

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

**Jolof Market**

**Appellant,**

**v.**

**Retailer Operations Division,**

**Respondent.**

**Case Number: C0200739**

**FINAL AGENCY DECISION**

It is the decision of the USDA that the record indicates that Jolof Market (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 7 CFR § 278.6(a) and (e)(1) in its administration of the SNAP, when it assessed a permanent disqualification against Jolof Market by letter dated September 5, 2017.

**AUTHORITY**

7 U.S.C. § 2023 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 August 7, 2017, Retailer Operations Division charged the 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 February 2017 through June 2017. The letter specifies that the penalty for trafficking is permanent disqualification as provided by 7

CFR § 278.6(e)(1). The letter also states 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).

In correspondence dated August 16, 2017, Appellant, through counsel, replied to the charge letter and generally stated that the disqualification is based on vague and undefinable principles such as unusually short time frames and excessively large purchase transactions which run completely afoul of the 14th Amendment as set forth and codified in the 5th Amendment providing my client with procedural due process. In sum, the mere one-sided belief that a certain frequency or amount can give rise to trafficking is devoid of any legal basis. Without certain concrete or even circumstantial evidence of a trend in behavior, the USDA simply cannot meet its burden of proof. Appellant, through counsel, stated that it is exclusively a market that specializes in real African foods and caters to all of Rhode Island and all of Massachusetts. They boast a clientele throughout New England to purchase their specialized African Foods at retail. Individuals will travel great distances to purchase items and will often make their bulk purchases and realize shortly thereafter that certain items were forgotten or otherwise acquired by virtue of an impulse item. Appellant, through counsel, also stated that customers will come in and purchase a plentiful amount of fish during any one visit. Accordingly the purchase of 20 pounds in any one visit gives rise to an amount in excess of 5 U.S.C. § 552 (b)(6) & (b)(7)(C) exclusive of any and all other items that may be purchased.

After giving consideration to the Appellant's reply and evidence of the case, Retailer Operations Division issued a determination letter dated September 5, 2017. This letter informed ownership that they were permanently disqualified from the SNAP in accordance with Sections 278.6(c) and 278.6(e)(1) of the SNAP regulations. The letter also states that Retailer Operations considered Appellant's eligibility for a trafficking civil money penalty (CMP) according to the terms of Section 278.6(i) of the SNAP regulations. However, Retailer Operations Division determined that Appellant was not eligible for the CMP because it failed to submit sufficient evidence to demonstrate that Appellant had established and implemented an effective compliance policy and program to prevent violations of the SNAP.

In a letter dated September 13, 2017, Appellant, through counsel, appealed the Retailer Operations Division's assessment and requested an administrative review of this action. The appeal was granted.

## **STANDARD OF REVIEW**

In appeals of adverse actions, the Appellant bears the burden of proving by a preponderance of the evidence, that the administrative 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 2008, as amended, 7 U.S.C. § 2021 and 278 of Title 7 of the Code of Federal Regulations (CFR). Part 278.6(a) and (e)(1)(i) establish the authority upon which a permanent disqualification may be imposed against a retail food store in the event that personnel of the firm have engaged in trafficking SNAP benefits.

7 CFR § 278.6(a) states, in part that, “FNS may disqualify any authorized retail food store...from further participation in the program 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, inconsistent redemption data, *evidence obtained through a transaction report under an electronic benefit transfer system...*” (*Emphasis added*)

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.” 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.”

7 CFR § 271.2 states in part that, “Eligible foods mean: 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 § 278.6(b)(2)(ii) states, in part, that: “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, 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.”

## SUMMARY OF THE CHARGES

The Appellant was charged and determined to be trafficking based on an analysis of electronic benefit transfer (EBT) transaction data from February 2017 through June 2017. This involved the following transaction patterns which are trafficking indicators:

1. Multiple transactions were made from individual benefit accounts in unusually short time frames.
2. Excessively large purchase transactions were made from recipient accounts.

