

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

Organic Halal N Halal Meat,

Appellant,

v.

Case Number: C0184641

Retailer Operations Division,

Respondent.

FINAL AGENCY DECISION

It is the decision of the U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS), that there is sufficient evidence to support a finding that a permanent disqualification from participation as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP) was properly imposed against Organic Halal N Halal Meat by the Retailer Operations Division of FNS.

ISSUE

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with Title 7 Code of Regulations (CFR) Part 278 in its administration of the SNAP, when it imposed a permanent disqualification against Organic Halal N Halal Meat on August 16, 2018.

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 conducted an investigation of the compliance of Organic Halal N Halal Meat with Federal SNAP law and regulations during the period September 15, 2015 through October 28, 2015. The investigation report documents that personnel at Organic Halal N Halal Meat, in addition to accepting SNAP benefits in exchange for ineligible items on three occasions, also exchanged SNAP benefits for cash during one undercover compliance visit. 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 August 1, 2016, that it was charged with violating the terms and conditions of the SNAP regulations. The Charge Letter along with a copy of the investigation report was delivered to the Appellant. The Charge 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 replies to the Retailer Operations Division of October 12, 2016, December 1, 2016, March 20, 2018, and June 13, 2018, the Appellant, through its former counsel, replied to the charges therein denying the allegation of trafficking. USDA appears to lack sufficient evidence upon which to base an allegation of trafficking as there is no contemporary evidence to show that the bills that USDA claims were involved in the trafficking transaction ever existed. The Appellant requested that the charges imposed against it be dismissed.

The record reflects that in the October 12, 2016 response to FNS, the Appellant’s former counsel requested information and documents from FNS with regard to the agency’s case against Organic Halal N Halal Meat pursuant to the Freedom of Information Act (FOIA). FNS provided a response to counsel’s FOIA request in a correspondence dated November 9, 2016. In a letter dated December 1, 2016, the Appellant’s former counsel filed a FOIA appeal of the documents provided by FNS in response to the FOIA request. The record reflects that FNS provided a response to counsel’s FOIA appeal, dated March 14, 2018, and received no further communication from the Appellant or its former counsel with regard to the agency’s response.

After giving consideration to the Appellant’s replies and the evidence in this case, the Retailer Operations Division informed the Appellant, by letter dated August 16, 2018, that Organic Halal N Halal Meat was permanently disqualified from participation as a retail store in the SNAP. 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 August 29, 2018, the Appellant requested an administrative review of the permanent disqualification determination. FNS granted the Appellant’s request for administrative review by letter dated September 17, 2018.

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, might 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 covered in the Food and 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 ... [Emphasis added.]

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, in part:

Trafficking means the buying or selling of coupons, ATP cards or other benefit instruments for cash or consideration other than eligible food ...

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 ...

7 CFR §278.6(i) states, in part:

FNS may impose a civil money penalty in lieu of a permanent disqualification for trafficking as defined in § 271.2 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

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

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). [Emphasis added.]

(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. [Emphasis added.]

SUMMARY OF CHARGES

During an investigation from September 15, 2015 through October 28, 2015, the USDA conducted four compliance visits at Organic Halal N Halal Meat. A report of the investigation was provided to the Appellant as an attachment to the Charge Letter dated August 1, 2016. The investigation report included Exhibits A through D which provide full details on the results of each compliance visit. The investigation report documents that SNAP violations occurred during four of the four compliance visits. During one of the compliance visits, a clerk exchanged cash for SNAP benefits as documented by Exhibit D. The buying or selling of SNAP benefits for cash or consideration other than eligible food is trafficking as defined under 7 CFR § 271.2.

APPELLANT'S CONTENTIONS

The following represents a brief summary of the Appellant's contentions in this matter. Please be assured, however, that in reaching a decision, full attention and consideration was given to all contentions presented, including any not specifically recapitulated or specifically referenced herein.

