

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

Cup Foods,

Appellant,

v.

Case Number: C0209111

Retailer Operations Division,

Respondent.

FINAL AGENCY DECISION

It is the decision of the USDA that there is sufficient evidence to support that the Retailer Operations Division properly imposed a permanent disqualification of Cup Foods as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP).

ISSUE

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with Title 7 Code of Federal Regulations (CFR) Part 278, when it imposed a permanent disqualification against Cup Foods.

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

In a letter dated June 20, 2018, the 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 November 2017 through April 2018. The letter noted that the penalty for trafficking is permanent disqualification as provided by 7 CFR § 278.6(e)(1). The letter stated the Appellant had the right to respond to the charges within 10 days of receipt to provide explanations for the irregular SNAP transaction patterns.

The letter also stated that the Appellant could request a trafficking civil money penalty (CMP) in lieu of a permanent disqualification within 10 days of receipt under the conditions specified in 7 CFR § 278.6(i). The charge letter was delivered to the Appellant by UPS on June 21, 2018.

The Appellant responded to the charge letter in a faxed document on June 27, 2018. In general, the Appellant stated that the patterns identified in the charge letter were due to the normal shopping patterns of the store's clientele and that it was not unusual for the store to have larger dollar transactions due to some families consisting of multiple household members. The Appellant did not request a trafficking CMP under 7 CFR § 278.6(i).

After considering the Appellant's response and the evidence in the case, the Retailer Operations Division issued a determination letter dated July 24, 2018. The determination letter informed the Appellant it was permanently disqualified from the SNAP in accordance with 7 CFR § 278.6(c) and 7 CFR § 278.6(e)(1). The determination letter also stated that the Retailer Operations Division considered the Appellant's eligibility for a trafficking CMP according to the terms of 7 CFR § 278.6(i). The Retailer Operations Division determined that the Appellant was not eligible for a trafficking CMP because the 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 postmarked July 27, 2018, the Appellant requested an administrative review of the Retailer Operation Division's determination. The request for administrative review was granted.

STANDARD OF REVIEW

In appeals of adverse actions, an appellant bears the burden of proving by a preponderance of the evidence, that the administrative action should be reversed. That means an appellant has the burden of providing relevant evidence which a reasonable mind, considering the record as a whole, would accept as sufficient to support a conclusion that the matter asserted is more likely to be true than not true.

CONTROLLING LAW AND REGULATIONS

The controlling law in this matter is covered in the Food & Nutrition Act of 2008, as amended, 7 U.S.C. § 2021, and promulgated through regulation under Title 7 CFR Part 278. In particular, 7 CFR § 278.6(a) and (e)(1)(i) establish the authority upon which a permanent disqualification may be imposed against a retail food store or wholesale food concern.

7 U.S.C. § 2021(b)(3)(B) states, in part:

... a disqualification under subsection (a) shall be ... permanent upon ... the first occasion or any subsequent occasion of a disqualification based on the purchase of coupons or trafficking in coupons or authorization cards by a retail food store or wholesale food concern or a finding of the unauthorized redemption, use, transfer, acquisition, alteration, or possession of EBT cards ...

7 CFR § 271.2 states that the definition of “coupon” includes:

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

7 CFR § 278.6(e)(1)(i) states:

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

7 CFR § 271.2 defines trafficking, in part, as:

The buying, selling, stealing, or otherwise effecting an exchange of SNAP benefits issued and accessed via Electronic Benefit Transfer (EBT) cards, card numbers and personal identification numbers (PINs), or by manual voucher and signature, for cash or consideration other than eligible food, either directly, indirectly, in complicity or collusion with others, or acting alone

7 CFR § 271.2 defines eligible food, in part, as:

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

7 CFR § 278.6(a) states, in part:

FNS may disqualify any authorized retail food store ... if the firm fails to comply with the Food and Nutrition Act of 2008, as amended, or this part. Such disqualification shall result from a finding of a violation on the basis of evidence that may include facts established through on-site investigations, inconsistent redemption data, **evidence obtained through a transaction report under an electronic benefit transfer system...**

[Emphasis added.]