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

### APPELLANT'S CONTENTIONS

In its response to the charge letter and in its request for administrative review, Appellant made the following summarized contentions, in relevant part:

- The disqualification is based on vague and undefinable principles such as unusually short time frames and excessively large purchase transactions which run completely afoul of the 14th Amendment as set forth and codified in the 5th Amendment providing my client with procedural due process. In sum, the mere one-sided belief that a certain frequency or amount can give rise to trafficking is devoid of any legal basis. Without certain concrete or even circumstantial evidence of a trend in behavior, the USDA simply cannot meet its burden of proof.
- My client is exclusively a market that specializes in real African foods and caters to all of Rhode Island and all of Massachusetts. They boast a clientele throughout New England to purchase their specialized African Foods at retail. Individuals will travel great distances to purchase items and will often make their bulk purchases and realize shortly thereafter that certain items were forgotten or otherwise acquired by virtue of an impulse item.
- Customers will come in and purchase a plentiful amount of fish during any one visit. Accordingly the purchase of 20 pounds in any one visit gives rise to an amount in excess of 5 U.S.C. § 552 (b)(6) & (b)(7)(C) exclusive of any and all other items that may be purchased.

Appellant, through counsel, provided six (6) signed and notarized client affidavits of customers attesting to purchases made at Appellant's store. Retailer Operations Division conducted an analysis of the customer affidavits and determined that two of the alleged customers did not have any information in the system and may not be SNAP recipients. The remaining four customers were found to have also shopped at area small grocery stores, medium grocery stores, supermarkets and superstores during the review period and did not rely solely on Appellant to fill their grocery needs. Additionally, the record reflects that:

- 5 U.S.C. § 552 (b)(6) & (b)(7)(C).
- 5 U.S.C. § 552 (b)(6) & (b)(7)(C)
- 5 U.S.C. § 552 (b)(6) & (b)(7)(C).
- 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

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

## ANALYSIS AND FINDINGS

The FNS authorized the business as a convenience store on March 15, 2017. The file indicates that in reaching a disqualification determination, Retailer Operations Division considered information obtained during a January 25, 2017, store visit to the business 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:

- One cash register and one POS device with a small counter area partially obstructed by other smaller items available for sale.
- Shopping baskets available but no carts available for customers.
- No adding machines or optical scanners were available at checkout. No specialty registers present.
- No unusual pricing structure **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** and does not round transaction totals.
- No evidence of wholesale business such as posted prices or separate entrances for wholesale customers.
- No kitchen or food preparation area
- No hot food sold and no food sold for onsite consumption.
- No deli area.
- No meat or seafood specials or bundles or fruit/vegetable boxes sold.
- Estimated to be 1300 square feet with no food stored in a storage area out of public view.
- No food stored off site and no storage coolers or freezers.
- Store does not take telephone or online orders and does not offer delivery.
- Store does not operate through a night window or plastic barrier with food stock behind the barrier.
- Store is not a delivery route, farmers' market or specialty food store primarily selling one food type such as meat, poultry, seafood, bread, fruit or vegetables.
- Highest priced items were Rice (\$55.00/bag), Bony fish (\$10.00/lb.), Con fish (\$7.00/lb.), and Sede fish (\$8.00/lb.).
- Store stocks minimal amounts of non-food items such as but not limited to paper products and general household products.
- Store stocks limited amounts of dairy products, bread and cereal products, fruit and vegetable products and meat, poultry and fish products.
- Store has empty/broken or unused coolers/freezers and empty shelves.

The second issue for consideration is whether Retailer Operations Division has presented a convincing case that Appellant likely trafficked in SNAP benefits. Each attachment furnished with the charge letter represents the questionable and unusual patterns of SNAP transactions indicative of trafficking which were conducted at Appellant's store during the review period. As there is more than one pattern of irregular transactions, the case of trafficking becomes more convincing.

**Attachment 1 of the Charge letter – Multiple transactions were made from individual benefit accounts in unusually short time frames.**

This attachment lists 11 sets of 25 transactions 5 U.S.C. § 552 (b)(6) & (b)(7)(C).  
5 U.S.C. § 552 (b)(6) & (b)(7)(C).

