

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

Al Arabi,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0200239

FINAL AGENCY DECISION

The U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS) finds that there is sufficient evidence to support a finding that the permanent disqualification of Al Arabi (Appellant or Al Arabi) 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 26, 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 December 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 replied to the charges by letters dated July 6, 2017. Appellant denied trafficking in SNAP benefits and stated that the transaction patterns were normal based on the unique circumstances and characteristics of the store. Appellant submitted some of its invoices to support its eligible food stock on July 27 and August 4, 2017. After considering the retailer's reply and the evidence, the Retailer Operations Division issued a determination letter dated August 14, 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.

In a letter postmarked August 18, 2017, Appellant 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 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 December 2016 through April 2017. This involved the following SNAP transaction patterns which are indicative of trafficking:

- 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 administrative review request dated August 18, 2017, and subsequent correspondence submitted by Appellant’s representative (Appellant’s accountant) by e-mail on September 21, 2017, Appellant provided the following summarized contentions, in relevant part:

- Appellant did not do anything wrong.
- Appellant is losing customers when it worked so hard to get these customers.
- The invoices show that 85% to 90% of Appellant’s purchases can be purchases

with SNAP benefits.

- The merchant and bank statements show that SNAP is less than 25% of total sales.
- Al Arabi has only one cash register and the owner is the only one using it.
- The store is small compared to other stores.
- The USDA has visited the store many times and never had any complaints.
- Appellant's customers are poor refugees who don't have cars and they walk to the store most of the time.
- Appellant sometimes gives its customers a discount to make the total an even number if the bill is within a dollar or two.
- Appellant feels that it is keeping good relations with his customers.
- Appellant has never cashed money to any of its customers and it simply wants to make profit when they make a purchase.

In its July 6, 2017, written reply to the Retailer Operations Division, Appellant provided the following summarized contentions:

- Sometimes customers buy their meat separately and then buy their groceries.
- Most of the time customers do not know how much they have available so they buy a portion of their groceries and once they see the remaining balance they purchase the rest.
- Appellant sells whole lamb meat that may cost more than \$200.00 depending on the weight.
- Twenty pounds of olive oil sells for \$170.00 and five pound blocks of cheese cost \$70.00.
- Customers shopping at their store buy meat, rice, sugar, cheese, and olive oil each month that results in large dollar totals sometimes reaching **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**.

In support of its contentions, Appellant's accountant submitted the following documents by e-mail on September 21, 2017:

- One hundred and four pages of invoices;
- Bank statements for February, March, and April 2017; and
- Credit Card Statement for August 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 Appellant as a small grocery on December 21, 2015. The case file indicates that in reaching a disqualification determination, the Retailer Operations Division considered information obtained during a May 22, 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:

- Appellant is approximately 1120 square feet.
- There were some shopping baskets and one shopping cart for customer use.
- There was one cash register and one point-of-sale device.
- There was no optical scanner for the speedy processing of transactions.
- The check-out counter space was small and limited.
- There were no meat/seafood specials or bundles that might sell for high prices.
- The store specialized in ethnic foods.
- There was fresh beef, lamb, and chicken.
- There was limited fresh produce including some eggplant, lettuce, cauliflower, peppers, potatoes, onions, and tomatoes.
- Dairy included milk, yogurt, and cheese.
- Other staple foods available for purchase were eggs, cereal, rice, pasta, an extensive selection of ethnic canned and packaged goods, and snack foods.
- Ineligible items included tobacco products (cigarettes and an extensive inventory of hookahs), gift items, party goods, housewares, souvenirs, cleaning products, paper goods, and health and beauty 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. Multiple transactions were made from individual benefit accounts in unusually short time frames. This attachment documents 58 sets of transactions **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** in SNAP benefits. 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.

5 U.S.C. § 552 (b)(6) & (b)(7)(C). The Retailer Operations Division determined that even with the ethnic specialty food available, it is unlikely that Appellant would have SNAP transactions more than triple the average SNAP transaction at a super store in Harris County. It is even less likely that several of these excessively large transactions would be conducted multiple times during a short time period.