7 CFR § 278.6(i) states, in part:

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

7 CFR § 278.6(b)(2) states, in part:

- (ii) Firms that request consideration of a civil money penalty in lieu of a permanent disqualification for trafficking shall have the opportunity to submit to FNS information and evidence as specified [in § 278.6\(i\)](#), that establishes the firm's eligibility for a civil money penalty in lieu of a permanent disqualification in

- accordance with the criteria included in § 278.6(i). **This information and evidence shall be submitted within 10 days, as specified in § 278.6(b)(1)**. [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

The Appellant was charged and determined to be trafficking based on an analysis of electronic benefit transfer (EBT) transaction data from November 2017 through April 2018. This involved the following transaction patterns which are trafficking indicators:

- **Charge Letter Attachment 1:** Multiple transactions were made from individual benefit accounts in a set time period. This attachment lists 18 sets of 37 transactions **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** in SNAP benefits. **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**.
- **Charge Letter Attachment 2:** Excessively large purchase transactions were made from recipient accounts. This attachment lists 284 SNAP transactions **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**.

APPELLANT'S CONTENTIONS

The Appellant made the following summarized contentions in its request for administrative review, in relevant part:

- The store is located in a neighborhood which is very close to residential houses.
- Regarding the multiple transactions within a set time period, the store cannot deny transactions as long as the household has the PIN code. The store is not required to collect IDs from users.
- Shoppers do not come in with a shopping list and if they forget something they will come back and buy it the same day or the next day.
- The store is convenient to its nearby customers who, lacking transportation, will walk to the store.
- Often a customer will make a purchase to check their balance and then purchase something else.
- Regarding the large dollar transactions, only three (3) exceeded **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. The business is located in an area with excessively large families of seven (7) or eight (8) members. Transactions in the **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** range are not unusual for these families.
- Customers will often make SNAP purchases when they receive their benefits for that month.
- The store has sale days and customers will purchase items in bulk.
- The store does not accept WIC so some of the store customers will purchase infant formula with SNAP benefits.

- The Appellant is providing store pictures with prices and a list of names and addresses for customers with their average purchase amount spent.

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

ANALYSIS AND FINDINGS

Authorization History

FNS authorized Cup Foods for the SNAP on May 26, 2016. During the review period of November 2017 through April 2018, the Retailer Operations Division classified the store as a convenience store.

The owner signed a SNAP reauthorization application for the store on April 25, 2016 and acknowledged that the owner was aware of the SNAP regulations and understood those regulations. That application included a certification and confirmation that the owner would "accept responsibility on behalf of the firm for violations of the SNAP regulations, including those committed by any of the firm's employees, paid or unpaid, new, full-time or part-time." The violations listed on this certification include accepting SNAP benefits in exchange for cash, otherwise known as trafficking, and other violations such as accepting SNAP benefits as repayment on credit accounts or in exchange for ineligible items.

Store Visit Report

The case record documents that in reaching a disqualification determination, the Retailer Operations Division considered information obtained during a May 12, 2018 store visit conducted by an FNS contractor to observe the nature and scope of the store's operation, stock and facilities. This information was then used to ascertain if there were justifiable explanations for the store's irregular SNAP transactions. The store visit report and photographs documented the following store size, description, and characteristics:

- Cup Foods is approximately 748 square feet in size and operates out of a building in an urban residential area.
- The store had no shopping carts and no handheld shopping baskets for customer use.
- The store had one (1) cash register and one (1) point-of-sale device for grocery purchases.
- The store did not have any optical scanners and there was no conveyor belt at the checkout area.
- There were no large bulk foods, expensive international or specialty foods that might sell for a high price. There were no fresh meat/poultry/seafood bundles or large boxes

of fresh fruit and vegetables for sale. The store had no signs advertising bulk purchase deals. The store had only two (2) units of infant formula for sale.

