

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

African Brothers Store LLC,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0199852

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 African Brothers Store LLC (African Brothers Store or 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 June 12, 2017, 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 November 2016 through April 2017. 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).

Appellant, through counsel, replied to the charges by letter dated June 22, 2017. Appellant 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 July 18, 2017. 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.

STANDARD OF REVIEW

In appeals of adverse actions, the Appellant bears the burden of proving by a clear preponderance of the evidence, that the administrative actions 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), (c) 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 CFR § 271.2 states, in part, that, "Eligible foods means: Any food or food product intended for human consumption except alcoholic beverages, tobacco and hot food and hot food products prepared for immediate consumption."

7 CFR § 271.2 defines trafficking as: "(1) 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, inter alia, that "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 November 2016 through April 2017. This involved the following SNAP transaction patterns which are indicative of trafficking:

- There were an unusual number of transactions ending in a same cents value.
- There were multiple transactions made from individual benefit accounts in unusually short time frames.
- There were excessively large purchase transactions made from recipient accounts.

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 July 25, 2017, administrative review request, Appellant, through counsel, provided the following summarized contentions, in relevant part:

- Appellant has never been under investigation for SNAP trafficking.
- Appellant and its employees review the SNAP user’s manual on a semi-annual basis.
- Appellant has provided verbal training, in-store training, and a copy of the manual to all of the employees and store operators.
- This was a first time offense and would dictate a CMP instead of a permanent disqualification.

- Appellant provided proof that it did not violate SNAP rules.
- There are no guidelines under the SNAP rules that state the alleged violations are even violations or trafficking.
- The fact that a determination was made for failure to provide enough evidence of training compliance on allegations that were unfounded is extremely harsh and an over reach by the Retailer Operations Division.
- According to 7 CFR § 278.6(2)(d) Appellant has not violated SNAP law.
- Appellant's transactions are based on the sale of qualified merchandise.
- There was no intent to violate the regulations by Appellant.
- Appellant has implemented an effective compliance policy.
- A photocopied booklet is provided to each of its employees and issues concerning EBT processing are addressed semi-annually, when updates are published and upon the hiring of each new employee.
- Appellant has had its compliance policy in place since the owner of the store received its SNAP license in 2013.
- Employees have their own manuals which they use to review the store processes semi-annually or when there are updates to the manual.
- The owners know it is not illegal to have multiple transactions in short time frames nor is it illegal to have excessively large purchase transactions made by EBT customers.
- Upon the second occasion of trafficking involvement, a firm shall not be eligible for a civil money penalty.

Counsel submitted three employee agreements on August 15, 2017, that were signed by each employee on August 15, 2017.

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 African Brothers Store as a small grocery on April 9, 2013. The case file indicates that in reaching a disqualification determination, the Retailer Operations Division considered information obtained during an April 19, 2017, 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:

- African Brothers Store is approximately 1,000 square feet, with no additional food storage outside of public view.

- There were no shopping baskets or shopping carts for customer use.
- There was one cash register and one point-of-sale device.
- The check-out space was limited and cluttered with an ice cream cooler in front.
- There were no meat/seafood specials or bundles that might sell for high prices.
- There was frozen beef, goat, and leaf palm and green vegetables.
- There was no fresh produce.
- There was limited dairy including milk and butter (ghee).
- Other staple foods available for purchase were eggs, juice, rice, bread, tortillas, beans, cereal, pasta, canned goods, and snack foods.
- Much of the remaining stock consisted of accessory foods such as candy, spices, and carbonated and uncarbonated drinks.
- Ineligible items included clothing, tobacco products, hair care products, cologne and perfumes, paper goods and cleaning products.

Given the available inventory as noted above, there is no indication from the store visit report that the store would be likely to have SNAP redemption patterns significantly different from similar-sized competitors.

Charge Letter Attachments

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. There were an unusual number of transactions ending in a same cents value. During the review period, there were a total of 300 transactions **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. When such patterns are unsupported by special pricing structures, they are a strong indicator of trafficking in SNAP benefits.

Counsel also contends that Appellant frequently rounds down its purchases to encourage customers to continue to shop at Appellant. During the store visit on April 19, 2017, store personnel indicated during the store visit survey that the store does not round transaction totals up or down at checkout. Also, if rounding down was so common, it would be expected that the majority of its transactions would end in 00 cents. There was no evidence advanced to support the contention that totals were rounded down.

It is possible that some of the smaller transactions are the result of purchasing one or some same cent items and this could explain some of the lower dollar same cent transactions. The larger transactions cited in the charge letter would most likely consist of the purchase of several relatively inexpensive items and it is unlikely that these purchases would routinely total to an amount **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. Consequently, when many transactions end in a same cents amount and same dollar amount, it appears that these transaction amounts are contrived and therefore, in the absence of compelling evidence to the contrary, are suggestive of trafficking.

