

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

Jawani Market,

Appellant,

v.

Case Number: C0147782

Retailer Operations Division,

Respondent.

FINAL AGENCY DECISION

It is the decision of the USDA that there is sufficient evidence to support that the Retailer Operations Division properly imposed a fiscal claim of \$793.79 and a permanent disqualification of Jawani Market as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP).

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 fiscal claim and a permanent disqualification against Jawani Market.

AUTHORITY

7 U.S.C. § 2023 and its 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

The USDA Office of Inspector General (OIG) conducted an investigation of the compliance of Jawani Market with Federal SNAP law and regulations from May 2011 through May 2014.

The OIG investigation report documents that, over the course of nine (9) undercover transactions, personnel at Jawani Market either exchanged SNAP benefits for cash or exchanged SNAP benefits for major ineligible non-food items. The investigation report documents that during seven (7) of the nine (9) undercover transactions, a store owner conducted the illegal SNAP transactions. 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 the evidence compiled from this investigation, the Retailer Operations Division charged the Appellant, in a letter dated December 12, 2016, with trafficking in SNAP benefits. The charge letter noted that the penalty for trafficking is permanent disqualification as provided by 7 CFR § 278.6(e)(1). The letter stated the Appellant had the right to respond to the charges within 10 days of receipt. The letter also stated that the Appellant could request a trafficking civil money penalty (CMP) in lieu of a permanent disqualification within 10 days of receipt under the conditions specified in 7 CFR § 278.6(i).

The Appellant, through counsel, responded to the charge letter in a telephone conversation on December 16, 2016 and a letter dated December 23, 2016. The Appellant generally denied that the store or its owners committed any SNAP violations and requested information under the Freedom of Information Act (FOIA). As a result of the FOIA request, the Retailer Operations Division held the permanent disqualification action and fiscal claim in abeyance pending completion of the FOIA process. The USDA-OIG sent the agency's official FOIA response to the Appellant's counsel in a letter dated September 29, 2017.

In a letter dated January 9, 2018, the Retailer Operations Division notified the Appellant that the official FOIA response had been issued and granted the Appellant an additional 10 days to provide any further response to the charge letter dated December 12, 2016. This letter was delivered to the Appellant's counsel via UPS on January 10, 2018. However, the Retailer Operations Division received no further response from the Appellant or the Appellant's counsel.

After giving consideration to the evidence in the case, the Retailer Operations Division informed the Appellant, by letter dated January 24, 2018, that Jawani Market was permanently disqualified from participation in the SNAP. In addition, the determination letter assessed a fiscal claim of \$793.79. The letter also stated that the Appellant was not eligible for a trafficking CMP as the Appellant did not 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 February 2, 2018, the Appellant, through counsel, requested an administrative review of the permanent disqualification determination and fiscal claim. The request for administrative review 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 action should be reversed. That means an appellant has the burden of providing relevant evidence which a reasonable mind, considering the record as a whole, might accept as sufficient to support a conclusion that the matter asserted is more likely to be true than not true.

CONTROLLING LAW AND REGULATIONS

The controlling law in this matter is covered in the Food & Nutrition Act of 2008, as amended, 7 U.S.C. § 2021, and promulgated through regulation under Title 7 CFR Part 278. 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, 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 states that the definition of “coupon” includes:

... an electronic benefit transfer card or personal identification number issued pursuant to the provisions of the Food and Nutrition Act of 2008, as amended, for the purchase of eligible food.

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 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 § 271.2 defines eligible food, in part, as:

Any food or food product intended for human consumption except alcoholic beverages, tobacco, and hot foods and hot food products prepared for immediate consumption

7 CFR § 278.6(a) states, in part:

FNS may disqualify any authorized retail food store ... if the firm fails to comply with the Food 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....

7 CFR § 278.7(a) states, in part:

FNS may establish and pursue claims against firms or other entities which have accepted or redeemed coupons in violation of the Food and Nutrition Act of 2008 or this part regardless of whether the firms or entities are authorized to accept food stamps

7 CFR § 278.6(i) states, in part:

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.

7 CFR § 278.6(b)(2) states, in part:

(ii) 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 as specified in § 278.6(i), 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).

(iii) If a firm fails to request consideration for a civil money penalty in lieu of a permanent disqualification for trafficking and submit documentation and evidence of its eligibility within the 10 days specified in § 278.6(b)(1), the firm shall not be eligible for such a penalty.