In the replies to the Charge Letter, in the administrative review request, and in subsequent correspondence to FNS, the Appellant, through its former counsel, made the following summarized contentions, in relevant part:

- The Appellant denies the allegation of trafficking. The Appellant has a policy against trafficking and the sale of ineligible items as a whole.
- The cashier who gave 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in exchange for SNAP benefits was a buyer for the business. The owner had been looking to sell the business and the buyer wanted to verify the store's monthly sales reports personally. The buyer ran the register and the store's manager worked in the meat department. The manager would come to the front and supervise the buyer intermittently.
- The store specializes in serving the grocery needs of SNAP participants along with providing Halal meat, and also carries a complete variety of food, drink, and snack items. Nearly all of Organic Halal N Halal Meat's clients come from the surrounding residential neighborhoods, and as such, the owner has crafted the store's offerings to cover most of the grocery needs of the average local family. A significant portion of the store's customers are SNAP participants, and accordingly, the vast majority of the store's offerings are qualified items under the SNAP regulations. One of the most significant draws of the store is the fresh Halal meats and foods sold therein, which are not available in the surrounding stores.
- The evidence presented before the Department is sworn to by the investigator, with no corroborating evidence. In Exhibit D of the investigation report, the investigator identifies the cash received as two (2) ten-dollar bills as follows: "\$10. 2: MF 13398477 A SERIES 2013, MA 10341400 A SERIES 2013." After a careful review of the Department's allegations set forth in the Charge Letter, and a review of the pertinent case law on this issue, the Department appears to lack sufficient evidence upon which to base an allegation of trafficking against the Appellant. There are technical issues with USDA's allegations against the Appellant. There are no photos of the bills that were allegedly trafficked and there is no way to verify that the bills that USDA claims were involved in the trafficking transaction every existed. There is no contemporary evidence showing that the bills were from the same transaction.
- Another investigation technicality is that the investigator's affidavit is "hearsay" by definition—an out of court statement offered to prove the truth of the matter asserted. Fed.R.Evid. 801(c). Pursuant to Section 556(d) of the Administrative Procedures Act, hearsay evidence may be used in an administrative procedure if found to be reliable and credible. The Appellant cited case laws in support thereof.
- The Appellant requests to subpoena and depose the investigator.
- The Appellant requests that FNS dismiss the trafficking charges imposed against it.

In support of these contentions, the Appellant provided FNS with 26 photos showing the business, food stock, and general options.

ANALYSIS AND FINDINGS

Denial of Trafficking Allegation

The Appellant denies the allegation of trafficking. It has a policy against trafficking and the sale of ineligible items as a whole.

Regarding the Appellant's contention that it denies that the trafficking of SNAP benefits took place as described in the investigation report, this review encompasses and documents the examination of the primary and relevant information in this case, the purpose of which is, as noted above, to determine whether the Appellant demonstrates by a preponderance of the evidence that the permanent SNAP disqualification should be reversed. In this case, therefore, if the Appellant demonstrates by a preponderance of the evidence that the trafficking of SNAP benefits did not occur in the Appellant's firm, then the SNAP violations will be considered not to have occurred and the disqualification reversed. If this is not demonstrated the case is to be sustained. Assertions that the firm has not violated program rules, by themselves and without supporting evidence and rationale, do not constitute valid grounds for dismissal of the current charges of violations or for mitigating their impact.

SNAP Violations

The Appellant contends that the cashier who gave **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** in exchange for SNAP benefits was a buyer for the business. The owner had been looking to sell the business and the buyer wanted to verify the store's monthly sales reports personally. The buyer ran the register and the store's manager worked in the meat department. The manager would come to the front and supervise the buyer intermittently.

These contentions cannot be accepted as a valid basis for dismissing any of the charges, or for mitigating the impact of those charges. As owner of the store, the Appellant is liable for all violative transactions that occur at Organic Halal N Halal Meat. Regardless of whom the ownership of a store may utilize to handle store business, ownership is accountable for the proper handling of SNAP benefit transactions. Prior to becoming authorized to participate in the SNAP on March 24, 2015, the Appellant completed and submitted a SNAP Application for Retail Stores. The SNAP Application contained a section indicating that the person(s) signing the Application understood and agreed to ensure that store employees follow the SNAP rules and regulations and that the person(s) accepts responsibility for any SNAP violations that may occur at the store that were committed by any of the store's employees. The SNAP Application also included a section that contained a statement which acknowledged that the person(s) signing the Application was aware that violations of program rules could result in fines, legal sanctions, withdrawal, or disqualification of the store. In addition, the Appellant was provided with program training and reference materials which reinforced the statements included in the SNAP Application.

