

**BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD  
OF THE STATE OF CALIFORNIA**

**AB-8526**

File: 21-119402 Reg: 05059244

LUFTI MUSTAFA ABBUSHI dba Jimmy's Market  
6245 Third Street, San Francisco, CA 94124  
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,  
Respondent

Administrative Law Judge at the Dept. Hearing: Robert R. Coffman

Appeals Board Hearing: January 11, 2007  
Sacramento, CA

**ISSUED APRIL 24, 2007**

Lufti Mustafa Abbushi, doing business as Jimmy's Market (appellant), appeals from a decision of the Department of Alcoholic Beverage Control<sup>1</sup> which revoked his license for violations of Welfare and Institutions Code section 10980, subdivision (g), in conjunction with Business and Professions Code section 24200, subdivisions (a) and (b), involving the federal Food Stamp program.

Appearances on appeal include appellant Lufti Mustafa Abbushi, appearing through his counsel, Walter Cook, and the Department of Alcoholic Beverage Control, appearing through its counsel, Robert Wieworka.

**FACTS AND PROCEDURAL HISTORY**

Appellant's off-sale general license was issued on February 5, 1982. On March

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<sup>1</sup>The decision of the Department, dated February 9, 2006, is set forth in the appendix.

24, 2005, the Department instituted an accusation against appellant charging that he knowingly used, transferred or possessed food stamps or authorizations to participate in the Federal Food Stamp Program (“FSP”) in a manner not authorized by the federal Food Stamp Act.<sup>2</sup>

An administrative hearing was held on January 10 and 11, 2006, at which time oral and documentary evidence was received. At that hearing, testimony was presented by Teresa L. Toups (“Ms. Toups”), officer in charge of the Sacramento field office of the United States Department of Agriculture Food and Nutrition Services (“USDA”); by Lufti Mustafa Abbushi, appellant/licensee (“Abbushi”); and by Basheer Abdullah, appellant’s bookkeeper.

Subsequent to the hearing, the Department issued its decision which determined that the charge of the accusation had been established and ordered appellant’s license revoked.

Appellant thereafter filed a timely notice of appeal. In his appeal, appellant contends: (1) the decision should be reversed because it is based on false conclusions in the exhibits which accompanied Ms. Toups’ testimony<sup>3</sup>; (2) Ms. Toups lacked the qualifications of an expert, and should not have been permitted to testify as such; (3) no

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<sup>2</sup> The USDA earlier found that violations had occurred, and permanently disqualified respondent from participating in the food stamp program. Respondent appealed the USDA determination and an Independent Review Officer sustained the USDA decision. The USDA decision became final when respondent failed to appeal to the United States District Court. (Finding of Fact 2, unnumbered paragraph 6.)

<sup>3</sup> We interpret this contention as asserting a claim of lack of substantial evidence.

violation can be sustained based on the alleged rapid and repetitive transactions;<sup>4</sup> (4) appellant was denied due process by the hearing officer's failure to enforce appellant's subpoena; and (5) the ALJ failed to recognize blatant due process violations.

## DISCUSSION

### I

Appellant contends that the decision must be reversed because of false conclusions based on the five attachments to a January 30, 2004, letter from Ms. Toups to appellant (Exhibit 8) charging him with food stamp trafficking violations (buying or selling of FSP benefits for cash or consideration other than eligible food). As noted, we view this contention as a challenge to the sufficiency of the evidence.

The Department's case was based on statistical evidence derived from a computer analysis of Electronic Benefits Transfer (EBT) transactions generated by appellant's store during the period July-December 2003.<sup>5</sup> During this period, appellant was recovering from heart surgery and his son, Mohamed, operated the store.<sup>6</sup>

The EBT program involved the issuance to food stamp recipients of ATM-type EBT cards with a preset balance. The EBT card replaced the food stamp paper scrip used previously. Each transaction with the EBT card reduces the remaining balance on the card by the amount of the purchase, until the card balance is exhausted. The

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<sup>4</sup> See footnote 2, *supra*.

<sup>5</sup> The exhibits containing the statistical data (Exhibits 4, 5, 6, 7, and 8) were admitted into evidence without objection [I RT 51-52].