SUMMARY OF CHARGES

During an investigation from May 2011 through May 2014, the USDA-OIG conducted nine (9) undercover SNAP transactions at Jawani Market. The violations were described by the Retailer Operations Division in the charge letter dated December 12, 2016 as follows:

1. On May 2, 2011, an unidentified clerk accepted 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in SNAP benefits in exchange for 5 U.S.C. § 552 (b)(6) & (b)(7)(C) worth of phone cards.
2. On July 19, 2011, an unidentified clerk accepted 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in SNAP benefits in exchange for 5 U.S.C. § 552 (b)(6) & (b)(7)(C) worth of phone cards.
3. On February 1, 2012, a clerk subsequently identified as 5 U.S.C. § 552 (b)(6) & (b)(7)(C) accepted 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in SNAP benefits in exchange for one blanket 5 U.S.C. § 552 (b)(6) & (b)(7)(C) worth of phone cards.
4. On March 5, 2012, a clerk subsequently identified as 5 U.S.C. § 552 (b)(6) & (b)(7)(C) accepted 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in SNAP benefits in exchange for 5 U.S.C. § 552 (b)(6) & (b)(7)(C) worth of phone cards.
5. On November 8, 2012, a clerk subsequently identified as 5 U.S.C. § 552 (b)(6) & (b)(7)(C) accepted 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in SNAP benefits in exchange for 5 U.S.C. § 552 (b)(6) & (b)(7)(C) worth of phone cards and a decorative incense holder priced at 5 U.S.C. § 552 (b)(6) & (b)(7)(C).
6. On June 4, 2013, a clerk subsequently identified as 5 U.S.C. § 552 (b)(6) & (b)(7)(C) accepted 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in SNAP benefits in exchange for 5 U.S.C. § 552 (b)(6) & (b)(7)(C) worth of phone cards.
7. On September 12, 2013, a clerk subsequently identified as 5 U.S.C. § 552 (b)(6) & (b)(7)(C) accepted 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in SNAP benefits in exchange for 5 U.S.C. § 552 (b)(6) & (b)(7)(C) cash.
8. On April 14, 2014, a clerk subsequently identified as 5 U.S.C. § 552 (b)(6) & (b)(7)(C) accepted 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in SNAP benefits in exchange for 5 U.S.C. § 552 (b)(6) & (b)(7)(C) worth of phone cards.
9. On May 28, 2014, a clerk subsequently identified as 5 U.S.C. § 552 (b)(6) & (b)(7)(C) accepted 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in SNAP benefits in exchange for 5 U.S.C. § 552 (b)(6) & (b)(7)(C) worth of phone cards.

APPELLANT'S CONTENTIONS

In its administrative review request dated February 2, 2018, the Appellant, through counsel, requested a reversal of the determination letter dated January 24, 2018. To support its request for review, the Appellant provided a copy of its letter dated December 22, 2016. The Appellant was given an opportunity to provide additional contentions but stated in an e-mail to the review officer dated April 24, 2018 that it would not be providing any additional information, evidence or contentions.

In the December 22, 2016 letter, the Appellant made the following summarized contentions, in relevant part:

- The store owners deny entirely that the store committed any of the violations referenced in the charge letter. The Appellant store owners' affidavits refute conclusively all of the charges as they swear that at no time did they accept SNAP benefits in exchange for cash, phone cards or any other ineligible items.
- The Appellant store owners purchased all stock from 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in May 2011. 5 U.S.C. § 552 (b)(6) & (b)(7)(C) and 5 U.S.C. § 552 (b)(6) & (b)(7)(C) have been the sole shareholders of Jawani Inc. since May 2011.
- FNS allowed years to pass since the time of the alleged events before issuing its charge letter.
- In the alternative, Jawani Market should qualify for the imposition of a hardship CMP pursuant to 7 CFR § 278.6(f)(1). There is no other SNAP authorized retail food store in the area of Jawani Market selling as large a variety of staple food items including halal meats and traditional ethnic staple foods.
- In the alternative, to the extent that trafficking is alleged, the store should qualify for a trafficking CMP in lieu of a permanent disqualification under 7 CFR § 278.6(i). As the owners were the only employees who would require SNAP training, the effective compliance policy consists of both owners familiarizing themselves with the "Training Guide for Retailers" and the "Compilation of Regulations Pertaining to Retail Food Stores, Wholesale Food Concerns and Financial Institutions." Concerning Criterion 1 and Criterion 2 under 278.6(i), this compliance program was appropriate under the circumstances and was in effect prior to the alleged violations. Concerning Criterion 3, the owners self-review of these materials constituted an effective personnel training program. Lastly, under Criterion 4, both owners confirm in their affidavits that they were not aware of and did not approve of any trafficking violations.