The regulations establish that an authorized food store may be disqualified from participating in the program when the store fails to comply with the Act or regulations because of the wrongful conduct of an owner, manager, or someone acting on their behalf. The Appellant admitted that the cashier who gave 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in exchange for SNAP benefits was a buyer for the business. Trafficking is defined in 7 CFR § 271.2 of the SNAP regulations which states that 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... The Food and Nutrition Act of 2008, at § 2021, does not allow for discretion in determining sanctions for trafficking and is specific in its requirement that “Disqualification ... shall be permanent upon ... the first occasion of a disqualification based on ... trafficking ... by a retail food store”.

In keeping with this legislative mandate, 7 CFR § 278.6(e)(1)(i) of the SNAP regulations states that FNS shall disqualify a firm permanently if personnel of the firm have trafficked. The Appellant’s implied contention that the trafficking of SNAP benefits was committed by a potential buyer without its knowledge, consent, or approval cannot be accepted as a valid basis for diminishing the penalty. To allow store ownership to disclaim accountability for the acts of persons whom the ownership chooses to utilize to handle store business would render virtually meaningless the enforcement provisions of the Food and Nutrition Act and the enforcement efforts of USDA.

Customer Hardship

The Appellant contends that the store specializes in serving the grocery needs of SNAP participants along with providing Halal meat, and also carries a complete variety of food, drink, and snack items. Nearly all of Organic Halal N Halal Meat’s clients come from the surrounding residential neighborhoods, and as such, the owner has crafted the store’s offerings to cover most of the grocery needs of the average local family. A significant portion of the store’s customers are SNAP participants, and accordingly, the vast majority of the store’s offerings are qualified items under the SNAP regulations. One of the most significant draws of the store is the fresh Halal meats and foods sold therein, which are not available in the surrounding stores.

With regard to the Appellant’s contentions, 7 CFR § 278.6(f) of the SNAP regulations provides for civil money penalty assessments in cases where disqualification would cause “hardship” to SNAP households because of the unavailability of a comparable participating food store in the area to meet their needs. However, this regulation also sets forth the following specific exception to such assessments there under: “A civil money penalty for hardship to SNAP households may not be imposed in lieu of a permanent disqualification”. Therefore, since this case involves a permanent disqualification action, the civil money penalty provision is not applicable to the present case.

No Corroborating Evidence

The Appellant contends that the evidence presented before the Department is sworn to by the investigator, with no corroborating evidence. In Exhibit D of the investigation report, the investigator identifies the cash received as two (2) ten-dollar bills as follows: “\$10. 2: MF 13398477 A SERIES 2013, MA 10341400 A SERIES2013.” After a careful review of the Department’s allegations set forth in the Charge Letter, and a review of the pertinent case law on this issue, the Department appears to lack sufficient evidence upon which to base an allegation of trafficking against the Appellant. There are technical issues with USDA’s allegations against the Appellant. There are no photos of the bills that were allegedly trafficked and there is no way to verify that the bills that USDA claims were involved in the trafficking transaction every existed. There is no contemporary evidence showing that the bills were from the same transaction.

Regarding the Appellant’s contentions, the charges of violations are based on the findings of a formal Department of Agriculture investigation; all transactions cited were conducted under the direct supervision of a Department investigator. All such transactions are fully documented and a review of this documentation has yielded no indication of substantial error or discrepancy in the reported findings; the investigative record is specific and thorough with regard to the dates and other specifics of the violations and in all other critically pertinent detail. Additionally, investigative results are routinely supported by documentation that confirms items purchased at a retail firm in the course of an investigation are donated to and signed for by a charitable organization following the transactions. Such documentation includes the signature and title of the official of the charitable organization accepting the donated item, the name and address of the organization, the date the donation was made and the official’s certification that the items described were in fact received.

The record also includes photographs of the items purchased at the store during the investigation, along with the dated receipts clearly showing that they were obtained at the Appellant store as well as documentation of trafficking transactions. The purchase costs of each of the transactions and documentation of trafficking involved in the investigation are documented on SNAP terminal receipts obtained during each transaction. Moreover, transaction data generated by each investigative purchase at the Appellant’s firm is stored in agency data systems.