- There was a small storage area outside of public view of approximately 36 square feet that contained carbonated and non-carbonated beverages. Store personnel confirmed that no food was stored offsite.
- The store visit contractor noted that there was expired and out of date food, dust on cans and packages and empty or partially filled shelves all of which indicates that food inventory did not turn over frequently. One of the pictures showed moldy buns for sale.
- The checkout area was behind a Plexiglas barrier with a very small window for conducting transactions. There was a small clear space of approximately 1.5 by 1.5 feet for stacking products to be purchased. The area around this space was crowded with candy and beef jerky for purchase. To the front and to the right of the checkout area were large reach-in coolers containing ice cream. The very limited space for stacking food at the checkout area made it not conducive to conducting large transactions.

The SNAP eligible staple food stocked by the store consisted mainly of a limited to moderate selection of inexpensive canned and packaged goods. There was no fresh meat although the store sold some frozen meat and poultry. The store visit pictures showed no fresh produce other than some onions, although tomatoes and lettuce appeared to be used in SNAP ineligible prepared food sold by the store. The store also sold a large amount of inexpensive accessory food items such as snack foods, ice cream, candy, potato chips, coffee, tea, carbonated and non-carbonated drinks, condiments, and spices. The store had a small kitchen/food preparation area with large posted signs for SNAP ineligible hot, heated and cold prepared food not intended for home preparation and consumption. In addition to prepared foods, the stocked ineligible items included lottery tickets, automotive products, health and beauty aids, paper goods, cleaning products, and general houseware.

Store personnel confirmed that the most expensive items sold by the store were 22.9 ounces of infant formula at \$32.99; a 36 count box of candy bars at \$24.00; five (5) pounds of taco meat at \$15.00; and a three (3) pack of 29 ounce pizza at \$14.99. Of these items, the store carried more than ten (10) stocking units only in taco meat. Given the available inventory and store layout as noted above, there is no indication from the store visit report that the store would be likely to have SNAP transaction patterns significantly different from similar-sized competitors offering similar food items.

Multiple Transactions by the Same Household within a Set Time Period

The Appellant states that it cannot refuse a SNAP purchase if the customer has its PIN code and it is not required to check IDs. It is true that SNAP households have no limit on the number of times they may use their SNAP cards or how much eligible food they may purchase. However, 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 a convenience store's stock and facilities and are thus indicative of trafficking.

Violating stores often conduct multiple split transactions from the same household account as a method to avoid the detection of single high dollar transactions that cannot be supported by the retailer's food inventory and infrastructure. Charge Letter Attachment 1 lists 18 sets of 37 transactions 5 U.S.C. § 552 (b)(6) & (b)(7)(C). 5 U.S.C. § 552 (b)(7)(E). It is not credible that a convenience store with a limited selection of inexpensive staple foods would have suspicious SNAP transactions much greater than a supermarket and a superstore. It is even less likely that these excessively large transactions would be conducted multiple times by the same household during a set time period.

The Appellant states that shoppers do not come in with a shopping list and if they forget something they will come back and buy it the same day or the next day. It is true that sometimes a customer will forget an item or two and come back later to make an additional small dollar purchase. However, the transactions cited in the charge largely consisted of second or subsequent transactions which greatly exceeded the average transaction of a Wisconsin convenience store during the review period.

The Appellant states that customers will often make a purchase to check their balance and then purchase something else. Regarding this contention, it should be noted that a SNAP recipient does not have to make a purchase to determine the balance of benefits on the card. Instead, the SNAP customer can ask the store to run a balance inquiry. Even if the retailer did not know this, the transactions cited in the charge letter 5 U.S.C. § 552 (b)(6) & (b)(7)(C) and therefore would not be explained by a purchase to determine the balance on the card followed by an additional purchase. It is also not credible that a SNAP customer would make a very large initial purchase to determine the balance on the card. For these reasons, the Appellant's claim is not credible.

The Appellant states that the store is convenient to its nearby customers who, lacking transportation, will walk to the store. However, the Appellant does not explain how these customers, lacking transportation, would be able to return home carrying a large amount of groceries atypical of a convenience store purchase.