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

Authorization and Ownership History

The Food & Nutrition Service (FNS) authorized Jawani Market for the SNAP on August 3, 2009. A store owner, 5 U.S.C. § 552 (b)(6) & (b)(7)(C), signed the SNAP application for the store on June 10, 2009. 5 U.S.C. § 552 (b)(6) & (b)(7)(C) also signed the most recent reauthorization application on April 8, 2014, and acknowledged that all store owners were aware of the SNAP regulations and understood those regulations. Both the initial application and the reauthorization application included a certification and confirmation that all owners would “accept responsibility on behalf of the firm for violations of the SNAP regulations, including those committed by any of the firm’s employees, paid or unpaid, new, full-time or part-time.” The violations listed on this certification include accepting SNAP benefits in exchange for cash, otherwise known as trafficking, and other violations such as accepting SNAP benefits for ineligible non-food items.

The attorney for 5 U.S.C. § 552 (b)(6) & (b)(7)(C) submitted documentation that he sold the store to 5 U.S.C. § 552 (b)(6) & (b)(7)(C) and 5 U.S.C. § 552 (b)(6) & (b)(7)(C) on May 31, 2011. Based on this documentation, the Retailer Operations Division determined that this was sufficient to disassociate 5 U.S.C. § 552 (b)(6) & (b)(7)(C) as a store owner effectively postdated to May 31, 2011. Therefore, this administrative review decision only applies to the current owners of Jawani Market, 5 U.S.C. § 552 (b)(6) & (b)(7)(C). However, it should be noted that 5 U.S.C. § 552 (b)(6) & (b)(7)(C) did sign the reauthorization application as a store owner in 2014 even though, allegedly, he did not have an ownership interest at that time. This reauthorization application also lists owner 5 U.S.C. § 552 (b)(6) & (b)(7)(C) as “5 U.S.C. § 552 (b)(6) & (b)(7)(C)” with the same birth date and address.

Investigation Report

The Appellant seeks to refute the findings of the investigation report solely through the affidavits of the store owners who deny all allegations made against them. However, a full review of the case record shows that the charges of violations are based on the findings of a formal USDA- OIG investigation. The transactions cited in the letter of charges were conducted under the direction of a USDA-OIG special agent and are thoroughly documented. A complete review of this documentation has yielded no known error or discrepancy. The investigation report is specific and thorough with regard to the dates of the violations, the specific facts related thereto,

and is supported by documentation that confirms specific details of the transactions. The documentation presented by the Retailer Operations Division establishes by a preponderance of the evidence that the violations as reported occurred at the Appellant store.

Fiscal Claim

SNAP regulation 7 CFR § 278.7(a) establishes the authority for FNS to pursue fiscal claims against firms or other entities which have accepted or redeemed SNAP benefits in violation of the Food and Nutrition Act of 2008. The case record documents that the loss to the government in this case involved the exchange of 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in SNAP benefits for ineligible non-food items and the exchange of 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in SNAP benefits for a lesser amount of cash. This total amount of 5 U.S.C. § 552 (b)(6) & (b)(7)(C)⁹ equals the fiscal claim assessed by the Retailer Operations Division. The case record documents that this fiscal claim was properly calculated and established by FNS.

Time Period between Violations and Charge Letter

The Appellant complains that FNS allowed years to pass since the time of the alleged events before issuing its charge letter. A review of the case record documents that the undercover investigation took place between May 2011 and May 2014. The investigation found numerous violations of SNAP regulations including transactions conducted by the store owners themselves.

The Retailer Operations Division's administrative action is dependent on the release of the investigative report by the agency or branch that conducted the investigation. There are a number of reasons why an administrative action in a case could be delayed. For example, investigations often involve a number of different stores, and no arrests or charges are made until after all store investigations have been completed. Also, a delay may be due to determinations on whether or not prosecution will be pursued. In the present case, the administrative action appears to have been on hold while the USDA-OIG sought a determination whether criminal prosecution would be pursued in this case. When the USDA-OIG released its hold on November 29, 2016, the Retailer Operations Division properly pursued the required administrative action by issuing a charge letter on December 12, 2016. This was not an unreasonable amount of time between the release of the hold and the administrative action. A review of the case record indicates that the agency did not act improperly in issuing its charge letter on December 12, 2016.

Hardship to SNAP Community

The Appellant states that Jawani Market should qualify for the imposition of a hardship CMP pursuant to 7 CFR § 278.6(f)(1) as there is no other SNAP authorized retail food store in the area selling as large a variety of staple food items including halal meats and traditional ethnic staple foods. Regarding this contention, there is no provision in SNAP law or regulations that would negate, waive or reduce a permanent disqualification for trafficking due to a purported hardship to SNAP customers. Trafficking in SNAP benefits is an extremely serious violation and both 7 U.S.C. § 2021(b)(3)(B) and 7 CFR § 278.6(e)(1)(i) mandate that a first time violation shall warrant a permanent disqualification. Therefore, the Appellant's contention does not constitute valid grounds for dismissal of the current charges of violations or for mitigating the impact of those charges.