Appellant, through counsel, contends that the store is exclusively a market that specializes in real African foods and caters to all of Rhode Island and all of Massachusetts. Individuals will travel great distances to purchase items and will often make their bulk purchases and realize shortly thereafter that certain items were forgotten or otherwise acquired by virtue of an impulse item. With regard to these contentions, it is important to note that although the store stocks ethnic food products, these items do not appear to be abundantly stocked to satisfy large SNAP purchases or in amounts that would allow Appellant to service the entire state of Rhode Island and Massachusetts. The store visit photographs show that Appellant has a sign posted that advertises fish sold by the pound however, there were no photographs showing stock that appeared to be sold by the pound and Appellant did not store any stock outside of public view. The record reflects that there are other stores in the area that offer the same or similar stock and therefore, it is implausible that SNAP recipients would consider Appellant a first choice destination or travel great distances to fulfill large purchases of food or that they would have made relatively large multiple purchases 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

Additionally, customers will sometimes forget an item or see something at the checkout and decide to purchase it after they've already completed their transaction. In such instances, it is reasonable to expect the subsequent purchase to be for a nominal amount because it is quite rare to find very expensive items positioned at the checkout area, especially in smaller stores. However, in a number of questionable transactions, the subsequent transactions were for amounts that exceed any nominal, afterthought purchase. In some cases the amounts of subsequent transactions exceeded the preceding transaction amount. Based on the above analysis, it is therefore more likely true than not true that the irregular transactions cited in the charge letter Attachment 1 are due to trafficking in SNAP benefits.

**Attachment 2 of the Charge letter - Excessively large purchase transactions were made from recipient accounts.**

This attachment lists 144 SNAP transactions 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Based on the results of the contracted store visit, the large transaction amounts are not consistent with the store's inventory of low priced foods. The firm does offer a few food items in bulk and ethnic or specialty foods that sell at a high price however, based on Appellant's available stock, the substantial number of high dollar transactions calls into question the legitimacy of these transactions. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Appellant does not appear to offer any fresh meat or produce and although it does offer some frozen ethnic food items it does not appear that these items are stocked in abundance. Appellant offers large sacks of rice however; it is implausible that households would purchase this item in large quantities.

The Appellant, through counsel, contends that customers will come in and purchase a plentiful amount of fish during any one visit. Accordingly the purchase of 20 pounds in any one visit

gives rise to an amount in excess of 5 U.S.C. § 552 (b)(6) & (b)(7)(C) exclusive of any and all other items that may be purchased. With regard to this contention, it is conceivable that, a customer could have a purchase in excess of 5 U.S.C. § 552 (b)(6) & (b)(7)(C) at Appellant's store however, the store's physical characteristics and available stock at the time of the store visit do not adequately support that Appellant would be able to sustain the number of excessively high SNAP transactions as cited in the charge letter or that they are legitimate SNAP purchases. Appellant did not provide any purchase invoices or receipts to show that it maintained enough stock to support this contention.

The record reflects that Retailer Operations Division compared Appellant's store to two other African ethnic stores within two miles of Appellant and found that those store carried the same or similar stock in significantly greater quantities than Appellant yet Appellant's store had much larger transaction amounts during the review period. Moreover, Appellant, through counsel, provided a list of available fish and price per pound however that list does not coincide with the list that was posted during the store visit and appears contrived in support of its contention.

**List provided by counsel**

- Couta fish - \$16.75/lb.
- Kinney fish - \$14.99/lb.
- Cat Fish - \$15.50/lb.
- Dry shrimp - \$19.00/lb.
- Smoky shrimp - \$15.99/lb.
- Mussels - \$19.95/lb.
- Dry Bonny - \$11.50/lb.
- Smoky Fish - \$21.00/lb.

