

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

**Barakah Supermarket,**

**Appellant,**

**v.**

**Case Number: C0204506**

**Retailer Operations Division,**

**Respondent.**

**FINAL AGENCY DECISION**

It is the decision of the USDA that the record indicates that Barakah Supermarket (hereinafter Appellant) committed violations of the Supplemental Nutrition Assistance Program (SNAP). There is sufficient evidence to support a finding that the permanent disqualification from participation as an authorized retailer in the program, 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 Title 7 Code of Federal Regulations (CFR) Part 278 in its administration of the SNAP, when it imposed a permanent disqualification against Appellant.

**AUTHORITY**

7 U.S.C. § 2023 and the implementing regulations at 7 CFR § 279.1 provides 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**

The USDA conducted an investigation of the compliance of Appellant with Federal SNAP law and regulations from February 26, 2018 to April 19, 2018. The investigation report documents that personnel at Appellant committed SNAP violations on three (3) out of four (4) compliance visits. During one (1) compliance visit, store personnel exchanged SNAP benefits for cash. The buying or selling of SNAP benefits for cash or consideration other than eligible food is trafficking as defined under 7 CFR § 271.2.

As a result of evidence compiled from this investigation, the Retailer Operations Division informed the Appellant, in a letter dated May 3, 2018, that it was charged with violating the terms and conditions of the SNAP regulations. The letter stated, in relevant part, that:

Your firm is charged with trafficking, as defined in Section 271.2 of the SNAP regulations. As provided by Section 278.6(e)(1) of the SNAP regulations, the sanction for the trafficking violation(s) ... is permanent disqualification.

The charge letter also stated that:

Under certain conditions, FNS may impose a civil money penalty (CMP) of up to \$59,000.00 in lieu of permanent disqualification of a firm for trafficking. The SNAP regulations, Section 278.6(i), list the criteria that you must meet in order to be considered for a CMP. If you request a CMP, you must meet each of the four criteria listed and provide the documentation as specified within 10 calendar days of your receipt of this letter.

In a facsimile dated May 16, 2018, Appellant, through counsel, responded to the charge letter and generally stated that it requested a CMP in lieu of disqualification and wished to prove that Appellant did not engage in any illegal acts stemming from large transactions, trafficking good, and the high volume of transactions from the same card holder in a short period of time. Appellant, through counsel, stated that since the onset of the business there were never any violations of USDA and/or SNAP law, the business heavily relies on software and inventory control systems that are meant to deter inadvertent trafficking, the owner and his employees review their SNAP user's manual on a regular basis. The compliance policy with his employees clearly states that there will be no exchange for cash for EBT benefits, customers cannot share EBT cards, any questions for EBT cards must be addressed to the owner, any employee engaging in EBT misuse will be terminated and employees can only sell qualified EBT items.

After considering the Appellant's reply and the evidence in the case, the Retailer Operations Division issued a determination letter dated May 29, 2018. The determination letter informed the Appellant 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 the Retailer Operations Division considered the Appellant's eligibility for a trafficking CMP according to the terms of Section 278.6(i) of the SNAP regulations. The Retailer Operations Division determined that the Appellant was not eligible for the trafficking CMP because the 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 June 5, 2018, the Appellant requested an administrative review of the Retailer Operations Division's determination. The appeal was granted.

### **STANDARD OF REVIEW**

In appeals of adverse actions, an appellant bears the burden of proving 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 1977, as amended, 7 U.S.C. § 2021 and 278 of Title 7 of the Code of Federal Regulations (CFR). In particular, 7 CFR § 278.6(a) and (e)(1)(i) establish the authority upon which a permanent disqualification may be imposed against a retail food store or wholesale food concern.

7 U.S.C. § 2021(b)(3)(B) states, *inter alia*: “... 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(e)(1)(i) states: “FNS shall disqualify a firm permanently if personnel of the firm have trafficked as defined in § 271.2.”

7 CFR § 271.2 states, *inter alia*: “**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 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*: “FNS may disqualify any authorized retail food store... if the firm fails to comply with the Food and Nutrition Act of 1977, 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....”

7 CFR § 278.6(f)(1) states, *inter alia*: “FNS may impose a civil money penalty as a sanction in lieu of disqualification when the firm’s disqualification would cause hardship to [SNAP] households because there is no other authorized retail food store in the area selling as large a variety of staple food items at comparable prices... A civil money penalty for hardship to [SNAP] households may not be imposed in lieu of a permanent disqualification.”

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(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**

During an onsite investigation from February 26, 2018 to April 19, 2018, the USDA conducted four (4) compliance visits at Appellant. A report of the investigation was provided to the Appellant as an attachment to the charge letter dated May 3, 2018. The investigation report documents that, SNAP violations were committed during three (3) of the four (4) compliance visits. During one (1) of the compliance visits, store personnel committed a trafficking violation by exchanging SNAP benefits for cash.

### **APPELLANT’S CONTENTIONS**

The Appellant made the following summarized contentions in its request for administrative review, in relevant part:

1. Request for CMP in lieu of Disqualification.
2. We are sending evidence to demonstrate that Barakah Supermarket implemented an effective compliance program to prevent violations of SNAP.
3. We wish to prove that the store did not engage in any illegal acts stemming from large transactions, trafficking goods and the high volume of transactions from the same card holder in a short period of time.

Appellant, through counsel, provided the following documentation in support of its position

- Exhibit A - Affidavits from the owner regarding training and dismissal.
- Exhibit B – Affidavits from employees regarding training.
- Exhibit C – Affidavits from customers regarding their buying habits.
- Exhibit D – Invoices from vendors from which EBT items are purchased.
- Exhibit E – Photographs of the store’s stock.
- Exhibit F – Store item price list and mark-up values.

