

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

New Candy Inc.,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0214955

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 the permanent disqualification of New Candy Inc. (Appellant) from participation as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP), 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), (c) and (e)(1) in its administration of the SNAP, when it assessed a permanent disqualification against Appellant.

AUTHORITY

7 USC § 2021 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 February 8, 2019, the Retailer Operations Division charged 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 August 2018 through January 2019. The letter noted that the penalty for trafficking is permanent disqualification as provided by 7 CFR § 278.6(e)(1). The letter also noted that Appellant could request a trafficking civil money penalty (CMP) in lieu of a permanent disqualification within ten days of receipt under the conditions specified in 7 CFR § 278.6(i).

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In response to the charge letter, on February 15, 2019, Appellant, through counsel, requested documents under the Freedom of Information Act (FOIA). The FOIA Office responded to Appellant's FOIA request on March 20, 2019. Counsel appealed the FNS FOIA response by letter dated June 18, 2019. The FOIA office issued its response to the appeal on February 15, 2021. On February 18, 2021, counsel provided to the Retailer Operations Division a reply to the charges. Appellant denied trafficking and explained that the transactions were normal based on the unique circumstances of the store.

After considering the evidence and the retailer's reply, the Retailer Operations Division issued a determination letter dated April 1, 2021. The determination letter informed Appellant that it was permanently disqualified from the SNAP in accordance with 7 CFR § 278.6(c) and § 278.6(e)(1). The determination letter also stated that Appellant was not eligible for a trafficking CMP because Appellant failed to submit sufficient evidence to demonstrate that the firm had established and implemented an effective compliance policy and program to prevent violations of the SNAP.

In a letter dated April 9, 2021, Appellant, through counsel, appealed the Retailer Operations Division's determination and requested an administrative review. 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 action should be reversed. That means the Appellant has the burden of providing relevant evidence which a reasonable mind, considering the record, 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 and Nutrition Act of 2008, as amended, 7 USC § 2021 and § 278 of Title 7 of the Code of Federal Regulations (CFR). Part 278.6(a) and (e)(1) establish the authority upon which a permanent disqualification may be imposed against a retail food store or wholesale food concern if personnel of the firm have engaged in trafficking SNAP benefits.

7 USC § 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, 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 § 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 § 278.6(a) states:

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 based on 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(b)(2)(ii) states, inter alia:

Firms that request consideration of a civil money penalty in lieu of a permanent disqualification for trafficking shall have the opportunity to submit to FNS information and evidence . . . that establishes the firm’s eligibility for a civil money penalty in lieu of a permanent disqualification in accordance with the criteria included in § 278.6(i). This information and evidence shall be submitted within 10 days, as specified in § 278.6(b)(1).

7 CFR § 278.6(e)(1) reads, in part:

FNS shall disqualify a firm permanently if personnel of the firm have trafficked as defined in § 271.2.

7 CFR § 278.6(i) states, inter alia:

FNS may impose a civil money penalty in lieu of a permanent disqualification for trafficking . . . if the firm timely submits to FNS substantial evidence which demonstrates that the firm had established and implemented an effective compliance policy and program to prevent violations of the Program.

SUMMARY OF THE CHARGES

Appellant was charged and determined to be trafficking based on an analysis of EBT transaction data from August 2018 through January 2019. This involved the following SNAP transaction patterns which is indicative of trafficking:

- There were multiple transactions made from the accounts of individual SNAP households within a set period.
- There were excessively large purchase transactions made from recipient accounts.