Accordingly, the Appellant offers no compelling information or supporting documentation which would constitute evidence that any relevant detail is incorrect in any substantial respect. As such, the Appellant’s claims of inadequacies in the investigation and denial of the charges exerts little force in the context of the considerable information and documentation presented by the Retailer Operations Division, as referenced above, which indicate that the merchandise as described was in fact obtained at the Appellant firm on the dates noted and that trafficking of SNAP benefits took place at the firm, that the manner in which it was obtained is accurately described and that the clerk(s) in attendance throughout did in fact conduct the transactions described.

Hearsay Evidence

The Appellant contends that another investigation technicality is that the investigator's affidavit is "hearsay" by definition—an out of court statement offered to prove the truth of the matter asserted. Fed.R.Evid. 801(c). Pursuant to Section 556(d) of the Administrative Procedures Act, hearsay evidence may be used in an administrative procedure if found to be reliable and credible. The Appellant cited case laws in support thereof.

The Appellant's contentions with regard to hearsay are duly noted. It is important to clarify, however, that the rules of evidence in administrative proceedings differ from those used in judicial proceedings generally and differ specifically with regard to the admissibility of hearsay: The Administrative Procedures Act (APA) at 5 U.S.C. § 556(d) provides that *any* oral or documentary evidence may be received. It excludes only "irrelevant, immaterial, or unduly repetitious evidence," primarily for the sake of expedience. Therefore the test for admissibility under the APA is relevance; hearsay is admissible, like other evidence, if it is relevant. In the present case, the statements of the investigator regarding the trafficking transactions are corroborated by additional and substantial physical evidence, impart probative value and are closely connected to the issues at hand, indicating materiality. Thus, they are clearly relevant, even if they may be seen as hearsay. Nonetheless, both investigators and their cooperating informants, if relevant, are typically available to testify at trial, in which case eye-witness accounts of the events described in the report could be presented, thus precluding the presumption of hearsay.

In regard to the case laws cited by the Appellant, considerations of relevant legal precedent through case laws, or the lack thereof in relation to the present case, are beyond the scope of this review. This review relies upon the statute and regulations governing the SNAP and evaluates whether the decision of the Retailer Operations Division to impose a permanent disqualification upon the Appellant was in accordance with same and sustainable by a preponderance of the evidence. The Appellant's case law references are acknowledged in this context only.

Request to Depose Investigator

The Appellant requests to depose and question the investigator. With regard to the Appellant's request, neither the Food and Nutrition Act of 2008 nor the SNAP regulations pursuant thereto provide for evidentiary proceedings at the administrative level of review, and therefore such proceedings are not included in the administrative review process. Rather, the Act and regulations provide that any firm aggrieved by an administrative review determination may seek judicial review of the determination in Federal court or a state court of record having competent jurisdiction. In such event, trial de novo proceedings ensure the firm of a full evidentiary hearing on the agency action at issue.

Dismissal of Sanction

The Appellant requests that FNS dismiss the trafficking charges imposed against it. However, as mentioned previously, the Food and Nutrition Act of 2008, at § 2021, does not allow for discretion in determining sanctions for trafficking and is specific in its requirement that "... a

disqualification . . . 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 . . .”. In keeping with this legislative mandate, 7 CFR § 278.6(e)(1)(i) of the SNAP regulations states that FNS shall disqualify a firm permanently if personnel of the firm have trafficked.

CIVIL MONEY PENALTY

As previously indicated, the August 16, 2018 Determination Letter advised the Appellant of the ineligibility for consideration for a trafficking civil money penalty according to the terms of Section 278.6(i) of the SNAP regulations. The letter of charges dated August 1, 2016 advised the Appellant that documentation of eligibility for that alternative sanction was to be provided within 10 days. The regulations specify that such documentation must, in part, establish that there was an effective compliance policy and training program and that both were in effect and implemented prior to the occurrence of violations. The letter indicates that no information was provided by the Appellant for consideration; therefore, on review the Retailer Operations Division’s determination that the Appellant firm is ineligible for the imposition of civil money penalties in lieu of disqualification is affirmed.

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 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. Therefore, the decision to impose a permanent disqualification against the Appellant, Organic Halal N Halal Meat, is sustained.

RIGHTS AND REMEDIES

Your attention is called to Section 14 of the Food and Nutrition Act of 2008 (7 U.S.C. 2023) and to Section 279.7 of the Regulations (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, 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.

LORIE L. CONNEEN
Administrative Review Officer

March 22, 2019