

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

N & A Market, Inc.,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0230959

FINAL AGENCY DECISION

It is the decision of the U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS) that the Retailer Operations Division properly denied the imposition of a hardship civil money penalty (CMP) in lieu of disqualification from the Supplemental Nutrition Assistance Program (SNAP). Therefore N & A Market, Inc. (hereinafter “Appellant”), shall be disqualified from SNAP for a period of three years due to the firm’s violations in the Special Supplemental Nutrition Program for Women, Infants and Children (WIC).

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, in its administration of SNAP when it imposed a three-year disqualification against N & A Market, Inc. and denied the imposition of a hardship CMP in lieu of disqualification.

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

FNS records show that the Appellant firm, N & A Market, Inc., was initially authorized for SNAP participation as a convenience store on April 2, 2002. In a letter dated March 7, 2019, the Michigan Department of Health and Human Services notified the Appellant that it was being disqualified from the WIC Program for one year for failure to maintain required inventory records, and for three years due to a pattern of claiming reimbursement for the sale of infant formula which exceeded the store’s documented inventory of that item. The more serious of

these violations resulted in a WIC sanction of three years in accordance with 7 CFR § 246.12(l)(1)(iii)(B) and the Michigan WIC Vendor Sanction Policy, Section C, Item 9. The March 7 letter further stated that the disqualification from WIC “may result in disqualification as a retailer in SNAP,” and added that “such a disqualification is not subject to administrative or judicial review under [SNAP].” Reciprocal SNAP disqualifications are imposed upon WIC Program violators in accordance with Federal regulations at 7 CFR § 246.12(h)(3)(xxvi).

The State agency’s notice of disqualification further indicated that the three-year WIC disqualification would begin on March 29, 2019.

On approximately June 15, 2020, the State of Michigan notified FNS’s Retailer Operation Division that N & A Market, Inc. had been disqualified from WIC for a period of three years. Included with the State agency’s notification was a copy of the March 7, 2019, notice of disqualification.

Consequently, in a letter dated July 23, 2020, the Retailer Operations Division informed the Appellant of FNS’s intention to disqualify N & A Market, Inc. from participation in SNAP for three years as a reciprocal administrative action on the basis of the store’s disqualification from the WIC program. The letter stated that the firm was also being considered for the imposition of a civil money penalty in lieu of disqualification.

The July 23 letter offered the Appellant an opportunity to “present any information, explanation, or evidence indicating that (1) [the] firm has not been disqualified from the WIC Program; (2) [the firm was] not informed of the possibility of Supplemental Nutrition Assistance Program disqualification in response to the WIC disqualification action; and (3) all opportunities for appeal of the WIC State agency action have not been exhausted or expired.”

The record shows that in reply to the July 23 letter, the Appellant contacted the Retailer Operations Division by telephone and confirmed the process for submitting a written response. However, no additional response was submitted.

After further evaluating the evidence in the case, the Retailer Operations Division determined that a three-year SNAP disqualification as a result of WIC violations was the proper penalty in accordance with 7 CFR § 278.6(e)(8). The Retailer Operations Division also evaluated the Appellant’s eligibility for a hardship civil money penalty in lieu of disqualification in accordance with 7 CFR § 278.6(a) and (f)(1), but determined that this alternative penalty was not appropriate because there were other SNAP-authorized retail stores in the area selling as large a variety of staple foods at comparable prices.

The Appellant was informed of the agency’s determination in a letter dated August 12, 2020. This letter further informed the Appellant that the determination to reciprocally disqualify N & A Market, Inc. from SNAP was final and was not subject to administrative review. However, appeal rights were available with regard to the denial of a hardship CMP.

In a letter postmarked August 20, 2020, the Appellant, through counsel, requested an administrative review of the agency’s determination. The request was granted and

implementation of the SNAP disqualification was held in abeyance pending completion of this review.

On September 14, 2020, Appellant's counsel submitted a request for information and documentation from the agency's case file in a request made under the Freedom of Information Act (FOIA). In accordance with agency policy in effect at the time of the Appellant's FOIA request, this administrative review was held in abeyance until a response to the FOIA request was completed.