One particularly egregious set is shown in transactions 19-20-21. This set consists of three (3) transactions from a single household account with transaction 5 U.S.C. § 552 (b)(6) & (b)(7)(C). 5 U.S.C. § 552 (b)(6) & (b)(7)(C). The Appellant did not offer any credible explanation for this or any other transaction patterns cited in Charge Letter Attachment 1.

In summary, the store visit pictures show that it is unlikely that SNAP customers would shop at the store and purchase such a large volume of items multiple times during a short time frame. In addition, the store's small checkout area and limited counter space makes it unsuitable for conducting large transactions. The store also had no shopping carts or shopping baskets for transporting food within the store which would be required for the large dollar transactions. Based on the analysis above, and in the absence of any other reasonable explanation, the irregular transaction patterns are more likely than not to be a result of trafficking in SNAP benefits.

Excessively Large Transactions

SNAP households have no limit on the amount of eligible food they may purchase (subject to the remaining balance on the card). However, the SNAP transactions noted in the charge letter are questionable not because they exceed any regulatory limits for use, but rather because they display characteristics of use inconsistent with the nature and extent of a convenience store's stock and facilities and are thus indicative of trafficking.

Charge Letter Attachment 2 cites 284 SNAP transactions **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. **5 U.S.C. § 552 (b)(7)(E)**. This average transaction is also more than double the average SNAP purchase for a supermarket in Wisconsin during the review period and nearly double that of a superstore. Even the smallest transactions cited in the charge letter had an amount which is three (3) or four (4) times higher than the average SNAP purchase amount for a Milwaukee County convenience store.

The Appellant states that only three (3) transactions exceeded **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** and that transactions in the **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** range are not unusual for large families. However, if this were true then other nearby SNAP authorized convenience stores would show the same patterns. The Retailer Operations Division compared the Appellant store to three (3) nearby convenience stores with an equivalent or superior amount and quality of food and none of these stores had large dollar transactions comparable to the Appellant store.

The Appellant states that customers will often make SNAP purchases when they receive their benefits for that month. It is true that SNAP recipients will often shop when they first receive their benefits for the month, but this is true at all stores and does not explain the excessively large transactions at the Appellant store.

The Appellant states that the store has sale days and customers will purchase items in bulk. Although, the store may have some days when it offers items on sale, there was no evidence in the store visit report and pictures that the store carried any items for sale in bulk that would explain the excessively large transactions cited in the charge letter.

The Appellant states that the store does not accept WIC so some of the store customers will purchase infant formula with SNAP benefits. However, this contention does not explain the irregular transactions cited in Charge Letter Attachment 2. The store visit report and photographs showed that the store carried only two (2) units of infant formula. SNAP recipients who have infants are likely to be participants in the WIC Program and will more likely shop at stores that accept WIC benefits to maximize their benefits.

The Appellant provided some store pictures with prices and a list of alleged customer names and addresses with their average purchase amount spent. However, this information is insufficient to support the Appellant's contention that the transactions cited in the charge letter are normal and not irregular. The pictures submitted by the Appellant are not significantly different from those taken at the time of the store visit. The alleged purchase amounts by clients does not specify whether these average amounts are only spent on SNAP eligible food with SNAP benefits or

whether these are the SNAP recipients' average transactions at all stores. In summary, the evidence provided by the Appellant is insufficient to rebut the determination of the Retailer Operations Division.

Sometimes a store may have higher than normal SNAP transactions due to the lack of access to other SNAP authorized stores in the area. However, the Retailer Operations Division determined that during the review period there were 42 SNAP authorized stores located within a one-mile radius of Cup Foods. These SNAP authorized stores consisted of 34 other convenience stores, five (5) small grocery stores, two (2) supermarkets and a superstore. One of the supermarkets was located 0.44 miles away. A government report¹ on SNAP benefit redemption patterns revealed that households most often redeemed their benefits at supermarkets and superstores with only four (4) percent of all households never shopping in a supermarket or superstore. Thus, when a supermarket or superstore is available, it is highly unlikely that a SNAP recipient would conduct excessively large SNAP transactions at a convenience store with a more limited selection of staple foods.