**List posted during store visit**



During the review period, Appellant's SNAP redemptions were nearly 5 U.S.C. § 552 (b)(6) & (b)(7)(C) higher than the average SNAP redemptions of other Providence County convenience stores. Appellant's average transaction amount during the review period was 5 U.S.C. § 552 (b)(6) & (b)(7)(C) higher than the average transaction amount of other convenience stores in Providence County, Rhode island, all while its total transactions conducted during the review period was 5 U.S.C. § 552 (b)(6) & (b)(7)(C) less than the average total transaction amounts of convenience stores in the area.

Based on the above analysis, the Retailer Operations presented a convincing case that Jolof Market trafficked in SNAP benefits which the Appellant failed to adequately rebut. The attachments furnished with the charge letter identify the irregular patterns of SNAP transactions which indicate that trafficking was taking place at the firm during the review period. As there is more than one pattern of trafficking, a determination that the Appellant firm engaged in trafficking becomes more convincing.

Appellant, through counsel, contends that the disqualification is based on vague and undefinable principles such as unusually short time frames and excessively large purchase transactions which run completely afoul of the 14th Amendment as set forth and codified in the 5th Amendment. In

sum, the mere one-sided belief that a certain frequency or amount can give rise to trafficking is devoid of any legal basis. Without certain concrete or even circumstantial evidence of a trend in behavior, the USDA simply cannot meet its burden of proof. With regard to these contentions, the extensive analysis of Appellant's EBT transaction record, upon which charges of violations are based, provides substantial evidence that questionable transactions during the focus period have characteristics that are not consistent with legitimate sales of eligible food to EBT customers at a store of this type and size. Rather, the characteristics are indicative of illegal trafficking in program benefits. In addition to the raw data of suspicious transactions, the file also notes that Appellant has no shopping carts and only a few shopping baskets available for customers to carry the many items no doubt necessary for questioned transactions as large as listed. Appellant has only one register and one EBT device, very limited counter space, and insufficient stock to explain as legitimate the program redemptions. A review of the record has yielded no indication of error or discrepancy in the reported findings by Retailer Operations Division that program benefits were accepted in exchange for cash or consideration other than eligible food. Therefore, based on a review of the evidence in this case, it appears the Retailer Operations has provided substantial evidence of trafficking violations, in the two patterns of EBT transaction characteristics indicated in the letter of charges, and that it is more likely true than not that program violations did, in fact, occur as charged.

Moreover, CFR § 278.6(a), which establishes the authority upon which FNS may disqualify any authorized retail food store, reads, in part: "Such disqualification shall result from a finding of a violation on the basis of evidence that may include facts established through ... inconsistent redemption data (and) evidence obtained through a transaction report under an electronic benefit transfer system." Therefore, that the Retailer Operations used computer printouts of transaction data and other reports, in addition to store visit observations and an analysis of household shopping behavior, in rendering a finding that violations indicative of trafficking are occurring, is as valid a means of establishing facts as direct evidence obtained through an on-site investigation and the eye witnessing of trafficking.

### **Right to Due Process**

With regard to the contention that the agency violated the Appellant's right to due process, it is important to note that the letter of charges provided Appellant the opportunity to reply to the charges and provide explanations for the questionable transactions. Appellant, through counsel, did reply to the charges in writing, denying the charge of trafficking and offering various explanations for the questionable transactions. After considering the evidence of the case and Appellant's reply, Retailer Operations Division determined that a permanent disqualification was warranted. But while administrative action is held in abeyance for most adverse actions against firms pending appeal, there can be no stay of action pending an appeal of a permanent disqualification. 7 U.S.C. at 2023(a)(18) of the Food Stamp Act of 2008, as amended, states, in part: "SUSPENSION OF STORES PENDING REVIEW. Notwithstanding any other provision of this subsection, any permanent disqualification ... shall be effective from the date of receipt of the notice of disqualification."

Furthermore, the regulations at 7 CFR § 278.6(c) state, "in the case of a firm subject to



permanent disqualification under paragraph (e)(1) of this section...” which describes disqualification for trafficking, “...the determination shall inform such a firm that action to permanently disqualify the firm shall be effective immediately upon the date of receipt of the notice of determination from FNS, regardless of whether a request for review is filed in accordance with part 279 of this chapter.”