On April 28, 2022, the administrative review officer was notified by FNS that a response to the FOIA request had been sent to Appellant's counsel. Later that same day, the review officer sent Appellant's counsel an e-mail which indicated that with the FOIA process now complete, counsel had 21 days from the date of receipt to submit any additional information it wanted considered in this matter. The due date for such information was May 18, 2022.

On May 18, 2022, Appellant's counsel submitted an eight-page brief outlining its contentions in this matter.

STANDARD OF REVIEW

In an appeal of adverse action, such as disqualification from SNAP or the denial of a civil money penalty in lieu of disqualification, an appellant bears the burden of proving by a preponderance of the evidence that the administrative action should be reversed. This means that 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 found in the Food and Nutrition Act of 2008, as amended (7 U.S.C. § 2021), and promulgated through regulation under Title 7 CFR Part 278. In particular, 7 CFR § 278.6(a) and (e)(8) establish the authority upon which FNS may disqualify a retail food store from participation in SNAP if the firm fails to comply with the provisions of the Act, including a reciprocal disqualification from SNAP on the basis of a WIC disqualification. Section 278.6(f)(1) establishes the authority upon which a civil money penalty may be imposed against a retail food store in lieu of disqualification when such disqualification would cause hardship to SNAP households.

7 CFR § 278.6(e)(8)(i) reads, in part:

FNS shall disqualify from SNAP any firm which is disqualified from the WIC Program:

(i) Based in whole or in part on any act which constitutes a violation of that program's regulation and which is shown to constitute a misdemeanor or felony violation of law, or for any of the following specific program violations:

(A) A pattern of claiming reimbursement for the sale of an amount of a specific food item which exceeds the store's documented inventory of that food item for a specified period of time.

7 CFR § 278.6(e)(8)(ii) states:

FNS shall not disqualify a firm from SNAP on the basis of a WIC disqualification unless:

(A) Prior to the time prescribed for securing administrative review of the WIC disqualification action, the firm was provided individual and specific notice that it could be disqualified from SNAP based on the WIC violations committed by the firm;

(B) A signed and dated copy of such notice is provided to FNS by the WIC administering agency; and

(C) A determination is made in accordance with paragraph (a) of [Section 278.6] that such action will not cause a hardship for participating SNAP households.

7 CFR § 278.6(e)(8)(iii) states:

Such a SNAP disqualification:

(A) Shall be for the same length of time as the WIC disqualification;

(B) May begin at a later date than the WIC disqualification; and

(C) Shall not be subject to administrative or judicial review under SNAP.

7 CFR § 278.6(a) reads, in part:

...FNS may, in lieu of a disqualification, subject a firm to a civil money penalty...if FNS determines that a disqualification would cause hardship to participating households....

7 CFR § 278.6(f)(1) reads, in part:

FNS may impose a civil money penalty as a sanction in lieu of disqualification when the firm subject to a disqualification is selling a substantial variety of staple food items, and the firm's disqualification would cause hardship to SNAP households because there is no other authorized retail food store in the

area selling as large a variety of staple food items at comparable prices....

APPELLANT'S CONTENTIONS

The Appellant, through counsel, made the following contentions in its request for administrative review, summarized by the review officer for purposes of brevity and relevance:

