactions in each set are too large to consist of forgotten items.

Counsel explains that co-shopping results in a higher number of transactions that occur in a shorter period than expected. Co-shopping may occur, but it is unlikely the reason that Appellant has more frequent large transactions by the same household than other similar stores during the review period. This would manifest itself in these households conducting similar transaction patterns at other retailers. Yet, the Retailer Operations Division found that the comparator stores only conducted half as many similar transactions sets while conducting twice as many SNAP transactions during the review period. This begs the question why households would be more likely to co-shop at Appellant than at other similar nearby stores.

Appellant has not offered sufficient evidence to show that the transactions listed in Attachment 1 were legitimate purchases of eligible food.

Charge Letter Attachment 2: Excessively large purchase transactions were made from recipient accounts. This attachment lists 239 SNAP transactions as large as \$494.85 and that total \$40,279.97. There is no evidence that the firm would be likely to have SNAP redemption patterns that differ considerably from similar-sized competitors.

The Retailer Operation Division noted the firm had six transactions that totaled exactly \$199.98 and four transactions that totaled exactly \$149.98. It is not uncommon for dollar values to repeat over the course of a six-month period. However, when certain dollar values are unusually repetitive without a reasonable explanation, they can be a likely indicator of trafficking. Based on the store visit, the store does not have any specials or food packages that can result in same repeated dollar amount purchases. As such, the Retailer Operations Division determined that these transaction amounts are likely contrived and are indicative of trafficking.

Counsel contends that Appellant's inventory is sufficient to account for the transactions as it consists of expensive items, like goat meat; meat packages, 20 pounds bags of flour, ten-pound bags of rice, shortening and oils, along with other food items. Throughout the retailer reply the attorney alleged additional expensive stock that did not appear to be present at the time of the store visit. Appellant may have these additional high dollar items offered for sale at the firm; however, at the time of the store visit, the stock did not reflect those items. In addition, there was no

evidence in the form of invoices to support that Appellant carried these items at these price points.

Appellant specialized in middle eastern ethnic food items therefore the Retailer Operations Division compared Appellant to a similar ethnic retailer located less than three miles from Appellant. This other retailer was notably larger and had a larger selection of fresh and frozen Halal meats as well as fresh produce. The other store conducted twice as many SNAP transactions as Appellant. Yet, Appellant's average SNAP transaction was 132% greater than the comparison store and Appellant total SNAP dollar volume was 14% greater than the larger store. The Retailer Operations Division also determined that Appellant conducted more SNAP transactions in most of each ten-dollar range between \$100.00 and \$499.99 than the comparison store. The other store did not conduct any SNAP transactions greater than \$270.00; whereas Appellant conducted 40 SNAP transactions greater than \$270.00 during the review period. Also of note is that Appellant's transactions greater than \$60.00 comprised 51% of its total SNAP transactions whereas 21% of the comparison's store were greater than \$60.00. This is unusual given that the comparison store had a greater quantity and quality of stock as well as conducted twice as many transactions as Appellant.

Counsel contends that transportation inconsistency is another reason why the store's transactions appear the way they do if transportation to other stores is not dependable. Sometimes a firm may have higher than average SNAP transaction amounts due to the lack of access to other SNAP authorized stores. The Retailer Operations Division determined that within a 2.5-mile radius, there are least 26 other authorized firms. The Retailer Operations Division completed a thorough analysis of the households in the charge letter. Each of the 80 households completed multiple transactions at other authorized firms during the review period. All but five of the 80 households transacted more of their SNAP benefits at other authorized firms other than at Appellant. Based on these findings, the households in the charge letter were not dependent on Appellant for their SNAP eligible food needs.

Previous RIB Investigation

Counsel contends that Appellant was investigated by the USDA during the review period and was found not to be trafficking. The available evidence does show that there was a previous undercover investigation. However, that Appellant refused to traffic to an unknown undercover investigator is not sufficient evidence that Appellant always enforces the SNAP rules and regulations. The refusal might simply evidence that Appellant personnel do not commit SNAP violations with unknown personnel; or that the unidentified clerk did not wish to commit SNAP violations at the given time.