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

APPELLANT'S CONTENTIONS

In its April 9, 2021, administrative review request, and subsequent correspondence submitted on May 11, 2021, Appellant, through counsel, provided the following summarized contentions, in relevant part:

- Appellant sells a variety and quantity of staple foods that sell frequently and require monthly replenishment. These items include bread, cereal, eggs, pasta, rice, milk, butter, canned meats, cookies, cakes, muffins, ice cream, and additional food items.
- Appellant's store is in an economically depressed area and in an area without any immediate competitors.
- The December 20, 2018, store visit occurred at the end of the month when the inventory was low.
- There are nine customer affidavits stating that they spend between \$30.00 and \$175.00 at Appellant during a single trip, exhausting 10% to 90% of their SNAP benefits.
- It is likely that a confirmation bias exists, and ambiguous and contradictory evidence has been disregarding or interpreted in such a way that favors the hypothesis that trafficking is occurring at Appellant.
- FNS bears the burden of proof not the retailer.
- FNS does not know what the correlation coefficient is between any of the ALERT scans and trafficking in SNAP benefits.
- The takeaway from the ALERT Correlation Coefficient and the data is the link between the ALERT scan categories and the actual act of trafficking in SNAP benefits is weak and non-existent, the presence of trafficking is identified to have ALERT hits is the exception to the rule rather than the rule.
- All the transactions listed in Attachment 1 are the result of Appellant's business practices, inventory, customer co-shopping, purchasing preferences, and the habits of the SNAP customers.
- It is possible to physically conduct these transactions in the timeframes set forth in the charge letter.
- Co-shopping, when both adult household members are responsible for half of the shopping, is on the rise.

- Different households will shop separately using the same account to pick up different needs and different household members will travel to the store together to make purchases and then separate the purchases to track the amount each member used.
- The store's inventory is sufficient to account for the transactions.
- Customers are more likely to return to Appellant for supplemental and quick shopping trips that they otherwise would at an average convenience store with an inferior inventory and a further distance from their homes.
- Appellant sits on a main transportation route and only a short walk from multiple bus stops.
- The transportation route causes an increased volume of transactions in comparison to stores who are not well located.
- Transportation inconsistency is another reason why Appellant's transactions appear the way they for: these participants do not have their own vehicles so trips to larger stores are dependent upon rides from friends or family.
- It is much easier to carry frozen groceries a few blocks home than it is to walk a mile round trip with the same groceries.
- Many SNAP recipients are unemployed and will shop frequently to satisfy their boredom.
- The inventory of the store is of such variety that it is reasonable to assume a household could satisfy all their needs on a single shopping trip.
- It is reasonable to expect SNAP customers to spend large amounts and/or most of their benefits at Appellant on the inventory items contained within the store which are evidenced by the on-site inspection conducted by the contractor.
- The households that are conducting large transactions likely have a larger amount of SNAP residents residing thus requiring a larger quantity of grocery products each month than those households with less participants.
- Given the higher priced items in the store, it is not difficult to imagine \$60.00 worth of groceries being purchased in a single trip and being transported by hand back to the household's residence.
- The only stores nearby do not have the inventory variety of Appellant and therefore Appellant is going to have larger transactions than the average convenience store.
- One household purchased three cans of formula that resulted in flagged transactions.
- FNS misidentified legitimate transactions because of an errant assumption about the store's inventory and clientele.
- Appellant requests a CMP. Appellant's effective compliance policy and program is reflected by Appellant's significant compliance history since it became an authorized SNAP retailer.

In support of its contentions, counsel submitted the following documents:

- Nine customer affidavits.
- Twenty-two photographs of inventory.
- Know your Core, Protect Your Core, Convenience Store News for the Single Store Owner April 2016.
- U.S Grocery Shopping Trends, 2016 by Food Marketing Institute.
- Profile of SNAP Households in 2018 for New York.

- Benefit Redemption Patterns in the Supplemental Nutrition Assistance Program in Fiscal Year 2017 Final Report by Insight Policy Research issued in September 2020; and
- Food Typically Purchased by Supplemental Nutrition Assistance Program Households by USDA, Food and nutrition Service, Office of Policy Support November 2016.