The evidence shows that Appellant did not have a pricing structure that supports high dollar **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** cent transactions. Appellant failed to provide a credible explanation for the same cent transactions listed on Charge Letter Attachment #1.

Charge Letter Attachment 2. Multiple transactions were made from individual benefit accounts in unusually short time frames. This attachment documents 26 sets of transactions **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. 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.

Counsel contends that transactions conducted by the same person do not equate to trafficking. This is true. However, 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 legitimate 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, or profusion of large packages. 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 second and third transactions in each set are too large to consist of a forgotten item or two.

In the absence of any other reasonable explanation, the irregular transaction patterns are more likely than not to be a result of trafficking in SNAP benefits.

Charge Letter Attachment 3: Excessively large purchase transactions were made from recipient accounts. This attachment lists 180 SNAP transactions **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. These large transaction amounts are not consistent with the store's inventory. Based on the store visit report, the firm offers limited food items in bulk. There was no fresh unprocessed meat or fresh produce on the day of the store visit. Therefore, the substantial number of high dollar purchases calls into question the legitimacy of these transactions.

Counsel reports that Appellant's transactions are based on the sale of qualified merchandise. Counsel contends that these large transactions can partially be explained by some of the high priced items Appellant sells including the following: a case of goat meat - \$200.00; corn - \$70.00; white corn flour - \$50.00; pasta - \$30.00 per case; and Ola Ola - \$36.00 per bag. The evidence from the store visit shows that Appellant's highest priced items on the day of the store visit were 50 pound bags of corn sold for \$35.00 and the pasta sold for \$30.00 per case. Although Appellant did have frozen meat products, there was no indication that Appellant sold goat meat by the case. Given the size of these items, it is unlikely that households would be making multiple purchases of these items; therefore these limited high-priced bulk items are unlikely to be the cause of the excessive large purchase transactions at Appellant.

Appellant submitted five pages that appear to be typed invoices for items purchased at Appellant. Counsel explains that they are price lists; however, items are listed in varying amounts and there are totals listed on the bottom of each sheet. A typical price list does not include totals on the bottom. None of the amounts listed match the charge letter transactions. Each of the sheets appears to have dates on the top of each sheet. Appellant may have submitted these documents to simply show the cost of its items; however, these receipts/invoices raise an interesting question. If these are actual receipts of transactions conducted at Appellant, then why is Appellant unable to provide the actual receipts for the transactions listed on each of the Attachments? This information does not adequately explain the large dollar transactions. Appellant did not provide inventory purchase invoices or store transaction receipts to support that the transactions listed in this attachment were for eligible food items only.

Counsel explains that customers come from as far as Oklahoma to buy these authentic foods. However, the Retailer Operations Division determined that none of the customers listed on the charge letter attachments were from Oklahoma. The Retailer Operations Division compared Appellant to two similar small groceries that specialize in African food products located within a three-mile radius from Appellant. The Retailer Operations Division determined that one of the other firms had a better stock of eligible food items including fresh meat items, likely making this store the first choice shopping destination to fulfill the ethnic food needs of the local African community. Thus, customers that are coming from 200 miles away, as alleged by counsel, would more likely visit the larger African specialty store than Appellant given its inventory of available food products.

Counsel contends that customers typically make large bulk purchases “one time a month” at Appellant. The Retailer Operations Division determined that there many households conducted large transactions more frequently. For example, one household conducted three very large transactions between December 11 and December 15, 2017, **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** in SNAP benefits. In addition, the fact that a household conducted only one large transaction is not credible evidence that the transaction is not trafficking.

In summary, Appellant’s layout, business structure, and food inventory do not support a high percentage of transactions markedly exceeding the average SNAP transaction amount of similar type stores. Government analyses of stores caught in trafficking violations during on-site investigations have found that transactions involving trafficking consistently display particular characteristics or patterns. These patterns include, in part, those cited in the letter of charges. Therefore, based on this empirical data, and in the absence of evidence to legitimize such transaction patterns, a conclusion can be drawn, through a preponderance of evidence that the “unusual, irregular, and inexplicable” transactions and patterns cited in the letter of charges evidence trafficking as the most likely explanation.

Intent and Prior Violations

Counsel argues that according to 7 CFR § 278.6(d) Appellant has not violated SNAP law. Appellant was never reprimanded for violations in the past and there was no intent to violate the regulations by Appellant. This regulation citation requires FNS to consider any prior warnings

and evidence of a firm's intent to violate when determining a sanction. It does not require FNS to give such warnings or, in this case, to prove a firm's intent to violate. Contrary to counsel's contention, the record shows that on Appellant was issued a warning letter on September 2, 2015, for selling ineligible item in exchange for SNAP benefits. Regardless, a record of participation in the SNAP with no previously documented instance of violations does not constitute valid grounds for dismissal of the current charges of violations or for mitigating the impact of the violations upon which they are based. **5 U.S.C. § 552 (b)(7)(E)**.