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. 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 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, 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 a forgotten item or two.

5 U.S.C. § 552 (b)(6) & (b)(7)(C).

Appellant explained that households make their first purchase and then when they find out their balance they will conduct another purchase. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Similarly, if customers were purchasing an item, for the purpose of checking their SNAP balance, it is more plausible that the first transaction in the set would be for a nominal amount and this was not the case in this Attachment. It is important to note that the EBT point-of-sale machine is programmed to permit immediate balance inquiries without having to first process a purchase. There is also a toll-free 800 telephone number that can be called to find out account balances. Therefore, it is not necessary for customers to make a purchase just to find out what they have on balance in their SNAP benefit accounts.

The Retailer Operations Division compared Appellant to a nearby medium grocery and combination store with similar ethnic food stock. The transaction pattern of Appellant exceeds the other two authorized stores, as seen on the table. The Retailer Operations Division considered this an indicator of trafficking.

5 U.S.C. § 552 (b)(7)(E)

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 2: Excessively large purchase transactions were made from recipient accounts. This attachment lists 415 SNAP transactions 5 U.S.C. § 552 (b)(6) & (b)(7)(C). 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Based on the store visit report, the firm does not offer food in bulk although it does offer specialty foods. There was limited fresh meat and limited fresh produce on the day of the store visit. The substantial number of high dollar purchases calls into question the legitimacy of these transactions.

5 U.S.C. § 552 (b)(6) & (b)(7)(C). However, on the day of the store visit there were no large packages of meat or any whole lambs available for sale. Appellant did not appear to sell five pound blocks of cheese or twenty pounds of olive oil on the day of the store visit. The photographs from the previous store visits conducted on December 8, 2015, and October 24, 2016, were also reviewed during this review and none of the aforementioned items were visible on those days as well. The report from the store visit shows that the largest priced items were 5.5 pounds of Nido Milk that sold for \$38.99; olive oil that sold for \$25.99, and puck cheese spread that sold for \$9.99.

The submitted invoices were reviewed and the largest container of olive oil purchased by Appellant was three liters and there were no five pound blocks of cheese purchased. Perhaps Appellant is suggesting that it sold cases of smaller containers of olive oil. Although there were no visible cases for sale on the day of the store visit, it is possible that Appellant sold cases of olive oil. However, it is unlikely that cases of olive oil can explain many of these large dollar transactions. There was also no evidence of any whole lambs purchased. The invoices from Texas All Grass-Fed were illegible and provided little detail as to what was purchased.

Appellant submitted advertising flyers to the Retailer Operations Division. These flyers advertise meat per pound. Whole lamb was advertised on these flyers but there was no other credible evidence that Appellant carried a sufficient supply of these products that results in the large dollar transactions.

5 U.S.C. § 552 (b)(6) & (b)(7)(C).

The Retailer Operations Division also determined that there were many same dollar transactions. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). There were no special packages or promotions that would result in these transactions amounts. Consequently, when many transactions end in a same cents amount and same dollar amount, it appears that these transaction amounts are contrived and in the absence of compelling evidence to the contrary, are suggestive of trafficking.

The Retailer Operations Division determined that within a five-mile radius there are at least six other authorized firms that specialize in similar ethnic products. Specifically, there are three large groceries within a one-mile radius of Appellant that carry a similar variety of ethnic foods. The Retailer Operations Division compared Appellant to a medium grocery and combination store that carry similar stock to Appellant and located within a two-mile radius. Appellant's average SNAP transaction amount exceeded the other two stores.

5 U.S.C. § 552 (b)(6) & (b)(7)(C). It is not plausible that the firm's customers would regularly purchase large amounts of merchandise at Appellant when similarly stocked stores are readily available and in the vicinity of the Appellant firm. The Retailer Operations Division considered this an indicator of trafficking.