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

ANALYSIS AND FINDINGS

Store Visit

FNS authorized New Candy Inc. as a convenience store on November 28, 2016. The case file indicates that in reaching a disqualification determination, the Retailer Operations Division considered information obtained during a December 20, 2018, store visit 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:

- Appellant is approximately 850 square feet with a small storage area that mostly contained beverages.
- There were no shopping baskets or shopping carts for customer use.
- There was one cash register and one point of sale (POS) device.
- There were no advertised meat bundles, seafood specials, or fruits/vegetables in boxes.
- There was no fresh unprocessed meat, poultry, or fish.
- The only frozen food item was ice cream.
- The only fruit and vegetable items were juice and some nuts.
- The only meat, poultry, or fish items was canned meat.
- The only dairy staple food item was one can of infant formula.
- Other staple foods available for purchase were juice, cereal, beans, and pasta, all in limited amount.
- Much of the remaining stock consisted of accessory foods such as candy and carbonated and uncarbonated drinks.
- Ineligible items included tobacco, paper goods, household items, and pet food.

The SNAP eligible food stocked by the store was generally of a low dollar value consisting mainly of inexpensive canned and packaged goods, snack foods, single-serving food items and accessory food items. The stock is mostly candy and snack items. The highest priced items noted were found in limited quantities and included one can of infant formula - \$29.99 and pints of Ben & Jerry's ice cream - \$5.99. There were no other items priced greater than \$5.00. Given the available inventory, there was very little sign that the firm would be likely to have SNAP redemption patterns that differed significantly from those of similar-sized competitors, especially competitors that sell similar or identical food items. The store did not a sufficient variety and quantity of staple food items to meet SNAP authorization requirements.

Charge Letter Attachment

Each attachment furnished with the charge letter represents the questionable and unusual patterns of SNAP transactions indicative of trafficking which were conducted at the Appellant firm during the review period. As there is more than one pattern of irregular transactions, the case of trafficking becomes more convincing.

Charge Letter Attachment 1. Multiple transactions were made from individual benefit accounts in a set timeframe. This attachment documents 29 sets of transactions conducted by 16 households that total \$3,809.24 in SNAP benefits that meet the parameters of this scan. Multiple transactions conducted by the same household account within a short period of time is a method which violating stores use to avoid single high dollar transactions that cannot be supported by a retailer's inventory and structure.

Although it is not uncommon for customers to have more than one transaction per day, it is not common that such multiple transactions are for large dollar amounts. The SNAP transactions noted in the charge letter are questionable not because they exceed any limits for use, but rather because they display characteristics of use inconsistent with the nature and extent of Appellant's stock and facilities and are therefore indicative of trafficking. The photographs from the store visit offer no explanation as to why SNAP customers would routinely shop at Appellant multiple times during a short period or purchase such a large volume of items, there being no great variety of products, price advantage, profusion of large packages, or significant bulk items for sale. The second and third transactions in each set are too large to consist of forgotten items.

Counsel explains that co-shopping results in a higher number of transactions that occur in a shorter period than expected. Co-shopping may occur, but it is unlikely the reason that Appellant has more frequent large transactions by the same household than other similar stores during the review period. This would manifest itself in these household conducting similar transaction patterns at other retailers that they shop. The Retailer Operations Division found that each of the three nearby convenience stores each conducted one similar transaction set during the review period. There is no credible explanation as to why households would be more likely to "co-shop" at Appellant than at other similar nearby stores.

Appellant did not submit sufficient evidence that the transactions conducted on the Attachment were for eligible food items only.

Charge Letter Attachment 2: Excessively large purchase transactions were made from recipient accounts. This attachment lists 546 transactions as large as \$154.00, and that total \$8,427.11. Considering Appellant is a candy store offering a more limited eligible food stock, this is unlikely and likely indicative of trafficking.

Appellant's average SNAP transaction amount was 30% greater than the average for convenience stores in the state and the county. Appellant's total SNAP transaction dollar volume was 66% greater than the average for convenience stores in Westchester County. There is no evidence that the firm would be likely to have SNAP redemption patterns that differ considerably from similar-sized competitors.