<sup>6</sup> Mohamed did not testify, nor did any of his brothers who, according to appellant, also helped out in the store.

USDA contention, and the heart of the Department's case, was that appellant's store, disguising the transactions as "purchases," was trading cash for a portion of the EBT card balance, the EBT card recipient receiving a percentage of each dollar charged against the card. As a result, when reimbursed by USDA for his EBT card transactions, appellant received a secret profit on the disguised transactions.

As explained by Ms. Toups, the transactions she described as "suspicious" consisted of the following:

(a) an inordinate number of high dollar transactions ending in the same cents value, with sample transactions set forth in Attachment 1 to Exhibit 4.

(b) multiple withdrawals from accounts of one or more food stamp recipients within unusually short time frames, with sample transactions set forth in Attachment 2 to Exhibit 4;

(c) multiple withdrawals from a single food stamp recipient's account within unusually short time frames, with sample transactions set forth in Attachment 3 to Exhibit 4;

(d) transactions for a high number of recipients who depleted the majority of their benefits in a single transaction, with sample transactions set forth in Attachment 4 to Exhibit 4; and

(e) excessively large withdrawals from accounts of food stamp recipients, with sample transactions set forth in Attachment 5 to Exhibit 4.

For example, Attachment 4 to Exhibit 4, which lists transactions in which the majority of benefits were depleted in a single transaction, shows a single transaction in

the amount of \$557.81, leaving a balance of 19 cents, another in the amount of \$402.08, leaving a balance of \$43.63, and still another in the amount of \$396.00, leaving a balance of 40 cents. Twelve of the transactions of this type exceeded \$200.00. Ms. Toups' testimony makes it clear these are highly suspect transactions. Their frequency magnifies the suspicion associated with them and the pattern they depict.

Appellant explained such transactions as, perhaps, involving the purchase of large numbers of cans of baby formula, a case of chickens (which appellant would obtain from another source), and the like. Lacking specific examples, he blamed his inability to explain the transactions on the loss of documents in a flood during the first half of 2003, well before the transactions in question occurred.

It is clear that the administrative law judge (ALJ) found appellant's various explanations of the suspicious transactions unworthy of belief. In a lengthy analysis he wrote (Findings of Fact 4 and 5):

FF4 The premises is primarily a liquor store. It offers for sale beer, wine, distilled spirits, tobacco products, soft drinks, canned goods, snack foods, cereal, baby formula, luncheon meats, and maintains a very small dairy section. It offers no fresh meats and no produce. It provides no carts or other means for patrons to carry their purchases to the counter area.

Food stamps may be used to purchase most foods, but not alcohol or tobacco products.

Based on the limited foods available at the premises it is highly unlikely that a recipient would deplete all of his or her monthly benefits at the premises. It is also highly unlikely that a large number of recipients would redeem the large amounts from their accounts at the premises, as set forth in Attachment 5 of Exhibit 4 in evidence, including a withdrawal of \$557.81. The premises just does not offer the full range of foodstuffs that would prompt patrons to spend such large amounts at the premises. The premises is not physically arranged to accommodate such large purchases; it supplies no carts or other means to bring

items to the counter area. A patron would have to purchase an extremely large amount of small items, excluding alcoholic beverages, to justify a \$557 transaction.

FF 5 Respondent offered several explanations for the above described EBT transactions, including the following:

(a) When recipients used stamps rather than EBT transfers he had a practice of rounding off the amount due, for example from \$20.31 to \$20.00, and that this practice carried over when the EBT program was first introduced.

The explanation is not credible. Such even dollar transactions occurred over a long period, not just when EBT was first introduced. In addition, coupons were in specific denominations, making respondent's asserted practice feasible with coupons, but not when dealing with electronic transfers.

(b) Respondent's explanation that the premises uses two cash registers, therefore two transactions would be made at or near the same time, was not credible. The evidence established that the second cash register is rarely used.

(c) Respondent asserts that some recipients called in their orders which were filled by store personnel, thereby making large purchases a more likely and reasonable practice.

The evidence did not establish the practice of patrons calling in orders. The evidence indicated that the premises did not take telephone orders.

