

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

House of Cognac,

Appellant,

v.

Case Number: C0204061

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 the permanent disqualification of House of Cognac (House of Cognac or 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 7, 2018, 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 June 2017 through November 2017. 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).

Appellant, through counsel, replied to the charges by letter dated February 20, 2018. Appellant denied trafficking and explained that it would be a hardship for the community if Appellant is permanently disqualified. After considering the retailer's reply and the evidence, the Retailer Operations Division issued a determination letter dated March 28, 2018. 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.

By letter dated April 10, 2018, 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 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, 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), (c) and (e)(1) establish the authority upon which a permanent disqualification may be imposed against a retail food store or wholesale food concern in the event that 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 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 § 271.2 states, in part, that, eligible foods means:

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 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(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.]

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 June 2017 through November 2017. This involved the following SNAP transaction patterns which are indicative of trafficking:

- There were multiple transactions made from individual benefit accounts in unusually short time frames.
- 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 appeal request dated April 10, 2018, Appellant, through counsel, provided the following summarized contentions, in relevant part:

- No consideration was given to the fact that this community has a particularly egregious shortage of available food stores and that the only market in the area closed.
- There are no readily available alternative locations to obtain the basic eligible food items.
- The exception does not require a detailed compliance program.
- There was no consideration given to the fact that the owner has participated in the program for 35 years and has never been cited for any violations of the rules or regulations.
- The statistical anomalies were screened by parties unknown using a mechanism that was never explained.

In support of its contentions, Appellant, through counsel, provided 28 color photographs, the March 28, 2018 determination letter from the Retailer Operations Division, and a copy of its February 20, 2018, response to the charges. This letter contained the following additional explanations for the questionable transactions:

- Appellant denies the allegations.
- Ownership has no specific records that relate to the transactions and it is difficult to reconstruct exactly what was purchased during these specific timeframes.
- Ownership was unaware of the limit on transaction size.
- Many customers began shopping at Appellant when the local supermarket was closed.
- The SNAP recipients are shopping at Appellant because of its proximity to their homes.
- Many of the residents do not have vehicles.
- There was no intent to defraud or to engage in trafficking.
- Ownership and staff have reviewed the SNAP Training Guide for Retailers and the regulations to make sure the mistakes do not happen again.
- The owner and staff are actively engaged in retraining all current and future employees.
- Ownership was unaware of the violations.

- Because ownership did not receive any prior notification of these alleged violations and it kept no records relating to the transactions, ownership does have documentation that would allow a meaningful response.
- Disqualifying Appellant would cause an economic hardship on the community and SNAP recipients in the neighborhood.
- There was no carelessness in supervision.
- Appellant requests a CMP of \$5,000.

The preceding may represent only a brief 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 House of Cognac as a convenience store on December 6, 1989. The case file indicates that in reaching a disqualification determination, the Retailer Operations Division considered information obtained during a November 9, 2017, 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:

- House of Cognac is approximately 5200 square feet.
- There were no shopping baskets but there were some shopping carts for customer use.
- The store does not offer any promotional specials, packaged, or bulk items.
- The checkout counter was small and limited and surrounded by a Plexiglas wall.
- Checkout occurred through a window.
- There was no fresh meat, poultry, or fish.
- There were some packages of deli meat, bacon, and kielbasa.
- There was no fresh produce.
- Dairy included butter, cheese, milk, ice cream, and sour cream.
- Other staple food items included bread, cereal, pasta, eggs, and a selection of canned goods.
- Much of the remaining stock consisted of accessory foods such as candy, spices, and carbonated and uncarbonated drinks.
- Ineligible items included include tobacco, alcohol, lottery, health and beauty aids, paper goods, and cleaning products.

The most expensive items noted were pistachios - \$9.99; coffee - \$8.49; jerky for \$6.99; and an ice cream pint - \$5.49. 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. Given the available inventory as noted above,

there is no indication from the store visit report that the store would be likely to have SNAP redemption patterns significantly different from similar sized competitors.

Charge Letter Attachments

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 unusually short time frames. This attachment documents 20 sets of transactions conducted by 14 households 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in SNAP benefits. 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

The SNAP transactions noted in the charge letter are questionable not because they exceed any limits for use, but because they display characteristics of use inconsistent with the nature and extent of Appellant's stock and facilities and are therefore indicative of trafficking. 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 photographs from the store visit show that is unlikely that SNAP customers would shop at Appellant multiple times during a short time frame, or purchase such a large volume of items. In addition, the store's enclosed checkout area with a turnstile window and very limited counter space makes it unsuitable for conducting large transactions.

Counsel explains that SNAP recipients are shopping at Appellant because of its proximity to their homes and that many of the residents do not have vehicles. The Retailer Operations Division determined that households that are conducting rapid, repetitive, and large transactions at Appellant are frequently shopping at better-stocked and more competitively-priced grocery stores, sometimes on or about the same day they shopped at Appellant. Based on the shopping patterns of these SNAP customers, transportation to other stores did not appear to be an issue and customers do not appear to rely on Appellant for all of its grocery needs.

While there are legitimate reasons why a SNAP household may shop at a given store multiple times in a day, the repetitive transactions cited in Attachment 1 is not normal shopping behavior at a convenience store. The store did not provide any documentation that would explain how a liquor store/convenience store with limited staple foods is legitimately conducting excessively large transactions multiple times during a short time period. 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.