Counsel explains that Appellant’s inventory of is of such variety that it is reasonable to assume a household could satisfy all their needs on a single shopping trip. Counsel also reports that it is reasonable to expect SNAP customers to spend large amounts and/or most of their benefits at Appellant on the inventory items contained within the store as evidenced by the on-site inspection conducted by the contractor. However, the store visit report and photographs does not support the questionable transactions. The staple food stock consisted of limited canned and pre-packaged foods and snacks. There was no fresh unprocessed meat, no fresh produce, no fresh dairy items, and no shopping carts or baskets. In fact, on the day of the store visit it appears that Appellant did not meet the authorization criteria for SNAP with too few staple food items. The store primarily sold candy, snack food items, and single serve beverages. As explained, there were only two items priced greater than \$5.00 on the day of the store visit.

The Retailer Operations Division compared Appellant to three other convenience stores that were located nearby. The Retailer Operations Division also determined that the transaction pattern of Appellant exceeded the three nearby convenience stores, as seen on the table herein. The data from these nearby stores show that the transaction patterns at the Appellant firm were unusual and indicative of possible trafficking violations.

Store	Attachment 1 Pattern	Attachment 2 Pattern
Appellant	29	142
Store #1	1	15
Store #2	1	12
Store #3	1	17

Counsel explains that it is common for customers to spend large amounts as a direct result of the lack of nearby alternative stores that offer sufficient inventory, discounted prices, and convenience. The Retailer Operations Division determined that there are 39 other authorized firms with a one-mile radius of Appellant including 11 other convenience stores, four combinations store, eight small groceries, seven medium groceries, two large groceries, four supermarkets, and one super store. There is a medium grocery and a supermarket located very close to Appellant.

The Retailer Operations Division determined that there were 42 households that conducted the large dollar SNAP transactions listed on Attachment 2. Thirty-five of these household conducted a transaction at a super store or a supermarket within one day of the large transaction conducted at Appellant. The Retailer Operations Division examined four households identified in the charge letter to analyze their shopping patterns at New Candy Inc. compared to their shopping patterns at other SNAP authorized stores. One household transacted \$114.43 at a supermarket on August 1, 2018, and **six minutes** later transaction an even \$61.00 at Appellant. On November 1, 2018, a different household conducted two SNAP transactions at Appellant that total \$118.30. Less than one hour later, this household transacted \$133.10 at a supermarket. On October 3 and October 4, 2018, another household conducted three SNAP transactions at a supermarket that total only \$33.61 and conducted three SNAP transactions at Appellant that total \$159.14. Despite this access to better stocked stores, each of the three households conducted excessively large transactions at New Candy Inc. within 24 hours of shopping at a supermarket or super store. It is questionable as to why households would conduct large transactions at Appellant, when these households had just visited or planned to visit larger stores with a better selection and likely better

prices. Counsel contends that transportation inconsistency is another reason why the store's transactions appear the way they do if transportation to other stores is not dependable. However, the evidence supports that these households had access to transportation within a short time frame of their unusual large transactions at Appellant.

Customer Statements

With the administrative review request, counsel submitted nine customer statements. These typed statements state that the customers frequently shop at Appellant, purchase a variety of grocery items, make large purchases, have never been charged extra money to use their SNAP benefits, and have never been offered cash back. The Retailer Operations Division attempted to review the transaction history of these SNAP households. There were five households that could not be reviewed with the information that was provided. The Retailer Operations Division was able to match four of the names; however, the address did not match the provided address. Despite the differences in recorded addresses, the Retailer Operations Division still reviewed the SNAP transactions of these households. None of these four households conducted any SNAP transactions at Appellant during the review period.

In summary, there was no evidence that any of the households that submitted statements conducted transactions at Appellant during the review period. Thus, the customer statements submitted are not sufficient evidence that any of the transactions listed on the Charge Letter were for eligible food items only.