- N & A Market, Inc. is approximately 2,500 square feet in size with an additional 100 square feet of storage space. The store provides the community with a variety of food, nearly all of which is eligible for purchase with SNAP benefits, including fresh and frozen fruits and vegetables, beef, chicken, pork, seafood, turkey, bread, cereal, pasta, flour, butter, cheese, infant formula, and milk. According to FNS's store inspection report, the store is well-stocked with over 14 varieties of fruits and vegetables (nine with 20+ units); over 10 varieties of grains (seven with 20+ units); eight varieties of meats (six with 20+ units), and seven varieties of dairy (four with 20+ units).
- According to USDA's recent demographic data for the area, approximately 22 percent of households receive SNAP benefits. Of those, 42.4 percent have children under age 18; 36.6 percent have one or more people over age 60; and 47.2 percent have disabled individuals. The area surrounding the store suffers from a high rate of poverty.
- According to USDA's website, there are 16 stores within a one-mile radius of the Appellant store, but none appear to be a supermarket or large retail food store. As such, it appears that the local SNAP population relies on small grocers like N & A Market, Inc. for their regular groceries.
- Many residents do not have regular or consistent access to transportation, making the Appellant store an important component of their regular shopping.
- If N & A Market were to go out of business, there are exceptionally few small grocers in the surrounding area. Most stores in the area are convenience stores, tobacco stores, prepared food stores, or combination grocery/other stores.
- The store is located near a performing arts center, a bus stop, an interstate, and a number of churches, making this store the most convenient for SNAP customers who are going through their regular routines.
- A disruption of the routine by removing the store from SNAP would be devastating to the local SNAP population, as there are simply no nearby stores to fill the void.
- While the WIC issues deserve appropriate redress, a disqualification of the store is little more than a self-inflicted wound for SNAP over a non-SNAP violation. The best avenue for the participants and the program would be to monetarily penalize the store under the hardship provisions and permit the store to continue to do the good work it does for local SNAP participants.
- The regulations specifically state that FNS shall not disqualify a firm from SNAP on the basis of a WIC disqualification unless the action would not cause hardship to SNAP households. Where a hardship is found, USDA shall grant the retailer a hardship CMP in lieu of disqualification.
- FNS exceeded the scope of 7 CFR § 278.6(e)(8) because the WIC disqualification did not fall within the requisite categories set forth under (e)(8)(i)(A)-(F) to trigger a reciprocal SNAP disqualification.

- FNS vaguely asserted in the charge letter that one of the violations described in the WIC letter was also a violation of SNAP regulations. A copy of the WIC letter was not included with the charge letter, nor was there a citation to the specific WIC violations which allegedly occurred at the store. As such FNS has exceeded the scope of § 278.6(e)(8) by issuing a reciprocal disqualification without providing proof that the requirements for the disqualification were met.
- If the administrative review officer determines that FNS satisfied all the requirements for a reciprocal SNAP disqualification, Appellant requests that a CMP be considered in lieu of disqualification.
- The factors to consider when determining whether hardship exists are: 1) the number of authorized SNAP retailers in the area; and (2) whether said SNAP retailers are selling as large a variety of staple food items as the Appellant at comparable prices.
- The Appellant carries a large variety of SNAP-eligible foods. None of the stores in the surrounding area that accept SNAP offer even a remotely comparable amount of inventory, both in quantity and quality.
- N & A Market, Inc. presents an ideal store for a hardship exception to be granted.

The preceding may represent only a brief summary of the Appellant's contentions presented in this matter. However, in reaching a final decision, full attention was given to all contentions submitted, including any not specifically summarized or explicitly referenced in this document.

ANALYSIS AND FINDINGS

In accordance with 7 CFR § 278.6(e)(8)(ii)(A) and (B), the Appellant was provided with specific notice that it could be disqualified from SNAP based on WIC violations committed by the firm. This notice was given to the firm by the Michigan Department of Health and Human Services in a letter dated March 7, 2019. A copy of the letter was provided to the Retailer Operations Division by the state of Michigan. That FNS did not then provide the Appellant with a copy of the letter, as Appellant has argued, is irrelevant, as FNS is under no obligation to do so.

Additionally, in accordance with 7 CFR § 278.6(e)(8)(iii), the Appellant was informed by both the State agency and the Retailer Operations Division that the decision to reciprocally disqualify N & A Market, Inc. from SNAP on the basis of the WIC disqualification would not be subject to administrative or judicial review. Further, the regulation states that the SNAP disqualification shall be for the same length of time as the WIC disqualification and may begin at a later date than the WIC disqualification.