(d) Respondent also justified large orders for large dollar amounts by asserting that some patrons ordered in bulk and he purchased bulk items for them.

Evidence did not establish the existence of such a practice. The contention is without merit.

(e) Respondent further explains that some large dollar purchases were made by certain patrons to whom he extended credit, such persons periodically purchasing items but only paying for such purchases once a month.

The evidence does not support this contention. The evidence was that only one customer was extended credit and she was a cash customer. In addition, the Program prohibits extending credit to food stamp recipients.

(f) Respondent accounts for repetitive transactions by stating that some recipients gave their EBT cards to others who used the cards at or near the time of the recipient's transactions. He also asserts that some recipients would purchase food items and later, on the same day, purchase additional food items.

Such practices may have accounted for some of the suspicious transactions found by the USDA, but not for the bulk of such transactions.

(g) Respondent also contends that his sales increased when a nearby store closed and when he increased the hours at the premises.

The closing of a nearby grocery was considered and may account for some of the increase in the EBT transactions at the premises. The evidence did not establish that an increase in hours occurred. But even if hours were increased it would not account for the violations found herein.

(h) Respondent offered some invoices for food items he purchased in 2005, but not for 2003. He states that the pertinent 2003 invoices were destroyed in a flood.<sup>7</sup> The invoices offered were fully considered.

(i) Respondent complains that USDA used paper transactions, rather than individuals, to determine whether he was trafficking in food stamps. The individuals, presumably [sic] undercover investigators or actual recipients, would then be subject to cross-examination in this proceeding.

That USDA chose to review respondent's participation in the program by evaluating EBT transactions does not diminish or undercut the validity of its findings, at least under the facts in this case, which are supported by hundreds of transactions that clearly establish a pervasive pattern of trafficking in food stamps. This is not to say that every transaction was a violation; it is the totality of the transactions and their unusual nature, as measured by respondent's operation, including the type of foods offered for sale and the type of purchases that are typically made at the premises. In addition, the factors set forth in Findings 3 and 4 are very persuasive indicators that respondent and/or his sons were engaging in food stamp trafficking on a large scale.

Appellant questions the accuracy of the transaction details contained in Exhibit 4, but only on a selective basis, which leaves more questions unanswered than answered. Appellant focuses on those transactions where the amount was in even dollars, and does not attempt to explain those high dollar transactions which exhausted virtually all of the card benefits in a single swipe. Indeed, we seriously doubt that there is any explanation for the vast majority of the transactions listed in that exhibit other than what

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<sup>7</sup> Appellant asserts in his brief (App. Br., page 4) that the flood occurred in 2004, but cites his record testimony that the flood was in 2003.

the ALJ found - a pervasive pattern of trafficking in food stamps. It simply defies imagination that transactions like those seen in Exhibit 4 would occur on such a frequent basis in a store that was little more than a liquor store with a smattering of low-cost foodstuffs. (See Exhibit 2 photographs.)

Appellant contends that the decision must be reversed because of the “false conclusions” in the attachment to Exhibit 4. However, that is not the standard the Board uses to review decisions of the Department; the Board reviews to see if substantial evidence supports the decision of the Department:

We cannot interpose our independent judgment on the evidence, and we must accept as conclusive the Department’s findings of fact. (*CMPB Friends, supra*, 100 Cal.App.4th at p. 1254; *Laube v. Stroh* (1992) 2 Cal.App.4th 364, 367 [3 Cal.Rptr.2d 779]; [Bus. & Prof. Code] §§ 23090.2, 23090.3.) We must indulge in all legitimate inferences in support of the Department’s determination. Neither the Board nor [an appellate] court may reweigh the evidence or exercise independent judgment to overturn the Department’s factual findings to reach a contrary, although perhaps equally reasonable, result. (See *Lacabanne Properties, Inc. v. Dept. Alcoholic Bev. Control* (1968) 261 Cal.App.2d 181, 185 [67 Cal.Rptr. 734] (*Lacabanne*)). The function of an appellate Board or Court of Appeal is not to supplant the trial court as the forum for consideration of the facts and assessing the credibility of witnesses or to substitute its discretion for that of the trial court. An appellate body reviews for error guided by applicable standards of review.