Photographs

Counsel submitted 22 color photos of Appellant's food stock. The Retailer Operations Division reviewed the photos and found that they were like the photographs from the contractor store visit. Most of the photos show single serve beverages, snacks, and candy. The freezer contained only ice cream and there was a photograph of two cans of formula (on the day of the store visit there was only once can noted). There was no fresh produce or meat products other than canned meat. The photos submitted by counsel did show cereal and large containers of oil that were not visible from the store visit photographs. However, these items do not adequately explain the flagged transactions.

Evidence

The ALERT system is a computerized fraud detection tool to identify SNAP transactions that form patterns having characteristics indicative of trafficking. However, this tool does not by itself determine or conclude that trafficking has occurred. The Retailer Operations Division must still conduct an extensive analysis of the transaction data and patterns, often with other factors such as, in this case, observations from store visits, an analysis of customer shopping behavior and a comparison of stores in the area, and render a determination whether the questionable transactions were, more likely than not, the result of trafficking.

The legality of this method is supported by 7 CFR §278.6(a) which states, inter alia, "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 based on 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.]

The documentation and evidence provided by the Retailer Operations Division was thoroughly examined. From all indications, the Retailer Operations Division obtained the EBT data (provided by ALERT), found it to be suspicious in comparison to other area stores of similar size, and then undertook a thorough investigation before concluding that trafficking was likely occurring.

Appellant bears the burden of demonstrating by a preponderance of the evidence that the administrative actions should be reversed and that the transactions detailed in the charge letter were more likely than not due to the legitimate sale of eligible food in exchange for SNAP benefits. Appellant offered little credible evidence to prove that the transactions listed in the charge letter were legitimate purchases of eligible food. In the absence of compelling information or documentation weighed in comparison to the evidence provided by the Retailer Operations Division, the evidence weighs in favor of the Retailer Operations Division’s determination that SNAP-benefit trafficking substantially produced the transaction activity at issue in the present case.

Appellant submitted recipient affidavits and contended that these documents are what the Department has stated it looks for from retailers to demonstrate their innocence by a preponderance of the evidence. However, the documents submitted in this case did not demonstrate by a preponderance of evidence that the transactions were for eligible food items only.

Case Law

Appellant cites some case law which it claims supports its position on the ALERT system as well as multiple transactions. It should be noted that considerations of legal precedent through case law is beyond the scope of this review. Instead, this administrative review is limited to whether the Retailer Operations Division appropriately followed the Food and Nutrition Act of 2008, as amended, and the regulations promulgated under the Act, and whether the action taken is sustainable by a preponderance of the evidence. Therefore, any application of a supposed judicial precedent would best be addressed in a judicial review in a court of law.

CIVIL MONEY PENALTY

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. SNAP regulations at 7 CFR § 278.6(b)(2)(iii) states that “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.] 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.

Counsel requested a CMP with its administrative review request and explains that the effective compliance policy and program at the store is reflected by the store's significant compliance history since it became an authorized SNAP retailer. There was no evidence submitted to support the existence of a compliance policy and program. In conclusion, 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

The Retailer Operations Division's analysis of Appellant's EBT transaction record was the primary basis for its determination to permanently disqualify Appellant. This data provided substantial evidence that the questionable transactions during the review period had characteristics that are consistent with trafficking violations 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 occur as charged by the Retailer Operations Division. The determination to impose a permanent disqualification against Appellant is sustained.

The Retailer Operations Division also determined that Appellant was not eligible for a trafficking civil money penalty according to the terms of 7 CFR Section 278.6(i) of the SNAP regulations. Under review, the denial of a trafficking CMP was deemed correct and proper.

RIGHTS AND REMEDIES

Applicable rights to a judicial review of this decision are set forth in 7 USC § 2023 and 7 CFR § 279.7. 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 the Appellant's owner resides or is 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, 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.

MARY KATE KARAGIORGOS
Administrative Review Officer

August 2, 2021