Evidence

Counsel contends that there are no guidelines under the SNAP rules that state the original alleged violations are even violations, to include 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 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.]

As previously noted, Appellant bears the burden of demonstrating by a preponderance of the evidence that the administrative actions should be reversed. Appellant must provide a preponderance of evidence 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 provided the Retailer Operations Division with four affidavits from the store employees attesting that they have done nothing wrong when using the EBT and believed they were following the SNAP rules at all times. Simply denying the allegations is not considered credible evidence. 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 the present case.

CIVIL MONEY PENALTY

Counsel explains that upon the second occasion of trafficking involvement, a firm shall not be eligible for a civil money penalty and implies that a firm is eligible for a CMP upon its first trafficking charge. It is true that the regulations prohibit a retailer from qualifying for a CMP when it is their second violation of trafficking. However, on the first charge of trafficking, a retailer can request a CMP but still needs to meet the eligibility requirements which are outlined below.

In the charge letter, the Retailer Operations Division informed Appellant of its right to request a trafficking CMP under 7 CFR §278.6(i) in lieu of a permanent disqualification. Appellant was informed that it would need to provide both the request and supporting evidence within ten

calendar days of receiving the charge letter and that no extension of time could be granted for making the request or for providing the required evidence.

In its response to the charge letter, Appellant, through counsel, contends that it had an effective compliance policy and program to prevent program violations in place since the owner of the store received its SNAP license in 2013. Counsel explains that a photocopied booklet is provided to each of its employees and issues concerning EBT processing are addressed semi-annually, when updates are published and upon the hiring of each new employee. Appellant's training program is a combination of verbal training, practical training, and a review of SNAP manual as a group. In support of its training and compliance program, counsel submitted an affidavit from the store owner stating that he trained his employees to adhere to the proper SNAP guidelines. Four employees also signed separate documents all dated June 22, 2017, that they have completed SNAP training and fully understand their responsibilities.

The criteria for a trafficking CMP in lieu of permanent disqualification is defined under 7 CFR §278.6(i) which reads, *inter alia*:

*In determining the minimum standards of eligibility of a firm for a civil money penalty in lieu of a permanent disqualification for trafficking, the firm shall, at a minimum, establish by **substantial evidence** [emphasis added] its fulfillment of each of the following criteria:*

Criterion 1. The firm shall have developed an effective compliance policy as specified in §278.6(i)(1); and

Criterion 2. The firm shall establish that both its compliance policy and program were in operation at the location where the violation(s) occurred prior to the occurrence of violations cited in the charge letter sent to the firm; and

Criterion 3. The firm had developed and instituted an effective personnel training program as specified in §278.6(i)(2); and

Criterion 4. Firm ownership was not aware of, did not approve, did not benefit from, or was not in any way involved in the conduct or approval of trafficking violations; or it is only the first occasion in which a member of firm management was aware of, approved, benefited from, or was involved in the conduct of any trafficking violations by the firm

The Retailer Operations Division determined that Appellant was not eligible for a CMP because it failed to submit substantial information to establish that the firm had an effective personnel training program compliance policy in place prior to the SNAP violations to qualify for a trafficking CMP under 7 CFR § 278.6(i). The Retailer Operations Division determined that the information submitted and Appellant's narrative explanation describing the training and the owner and employee affidavits are not substantial evidence that Appellant met all four criteria required by 7 CFR § 278.6(i). For example:

- There is no documentation of any of Appellant's employees' dates of employment

- or dates when the training was conducted.
- There is no contemporary documentary evidence that all employees were provided SNAP compliance training on their initial hire date or when any other alleged training occurred prior to the violations.
 - There is no contemporary documentary evidence that employees were required to watch the FNS training video.
 - There is no contemporary evidence of training agendas, training logs, signed training certificates or other evidence of employee training.
 - There is no indication that quizzes or tests were conducted to insure that the employees understood any training that was provided to them.
 - There is no documentation of what materials were used to conduct the training.

In the absence of any such documentation, a civil money penalty was not imposed in lieu of permanent disqualification by the Retailer Operations Division. The record is clear that Appellant did not submit sufficient evidence to establish that Appellant had an effective compliance program and policy in effect *prior* to the violations. Therefore, 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 of 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 also determined 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. The denial of a trafficking CMP 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 owners reside or are 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

November 7, 2017