The agency’s due process procedures are two-fold in nature. First, the retailer is afforded an opportunity to reply to the charges as specified by the Retailer Operations Division; Appellant has availed itself of this first aspect of the due process procedures in the form of a written reply to the Retailer Operations Division. The second level of due process involves an administrative review, of which Appellant has likewise availed itself and in the process of which Appellant was granted an additional three (3) weeks within which additional information may be provided in support of the request for review. The purpose of the administrative review process is to ensure that firms aggrieved by FNS’s adverse actions have the opportunity to have their position fairly considered by an impartial reviewing authority prior to that adverse action becoming final.

Appellant has been duly given, and has taken, the opportunity to present to USDA through the administrative review process whatever evidence and information it deems as pertinent in support of its position that the Retailer Operations Division’s adverse action should be reversed. In the instant case Appellant provided additional materials a full month following delivery of the letter acknowledging acceptance of the appeal, the additional materials were accepted and included in the administrative review. Therefore, any evidence and information that Appellant presented to the Retailer Operations Division, as well as any such information submitted subsequently, have now been considered in this administrative review in rendering the final agency administrative decision in this case. The record does not indicate any departure from established policy or procedures with regard to Appellant’s right to a fair and thorough review. Appellant has exercised its opportunity to reply to the charge letter and its administrative review rights, and by doing so has availed itself of the full complement of the agency’s statutory obligations with regard to due process.

## **Summary**

The transaction data and overall firm record convincingly demonstrate repetitive patterns of unusual, irregular, and inexplicable SNAP activity for this type of firm indicative of trafficking. Once Retailer Operations Division established a convincing case against Appellant, ownership bears the burden of proving, by a preponderance of the evidence, that the administrative action should be reversed. That means the Appellant has the burden of providing relevant evidence which a reasonable mind, considering the record as a whole, would accept as sufficient to support a conclusion that the matter asserted is more likely to be true than not true. If this is not demonstrated, the case is to be sustained.

As previously noted, 7 CFR § 278.6(a) states 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 inconsistent redemption data, and evidence obtained

through a transaction report under an electronic benefit transfer system.

Retailer Operations has presented a convincing case that Appellant has likely trafficked in SNAP benefits. This is evidenced by: the suspicious patterns identified in the charge letter, the lack of food inventory necessary to support the firm's SNAP redemptions as observed and recorded during the onsite visit, the lack of purchase invoices of foods to cover SNAP redemption totals for the review months, the lack of adequate explanations for customer spending habits given that there are other SNAP authorized stores located within proximity to Appellant, and the irregular SNAP transaction data of Appellant as compared to other convenience stores in the State.

While ownership was afforded the opportunity to provide valid explanations and evidence that support that the questionable transactions were the result of legitimate purchases of eligible food items, Retailer Operations Division determined that Appellant's contentions did not outweigh the evidence in the record. The owner has not provided sufficient evidence to rebut the convincing case that Appellant most likely trafficked in SNAP benefits. As such, the SNAP regulations are specific with regard to the action that must be taken if personnel of the firm have trafficked, which is that FNS shall disqualify the firm permanently.

### **CIVIL MONEY PENALTY**

The Appellant did not timely request consideration for a trafficking CMP in lieu of a permanent disqualification under 7 CFR § 278.6(i) even though it was informed of the right to do so in the charge letter dated July 10, 2017. Even if a timely request had been submitted, the Appellant would likely not have been eligible for a trafficking CMP in lieu of disqualification because there is insufficient evidence to demonstrate that the firm had established and implemented an effective SNAP compliance policy and program *prior* to the violations. 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**

Retailer Operations Division's analysis of Appellant's EBT transaction record was the primary basis for its determination to permanently disqualify Jolof Market. This data provided substantial evidence that the questionable transactions during the review period had characteristics that are consistent with trafficking in SNAP benefits. Therefore, based on a review of all the evidence in this case, it is more likely true than not true that program violations did, in fact, occur as charged by Retailer Operations Division. Based on the discussion above, the determination to impose a permanent disqualification against Jolof Market 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

December 6, 2017