(*Dept. of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd. (Masani)* (2004) 118 Cal.App.4th 1429, 1437 [13 Cal.Rptr.3d 826].)

It is readily understandable why appellant had such difficulty in explaining the transactions questioned by USDA. He had undergone heart surgery in the beginning of 2003, and turned the business over to his son Mohamed. Neither appellant nor his attorneys, at either the administrative level or here, have offered any explanation why Mohamed did not testify. Mohamed was the person in charge during the time period

covered by the transactions in question, and the most logical person to explain them, if there was an explanation.

Substantial evidence clearly exists to support the ALJ's findings.

## II

Appellant complains that Ms. Toups testified as an expert, but lacked the qualifications of an expert.

There are several reasons why this contention lacks merit.

First, Ms. Toups testified that since 2003 she had conducted approximately 480 investigations of the type involved in this case. She also testified that she had been employed by USDA for 25 years, had been monitoring food stamp retailers for about four and one-half years. She has an associate degree in accounting and has taken numerous courses from the Federal Law Enforcement Center in white collar crime, computer fraud, and financial investigation techniques. This alone would be sufficient to qualify her as an expert with respect to the subject matter of the investigation.

Ms. Toups testified in great detail about the manner in which the investigation of appellant's store was conducted, and how the exhibits containing the suspicious transactions were compiled. The attorney who represented appellant at the administrative hearing objected only once during Ms. Toups' entire direct and redirect examination, and that objection concerned the use of the word "reasonable" in a single question. There was no attempt by appellant's attorney to exclude Ms. Toups' testimony on the ground she lacked expert qualifications, and, moreover, there was no objection to the admission into evidence of the computer runs generated in the course of the investigation which showed the pattern of food stamp fraud.

In any event, the failure to raise a proper objection at the hearing was a waiver of the issue. (See 9 Witkin, Cal. Procedure (4th ed. 1997) Appeal §394, p. 444.)

### III

Appellant served a subpoena duces tecum on USDA calling for the production of USDA Daily Transaction Details for appellant's store for the years 2003 and 2004, and the names, addresses, and telephone numbers of all EBT households identified by number in attachments 1 through 5 to the January 30, 2004 letter from Ms. Toups to appellant.<sup>8</sup> Although producing the requested documents, Ms. Toups did not supply the names, addresses, and telephone numbers of the EBT households, stating that such information was privileged and confidential. Such information that was contained on the documents she produced had been redacted.

Appellant now contends the ALJ should, sua sponte, have ordered the subpoena enforced and the names, addresses and telephone numbers of the EBT recipients be disclosed. Appellant also contends that the refusal of Ms. Toups to provide such information resulted in a denial of due process.

Appellant does not contend that the ALJ was asked to enforce the subpoena, nor, as the ALJ observed in his proposed decision, did appellant file a motion to compel or any other motion related to the subpoena.

We know of no requirement that an ALJ take action to enforce a subpoena when there has been no request by the attorney for the party who served the subpoena that he do so, and appellant has cited no authority holding that the ALJ has any obligation to do so, other than a generalized claim that due process requires it.

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<sup>8</sup> These are the same attachments in Exhibit 4.

Appellant did not raise the subject of the subpoena until well after Ms. Toups had completed her direct- and cross-examination [II RT 260-261]. The half-hearted and untimely manner in which he did raise the subject leads us to think he had no serious intentions of challenging the Department's case with the testimony of EBT recipients.

ORDER

The decision of the Department is affirmed.<sup>9</sup>

FRED ARMENDARIZ, CHAIRMAN  
TINA FRANK, MEMBER  
ALCOHOLIC BEVERAGE CONTROL  
APPEALS BOARD

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<sup>9</sup> This final decision is filed in accordance with Business and Professions Code §23088 and shall become effective 30 days following the date of the filing of this final decision as provided by §23090.7 of said code.

Any party may, before this final decision becomes effective, apply to the appropriate district court of appeal, or the California Supreme Court, for a writ of review of this final decision in accordance with Business and Professions Code §23090 et seq.