Charge Letter Attachment 2: Excessively large purchase transactions were made from recipient accounts. This attachment lists 262 SNAP transactions 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Appellant's total SNAP redemptions and Appellant's average SNAP transaction amount during the review period was greater than the average for convenience stores in the county. The store photographs indicate that the store carries limited staple food

stock, has no fresh meat and no fresh produce. There is no compelling reason for customers to consider Appellant as a first choice destination to fulfill large purchases of food, or to make cumulative purchases 5 U.S.C. § 552 (b)(6) & (b)(7)(C) resulting in large amounts. Therefore, the substantial number of high dollar purchases calls into question the legitimacy of these transactions.

The Retailer Operations Division compared Appellant to six other nearby convenience stores. 5 U.S.C. § 552 (b)(6) & (b)(7)(C). In addition, the transaction patterns of Appellant noted in the Charge Letter exceed the other six authorized stores. The Retailer Operations Division considered this an indicator of trafficking.

Counsel explained to the Retailers Operations Division that Appellant's business increased when a nearby grocery closed. It is true that sometimes a firm may have higher than average SNAP transactions amounts due to the lack of access to other SNAP authorized stores. However, the Retailer Operations Division determined are 42 other SNAP authorized stores within a two-mile radius of Appellant including 18 small groceries, ten medium groceries, three large groceries, four supermarkets, and seven super stores. Appellant did not provide any evidence to support that Appellant's large transactions are due to the closing of a nearby store.

The Retailer Operations Division analyzed the shopping patterns of three households identified in the charge letter. All of these households had access to, and shopped at supermarkets and super stores. However, despite this access to better stocked stores, each of the three households conducted excessively large transactions at House of Cognac 5 U.S.C. § 552 (b)(6) & (b)(7)(C) of shopping at a supermarket or super store. It is unlikely that households would conduct large transactions at Appellant when these households had just visited or planned to visit larger stores with a better selection of staple foods including fresh meat and produce and likely better prices.

Counsel stated that Appellant was unaware that there was a limit on transaction size. The SNAP transactions noted in this Attachment are not presumed to be trafficking because they exceed a set dollar amount; they are questionable because they are inconsistent for this type of store and the store's stock. Households in this Attachment are regularly shopping at much larger stores and conducting transactions of large dollar amounts, yet are conducting comparable or higher dollar value transactions at Appellant's smaller and minimally stocked business. Since Appellant's business carries no fresh or frozen unprocessed meat or seafood, no fresh produce, and minimal staple food stock, these patterns are deemed to be suspicious.

In summary, Appellant's layout, business structure, and food inventory do not support a high percentage of transactions markedly exceeding the average SNAP transaction amount of similar type stores. While some households may have conducted legitimate transactions at Appellant, insufficient evidence was presented to support this argument. 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.

No Previous Violations

Appellant contends that it has never had any previous violations. A record of participation in the

SNAP with no previously documented instance of violations does not constitute valid grounds for dismissal of the current charges of violations or for mitigating the impact of the violations upon which they are based. There is no provision in the Act or regulations that reverses or reduces a sanction based upon a lack of prior violations by a firm and its owners, managers, and/or employees.

Evidence

Counsel contends that the charges are based on statistical anomalies that were screened by parties unknown and using a mechanism that was never explained. The charge letter attachments are derived from transaction reports under the electronic benefit transfer system. Specifically, FNS uses 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.

7 CFR §278.6(a) clearly 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.]

Appellant must provide a preponderance of evidence 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 did not provide any compelling justifications for the transactions listed on the charge letter attachments. It did not furnish receipts for the questionable transactions or any invoices or evidence of stocking adequate eligible foods to cover the SNAP redemption totals. 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.

Civil Money Penalty

Counsel implies that it was eligible for a hardship CMP. Counsel contends that the business is located in a low-income neighborhood in a notorious subdivision for poverty which yields a higher than normal amount of EBT customers. The available evidence shows that there are 42 other SNAP authorized stores within a two-mile radius of Appellant including 18 small groceries, ten medium groceries, three large groceries, four supermarkets, and seven super stores located a half-mile from Appellant. Moreover, where there is a hardship to SNAP households, FNS may impose a hardship CMP on a firm in lieu of a disqualification where there is a lack of authorized stores in the area. However, the regulations at 7 CFR § 278.6(f)(1) clearly state that

“a civil money penalty for hardship to [SNAP] households may not be imposed in lieu of a permanent disqualification.” Because the Retailer Operations Division has taken action to permanently disqualify Appellant’s firm, a hardship CMP in lieu of disqualification cannot be granted.

Counsel contends that eligibility for a CMP does not require a detailed compliance program. However, the regulations are very clear and do require such. The criteria for a trafficking CMP in lieu of disqualification is defined under 7 CFR § 278.6(i) which reads, in part:

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

Regarding training program standards, 7 CFR § 278.6(i)(2) states, in part:

A firm which seeks a civil money penalty in lieu of a permanent disqualification **shall document its training activity** by submitting to FNS its **dated training curricula and records of dates training sessions were conducted**; a record of dates of employment of firm personnel; and **contemporaneous documentation** of the participation of the violating employee(s) in initial and any follow-up training held prior to the violation(s). [Emphasis added.]

Appellant did not submit any such documentation. Based on the above analysis, 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 of 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 13, 2018