The March 7 letter plainly stated that the Appellant firm claimed reimbursement for the sale of an amount of a specific supplemental food item which exceeded the store's documented inventory of that item for a specific period of time – a violation that warrants a three-year WIC disqualification. This violation is clearly identified in 7 CFR § 278.6(e)(8)(i)(A) as a basis for a reciprocal SNAP disqualification. The record also shows that N & A Market, Inc.'s appeal options regarding the WIC penalty have been exhausted.

With all of these facts clearly in place, this review finds that the Retailer Operations Division's decision to reciprocally disqualify the firm from SNAP is wholly in line with regulations. As

such, this review has no authority to further review such a determination (see 7 CFR § 278.6(e)(8)(iii)(C)). Therefore, the only remaining issue for this review to consider is whether the Retailer Operations Division took appropriate action by determining that the Appellant was not eligible for a hardship CMP in lieu of a three-year disqualification from SNAP.

Hardship Civil Money Penalty

The Appellant has made several arguments pertaining to apparent hardship that will be experienced by participating households if the SNAP disqualification is upheld. In particular, the Appellant has claimed that N & A Market, Inc. carries large amounts of staple foods – more than any other store in the area; that the store is convenient for SNAP households due to its location and households’ limited transportation options; and that removal of the firm’s SNAP authorization would be devastating to the local SNAP population.

To address potential difficulties that SNAP households might incur when a firm is disqualified, regulations at 7 CFR § 278.6(f)(1) allow, in limited circumstances, for a civil money penalty to be imposed instead of disqualification. Specifically, the regulation states that a CMP is permitted when a firm’s disqualification would cause “hardship” to SNAP households.

While it is recognized that some degree of inconvenience to SNAP recipients is likely whenever a retail food store is disqualified for a period of time and households are forced to use their benefits elsewhere, such inconvenience does not rise to the level of “hardship” unless there are no comparable SNAP-authorized stores in the area at which customers can shop. The regulation states that hardship to SNAP households occurs when there is “no other authorized retail food store in the area selling as large a variety of staple food items at comparable prices” (emphasis added); in such circumstances, a CMP in lieu of disqualification may be considered.

It is the determination of this review that a disqualification of N & A Market, Inc., a convenience store, would not cause hardship to SNAP households because there are many other shopping options in the area. According to agency records, there are at least two dozen similarly-stocked or larger SNAP-authorized retail stores located within a one-mile radius of N & A Market, Inc., including three supermarkets, one of which is located barely a quarter of a mile away. There is also no evidence that the inventory at other stores in the area is not comparably priced.

Because hardship conditions, as defined by regulation, do not exist in this case, a CMP in lieu of disqualification cannot be granted.

CONCLUSION

Because the circumstances found in 7 CFR 278.6(e)(8)(i) and (ii) have been met, this review has no authority to reconsider the three-year reciprocal SNAP disqualification, which was imposed on the Appellant on the basis of a WIC disqualification.

As for the Retailer Operations Division’s determination to deny the imposition of a hardship civil money penalty in lieu of a disqualification against N & A Market, Inc., this decision is sustained.

A preponderance of the evidence shows that SNAP households will not incur hardship as a result of the firm's disqualification.

In accordance with the Food and Nutrition Act of 2008 and associated regulations, the three-year disqualification from SNAP shall become effective 30 days after receipt of this letter. A new application for SNAP may be submitted by the firm no earlier than 10 days prior to the expiration of the disqualification period. In accordance with 7 CFR § 278.1(b)(4), at the time of any new application for participation in SNAP, the firm will be required to submit a collateral bond or irrevocable letter of credit as a condition for again being authorized to participate in the Program. This bond requirement is due to the firm's disqualification of a period longer than six months.

RIGHTS AND REMEDIES

Applicable rights to a judicial review of this decision are set forth in Section 14 of the Food and Nutrition Act of 2008 (7 U.S.C. § 2023) and in Section 279.7 of the SNAP regulations. 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 owner resides or is engaged in business, or in any court of record of the State having competent jurisdiction. If a complaint is filed, it must be filed within 30 days of receipt of this decision. The judicial filing timeframe is mandated by the Act, and this office cannot grant an extension.

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.

JON YORGASON
Administrative Review Officer

June 6, 2022