The case record also documents that the Retailer Operations Division conducted a detailed analysis of five (5) households identified in the charge letter to analyze their shopping patterns at Cup Foods compared to their shopping patterns at other SNAP authorized stores. Only one (1) household redeemed its benefits exclusively at Cup Foods. The remaining four (4) households had access to, and shopped at large grocery stores, supermarkets and/or superstores including stores more than a mile distant from Cup Foods. However, despite this access to better stocked stores, these sampled households conducted excessively large transactions at Cup Foods on the same day or within a few days of shopping at these larger stores. It is highly unlikely that a convenience store with limited staple foods would have legitimate SNAP transactions comparable or larger than these SNAP authorized supermarkets and superstores. In addition, the Wisconsin administrative terminal documented that these four (4) households did not live in the neighborhood of Cup Foods, but instead lived six (6) to seven (7) miles away. There does not appear to be any legitimate explanation for why these households would go out of their way to shop at Cup Foods, a convenience store with no bulk food sales or specialty items that could not be obtained at other stores.

In summary, the store's layout, infrastructure, and food inventory do not support a high percentage of transactions markedly exceeding the average SNAP transaction amount of similar type stores. In addition to the statistical irregularity of such high dollar transactions, the limited availability of counter space for checking out and the lack of shopping carts and shopping baskets support the Retailer Operations Division determination. Customers purchasing such large quantities of food items would have to hold them in their arms, or enlist the help of others while shopping. Based on a preponderance of the evidence, the irregular transaction patterns cited in Charge Letter Attachment 2 are more likely than not the result of trafficking in SNAP benefits.

¹ "Benefit Redemption Patterns in the Supplemental Nutrition Assistance Program," report prepared by Mathematica Policy Research for the Food and Nutrition Service, February 2011.

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. The SNAP regulation at 7 CFR § 278.6(b)(2)(ii) mandates that a request for a trafficking CMP along with supporting documentation shall be submitted within ten (10) days of receipt of the charge letter.

The SNAP regulation at 7 CFR § 278.6(b)(2)(iii) also states, in part, 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 ... 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. 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

The Retailer Operations Division’s analysis of the Appellant’s EBT transaction record was the primary basis for its determination to permanently disqualify the retailer. This data provided substantial evidence that the questionable transactions during the review period had characteristics that are consistent with trafficking in SNAP benefits. Government analyses of stores caught in trafficking violations during on-site investigations have found that transactions involving trafficking consistently display particular characteristics or patterns. These patterns include, in part, those cited in the letter of charges.

In the absence of any reasonable explanations for such transaction patterns, a conclusion can be drawn through a preponderance of evidence that the “unusual, irregular, and inexplicable” transactions and patterns cited in the letter of charges evidence trafficking as the most likely explanation. Therefore, based on a review of all of the evidence in this case, it is more likely true than not true that program violations did in fact occur as determined by the Retailer Operations Division. Based on the discussion above, the decision to impose a permanent disqualification against Cup Foods, Appellant, is sustained.

RIGHTS AND REMEDIES

Section 14 of the Food and Nutrition Act of 2008 (7 U.S.C. § 2023) and Title 7, Code of Federal Regulations, Part 279.7 (7 CFR § 279.7) addresses your right to a judicial review of this determination. Please note that if a judicial review is desired, the Complaint, naming the United

States as the defendant, must be filed in the U.S. District Court for the district in which you reside or are engaged in business, or in any court of record of the State having competent jurisdiction. If any Complaint is filed, it must be filed within thirty (30) days of receipt of this Decision.

Under the Freedom of Information Act, FNS is releasing this information in a redacted format as appropriate. FNS will protect, to the extent provided by law, personal information that could constitute an unwarranted invasion of privacy.

RONALD C. GWINN
Administrative Review Officer

October 9, 2018