It should be noted that where there is a hardship to SNAP households due to a lack of authorized stores in the area, FNS may impose a hardship CMP on a firm in lieu of a **less than** permanent disqualification. However, the regulations at 7 CFR § 278.6(f)(1) clearly state that “a civil money penalty for hardship to SNAP households **may not be imposed** in lieu of a permanent disqualification.” [Emphasis added.] Because the Retailer Operations Division has taken action to permanently disqualify the Appellant firm, a hardship CMP in lieu of disqualification cannot be granted.

In any event, agency mapping systems show there are 46 SNAP authorized stores located within a one-mile radius of the Appellant store. Among these store are a few comparable or larger stores that sell halal meat and seafood and Middle-Eastern and international foods. Therefore, it is unlikely that the local SNAP community will suffer a hardship as opposed to a mere inconvenience due to the permanent disqualification of **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**.

TRAFFICKING CIVIL MONEY PENALTY

The Appellant requests reconsideration for a trafficking CMP in lieu of a permanent disqualification. The eligibility criteria for a trafficking CMP in lieu of a permanent disqualification is defined under 7 CFR § 278.6(i) which reads, in part:

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 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

[Emphasis added.]

The Appellant states that as the owners were the only employees who would require SNAP training, the effective compliance policy consists of both owners familiarizing themselves with the “Training Guide for Retailers” and the “Compilation of Regulations Pertaining to Retail Food Stores, Wholesale Food Concerns and Financial Institutions.” The Appellant contends that by doing so it met Criterion 1 and Criterion 2 under 7 CFR § 278.6(f)(1) and that this compliance program was appropriate under the circumstances and was in effect prior to the alleged violations. Concerning Criterion 3, the Appellant states that the self-review of these materials by the owners constituted an effective personnel training program. Lastly, under Criterion 4, both owners confirm in their affidavits that they were not aware of and did not approve of any trafficking violations.

Regarding the Appellant’s contentions, it is not credible that the store had an **effective** compliance program when the owners themselves participated in the majority of the SNAP violations described in the charge letter. The fact that a store owner participated in a trafficking violation in which SNAP benefits were exchanged for cash also invalidates the contention that the Appellant store met Criterion 4.

Furthermore, a review of the case record documents that the Retailer Operations Division determined that the documentation, or lack of documentation, submitted by the Appellant did not rise to the level of **substantial** evidence required under 7 CFR § 278.6(i)(1) and (2).

Regarding compliance policy standards, 7 CFR § 278.6(i)(1) states, in part:

As specified in Criterion 1 above, 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

A review of the case file establishes by a preponderance of the evidence that the Appellant did not meet the compliance policy standards of 7 CFR § 278.6(i)(1) as

there no were no written and dated statements of firm policy from before the date of the violations. The Appellant merely provided copies of documents that are sent to all retail food stores when they are authorized for the SNAP.

Regarding training program standards, 7 CFR § 278.6(i)(2) further states, in part:

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). [Emphasis added.]

A review of the case file establishes by a preponderance of the evidence that the Appellant did not meet the training program standards of 7 CFR § 278.6(i)(2) as the Appellant store owners did not provide any dated documentation of their initial self-training or documentation of any follow-up or refresher training.

Based on the analysis above, the Appellant did not meet all four required criteria under 7 CFR § 278.6(i) in order to qualify for a trafficking CMP. In addition, the Appellant did not meet the compliance policy standards of 7 CFR § 278.6(i)(1) or the training program standards of 7 CFR § 278.6(i)(2). Therefore, the Retailer Operation Division's denial of a trafficking CMP in lieu of a permanent disqualification is sustained as appropriate under 7 CFR § 278.6(i).

CONCLUSION

The SNAP regulation at 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, selling, stealing, or otherwise effecting an exchange 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 full review of the evidence in this case, there is no question that trafficking violations did occur during a USDA-OIG investigation. Based on the analysis above, the decision to impose a fiscal claim of \$793.79 and a permanent disqualification against Jawani Market, Appellant, is sustained.

RIGHTS AND REMEDIES

Section 14 of the Food and Nutrition Act of 2008 (7 U.S.C. § 2023) and Title 7, Code of Federal Regulations, Part 279.7 (7 CFR § 279.7) addresses 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, FNS is releasing this information in a redacted format as appropriate. FNS will protect, to the extent provided by law, personal information that could constitute an unwarranted invasion of privacy.

RONALD C. GWINN
Administrative Review Officer

April 26, 2018