Appellant, through its accountant, explains that many of its customers are refugees without cars and they walk to the store most of the time. This is likely true. However, it is unlikely that these large dollar transactions are conducted by customers that are walking to the store. It is not plausible that these households are carrying hundreds of dollars of groceries while walking home.

Lastly, the Retailer Operations Division examined several households identified in the charge letter to analyze their shopping patterns at Appellant compared to their shopping patterns at other SNAP authorized stores. All of these households were also shopping at larger and better stocked stores, including ethnic stores, while at the same time exhibiting suspicious shopping patterns at Appellant. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). The Retailer Operations Division researched Texas's state system and determined that this household appears to be a one person household. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). The most likely explanation is that this household is trafficking its SNAP benefits.

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.

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 in order for the administrative action to be reversed. Appellant did not provide any compelling justifications for the transactions listed on the charge letter attachments. 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.

Invoice Analysis

Appellant submitted 34 invoices to the Retailer Operations Division to support its eligible food stock. Almost all of the invoices were dated outside of the review period. Appellant explained that its mark-up varies but is usually 25%. Appellant also indicated that 25% of Appellant's sales are SNAP sales. Although most of the invoices were outside of the review period, the Retailer Operations Division analyzed each of them. Even using a generous 40% markup and considered 80% of sales from SNAP, Appellant was not able to justify its SNAP redemptions for the months that it submitted invoices. Redemptions exceeding inventory are suggestive of trafficking.

In support of its administrative review request, Appellant, through its accountant, submitted additional invoices of its food items purchased during two months of the review period, February and March 2017. These invoices were analyzed. The invoices from Cedar's Bakery did not appear to be the original invoices because they were numbered all in sequential order. They were still included in the analysis. Ineligible non-food items were excluded from all calculations. Appellant's accountant indicated that merchant and bank statements show that less than 25% of

total sales are sold on SNAP benefits. Even considering a 40% mark-up and 50% of the sales from cash or credit, Appellant still did not have sufficient stock to support its redemptions.

The invoices submitted during the administrative review were also combined with the invoices previously submitted in response to the charges and analyzed together to see if Appellant was able to justify its redemptions considering information submitted for the review period. There were very few invoices submitted for January 2017, so in favor of the retailer, January's SNAP redemptions were removed from the analysis. The invoices still do not show that Appellant purchased sufficient inventory to support its SNAP redemptions. In this instance, even if a 40% mark-up was used and 20% cash and credit sales, Appellant's inventory fell short to support its SNAP redemptions.

Economic Hardship

Appellant contends that the business is suffering due to its SNAP disqualification. With regards to Appellant's contention that the disqualification will affect its business, it is recognized that economic hardship is a likely consequence whenever a store is permanently disqualified from participation in SNAP. However, there is no provision in the SNAP regulations for waiver or reduction of an administrative penalty assessment on the basis of possible economic hardship to the firm resulting from imposition of such penalty. To excuse ownership from assessed administrative penalties based on purported economic hardship to the firm would render virtually meaningless the enforcement provisions of the Food and Nutrition Act of 2008 and the enforcement efforts of the USDA.

Moreover, giving special consideration to economic hardship to the firm would forsake fairness and equity, not only to competing stores and other participating retailers who are complying fully with program regulations, but also to those retailers who have been disqualified from the program in the past for similar violations. Therefore, Appellant's contention that the firm will incur economic hardship based on the assessment of an administrative penalty does not provide any valid basis for dismissing the charges or for mitigating the penalty imposition.

No Previous Violations

Appellant's accountant contends that the USDA has visited the store many times and never had any complaints. Regarding this contention, 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. There is no provision in the Act or regulations that reverses or reduces a sanction based upon a lack of prior violations by a firm and its owners, managers and/or employees.

CIVIL MONEY PENALTY

In the charge letter, the Retailer Operations Division informed Appellant of its right to request a trafficking CMP under 7 CFR § 278.6(i). 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. Appellant did not 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.

Even if a timely request had been submitted, 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 compliance policy to prevent SNAP 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. Under review, 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 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

December 7, 2017