The preceding may represent only a brief summary of the Appellant’s contentions presented in this matter. Please be assured, however, in reaching a decision, full attention was given to all contentions presented, including any not specifically recapitulated or specifically referenced herein.

### **ANALYSIS AND FINDINGS**

The Appellant, through counsel, does not dispute that the trafficking violations as described in the investigation report took place. Instead, the Appellant, through counsel, requests a review of the denial of a CMP in lieu of permanent disqualification and contends that there is evidence that the store implemented an effective compliance program to prevent violations of SNAP.

It is important to note that Appellant was not charged with large transactions or a high volume of transactions from the same card holder in a short period of time. An onsite investigation was conducted and during this investigations store personnel sold ineligible items with SNAP benefits and one of those personnel trafficked by exchanging an unknown amount of SNAP benefits for **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** cash.

### **CIVIL MONEY PENALTY**

The Appellant, through counsel, request consideration for a trafficking CMP in lieu of a permanent disqualification under 7 CFR 278.6(i) and submitted documentation in support of its contention that it implemented an effective compliance program to prevent violations of SNAP. The issue to be decided here, then, is whether, through a preponderance of the evidence, Barakah Supermarket had an effective policy and program to prevent trafficking violations that was fully in accord with the provisions of 7 CFR §278.6(i), and thus that it is eligible for a CMP.

7 CFR §278.6(i) specifies that in order for a firm to qualify for a CMP in lieu of permanent disqualification, it must submit substantial evidence that it has fulfilled 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...”

As it relates to the above Criteria 1 and 2, 7 CFR §278.6(i)(1), entitled “Compliance policy standards,” provides the following, in relevant part:

“...in determining whether a firm has established an effective policy to prevent violations, FNS shall consider written and dated statements of firm policy which reflect a commitment to ensure that the firm is operated in a manner consistent with this part 278 of current SNAP regulations and current SNAP policy on the proper acceptance and handling of food coupons. As required by Criterion 2, such policy statements shall be considered only if documentation is supplied which establishes that the policy statements were provided to the violating employee(s) prior to the commission of the violation. In addition, in evaluating the effectiveness of the firm’s policy and program to ensure SNAP compliance and to prevent SNAP violations, FNS may consider the following:

- (i) Documentation reflecting the development and/or operation of a policy to terminate the employment of any firm employee found violating SNAP regulations;

- (ii) Documentation of the development and/or continued operation of firm policy and procedures resulting in appropriate corrective action following complaints of SNAP violations or irregularities committed by firm personnel;
- (iii) Documentation of the development and/or continued operation of procedures for internal review of firm employees' compliance with SNAP regulations;
- (iv) The nature and scope of the violations charged against the firm;
- (v) Any record of previous firm violations under the same ownership; and
- (vi) Any other information the firm may present to FNS for consideration."

As it relates to the above Criterion 3, 7 CFR §278.6(i)(2), entitled "Compliance training program standards," provides the following, in relevant part:

"...the firm shall have developed and implemented an effective training program for all managers and employees on the acceptance and handling of (SNAP benefits)...A firm which seeks a civil money penalty in lieu of a permanent disqualification shall document its training activity by submitting to FNS its dated training curricula and records of dates training sessions were conducted; a record of dates of employment of firm personnel; and contemporaneous documentation of the participation of the violating employee(s) in initial and any follow-up training held prior to the violation(s). FNS shall consider a training program effective if it meets or is otherwise equivalent to the following standards:

- (i) Training for all managers and employees whose work brings them into contact with (SNAP benefits) or who are assigned to a location where (SNAP benefits) are accepted, handled or processed shall be conducted within one month of the institution of the compliance policy under Criterion 1 above. Employees hired subsequent to the institution of the compliance policy shall be trained within one month of employment. All employees shall be trained periodically thereafter;
- (ii) Training shall be designed to establish a level of competence that assures compliance with Program requirements as included in this part 278;
- (iii) Written materials, which may include FNS publications and program regulations that are available to all authorized firms, are used in the training program.

Training materials shall clearly state that the following acts are prohibited and are in violation of the Food and Nutrition Act and regulations: the exchange of... (SNAP benefits)...for cash..."

In this case, and in accordance with SNAP regulations, the documentation provided as evidence of its compliance policy is considered insufficient to establish that there was an effective compliance policy in place prior to the SNAP violation. 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**

As previously stated, 7 CFR § 278.6(e)(1)(i) reads, in part, "FNS shall disqualify a firm permanently if personnel of the firm have trafficked as defined in § 271.2." Trafficking is defined, in part, in 7 CFR § 271.2, as "the buying or selling of SNAP benefits for cash or

consideration other than eligible food.” The law and regulations do not provide for a lesser period of disqualification for this violation.

Based on a review of the evidence in this case, there is no question that program violations did occur during a USDA onsite investigation. All transactions cited in the letter of charges were conducted or supervised by a USDA Investigator and all are thoroughly documented. A review of this documentation has yielded no indication of error or discrepancy in any of the reported findings. Rather, the investigative record is specific and accurate with regard to the dates of the violations, including the exchange of SNAP benefits for cash, and in all other critically pertinent details. The decision to impose a permanent disqualification against Barakah Supermarket is sustained.

### **RIGHTS AND REMEDIES**

Your attention is called to Section 14 of the Food and Nutrition Act of 2008, as amended, (7 U.S.C. § 2023) and to Title 7, Code of Federal Regulations, Part 279.7 (7 CFR § 279.7) with respect to your right to a judicial review of this determination. Please note that 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 you 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 (FOIA), 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.

Monique Brooks  
Administrative Review Officer

September 13, 2018