Customer Statements

Appellant submitted five client affidavits in support of the questionable transactions. The Retailer Operations Division could not match two of the households that submitted affidavits. The Retailer Operations Division conducted a thorough analysis of the shopping transaction activity of the three other households. However, the Retailer Operations Division determined that there was no evidence to support that the transactions were for eligible food items only. Furthermore, even if the affidavits are accepted as credible, these statements only accounted for a small number of the

transactions in the charge letter. The customer statements submitted are not sufficient evidence to explain the flagged transactions.

Evidence

The ALERT system is a computerized fraud detection tool to identify SNAP transactions that form patterns having characteristics indicative of trafficking. However, this tool does not by itself determine or conclude that trafficking has occurred. The Retailer Operations Division must still conduct an extensive analysis of the transaction data and patterns, often with other factors such as, in this case, observations from store visits, an analysis of customer shopping behavior and a comparison of stores in the area, and render a determination whether the questionable transactions were, more likely than not, the result of trafficking.

The legality of this method is supported by 7 CFR §278.6(a) which states, inter alia, “FNS may disqualify any authorized retail food store . . . if the firm fails to comply with the Food and Nutrition Act of 2008, as amended, or this part. Such disqualification shall result from a finding of a violation based on 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.]

The documentation and evidence provided by the Retailer Operations Division was thoroughly examined. From all indications, the Retailer Operations Division obtained the EBT data (provided by ALERT), found it to be suspicious in comparison to other area stores of similar size, and then undertook a thorough investigation before concluding that trafficking was likely occurring.

Appellant bears the burden of demonstrating by a preponderance of the evidence that the administrative actions should be reversed and that the transactions detailed in the charge letter were more likely than not due to the legitimate sale of eligible food in exchange for SNAP benefits. Appellant submitted insufficient evidence. The numerous studies, customer affidavits, bank statements, and profit and loss statements did not prove that the transactions listed in the charge letter were legitimate purchases of eligible food. In the absence of compelling information or documentation weighed in comparison to the evidence provided by the Retailer Operations Division, the evidence weighs in favor of the Retailer Operations Division’s determination that SNAP-benefit trafficking substantially produced the transaction activity at issue in this case.

CIVIL MONEY PENALTY

Appellant did not timely request consideration for a trafficking CMP in lieu of a permanent disqualification under 7 CFR 278.6(i) even though it was informed of the right to do so in the charge letter. SNAP regulations at 7 CFR § 278.6(b)(2)(iii) states 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 in § 278.6(b)(1), the firm **shall not be eligible** for such a penalty.” [Emphasis added.] Even if a timely request had been submitted, the Appellant would likely not have been eligible for a trafficking CMP in lieu of disqualification because there is insufficient evidence to demonstrate that the firm had established and implemented an effective SNAP compliance policy and program prior to the violations. The

Retailer Operations Division's decision not to impose a trafficking CMP in lieu of disqualification is sustained as appropriate pursuant to 7 CFR § 278.6(i).

CONCLUSION

The Retailer Operations Division's analysis of Appellant's EBT transaction record was the primary basis for its determination to permanently disqualify Appellant. This data provided substantial evidence that the questionable transactions during the review period had characteristics that are consistent with trafficking violations in SNAP benefits. Therefore, based on a review of all the evidence in this case, it is more likely true than not true that program violations did occur as charged by the Retailer Operations Division. The determination to impose a permanent disqualification against Appellant is sustained. The Retailer Operations Division's determination that Appellant was not eligible for a trafficking civil money penalty according to the terms of 7 CFR Section 278.6(i) of the SNAP regulations is also sustained.

RIGHTS AND REMEDIES

Applicable rights to a judicial review of this decision are set forth in 7 USC § 2023 and 7 CFR § 279.7. If a judicial review is desired, the Complaint, naming the United States as the defendant, must be filed in the U.S. District Court for the district in which the Appellant's owner resides or is engaged in business, or in any court of record of the State having competent jurisdiction. If any Complaint is filed, it must be filed within thirty (30) days of receipt of this Decision.

Under the Freedom of Information Act, we are 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.

MARY KATE KARAGIORGOS
Administrative Review Officer

March 13, 2023