

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

Brothers Of Chalmette,

Appellant,

v.

**Office of Retailer Operations and
Compliance,**

Respondent.

Case Number: C0229128

FINAL AGENCY DECISION

The U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS) finds that there is sufficient evidence to support the determination by the Office of Retailer Operations and Compliance to deny Brothers Of Chalmette (“Appellant”) a hardship civil money penalty in lieu of a three-year disqualification from participating as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP) as a result of WIC program violations.

ISSUE

The purpose of this review is to determine whether the Office of Retailer Operations and Compliance took appropriate action, consistent with Title 7 of the Code of Federal Regulations (CFR) § 278.6(e)(8) and 7 CFR §278.6(f), when it denied a civil money penalty in lieu of a three-year disqualification against Appellant on May 22, 2020.

AUTHORITY

According to 7 U.S.C. § 2023 and its implementing regulations at 7 CFR § 279.1, “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 May 4, 2020, the Office of Retailer Operations and Compliance informed Appellant of the agency’s intention to impose a three-year disqualification against Appellant from participating as an authorized retailer in SNAP. The firm was disqualified for three years from the WIC Program for violations that included, pursuant to 7 CFR § 278.6(e)(8)(i)(E) of the SNAP regulations, "a pattern of charging WIC customers more for food than non-WIC customers or charging WIC customers more than the current shelf price.”

Appellant replied to the Office of Retailer Operations and Compliance's charges in writing. The record reflects that the Office of Retailer Operations and Compliance received and considered the information provided prior to making a determination.

After considering the evidence, the Office of Retailer Operations and Compliance informed Appellant by letter dated May 22, 2020, that the store was not eligible for imposition of a civil money penalty in lieu of disqualification and would be disqualified from participation as a retail store in SNAP for a period of three years. Appellant was also informed that the determination to disqualify Appellant from SNAP on the basis of the WIC Program disqualification is not subject to administrative review; rather the firm only has appeal rights with regards to its eligibility for a civil money penalty. This is in accord with the Food and Nutrition Act of 2008, as amended, and 7 CFR § 278.6(e)(8) of the SNAP regulations.

On May 28, 2020, Appellant, appealed the Office of Retailer Operations and Compliance's decision to deny assessing a civil money penalty and requested an administrative review of this action. The appeal was granted and implementation of the sanction has been on hold pending completion of this review.

STANDARD OF REVIEW

In an appeal of an adverse action, Appellant bears the burden of proving by a preponderance of evidence that the administrative action should be reversed. That means Appellant has the burden of providing relevant evidence that a reasonable mind, considering the record as a whole, would accept as sufficient to support a conclusion that the argument asserted is more likely to be true than untrue.

CONTROLLING LAW

The controlling statute in this matter is contained 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) establishes the authority upon which a reciprocal disqualification may be imposed against a firm disqualified from the WIC Program. Part 278.6(f)(1) provides for civil money penalty assessments in lieu of disqualification in cases where disqualification would cause hardship to SNAP households because of the unavailability of a comparable participating food store in the area to meet their shopping needs.

7 CFR § 278.6(e)(8) reads, in part, "FNS shall disqualify from the Supplemental Nutrition Assistance Program (SNAP) any firm which is disqualified from the WIC Program." 7 CFR § 278.6(e)(8)(iii)(A) states that such a disqualification, "shall be for the same length of time as the WIC disqualification." 7 CFR § 278.6(e)(8)(iii)(C) states that such reciprocal SNAP disqualifications shall not be subject to administrative or judicial review.

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'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

Appellant's responses regarding this matter are essentially as follows:

- Appellant is well stocked and sells meat bundles.
- Appellant has not had any previous SNAP violations despite repeated undercover investigations.
- Appellant's prices are lower than those of a nearby superstore.
- The nearby superstore is much more than a mile away by foot.
- Disqualification would pose a hardship to SNAP participants who rely on the firm.
- A reciprocal disqualification is not applicable because the charge letter did not cite the WIC violation which would support a reciprocal disqualification.

These explanations may represent only a brief summary of Appellant's contentions. However, in reaching a decision, full consideration has been given to all contentions presented, including any others that have not been specifically listed here.

ANALYSIS AND FINDINGS

With regards to Appellant's contention that Appellant has not had any previous SNAP violations despite repeated undercover investigations, no findings or conclusions can be made. Appellant contends a reciprocal disqualification is not applicable because the charge letter did not cite the WIC violation which would support a reciprocal disqualification. Appellant has been disqualified from participation in the WIC Program based on violations which include those specified within 7 CFR § 278.6(e)(8) for a period of three years. The only issue in this review is whether the Office of Retailer Operations and Compliance properly denied Appellant the option of a civil money penalty (CMP) in lieu of a three-year SNAP disqualification.

The action to disqualify Appellant from SNAP is a required reciprocal action on the basis of the firm being disqualified from the WIC Program. Such action to reciprocally disqualify is directed by 7 CFR § 278.6(e)(8) of the SNAP regulations and provides no agency discretion in the matter.

CIVIL MONEY PENALTY

Appellant contends that it is eligible for a hardship civil money penalty (CMP). The imposition of a CMP in lieu of disqualification is appropriate only if: 1) a store sells a substantial variety of staple food items, and; 2) its disqualification would create a 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.

In this case, however, the Office of Retailer Operations and Compliance has rendered a finding pursuant to 7 CFR § 278.6(f) that it would not be appropriate to impose a CMP in lieu of a

period of disqualification because of its determination that Appellant is not the only authorized retail food store in the area "selling as large a variety of staple food items at comparable prices."

Appellant contends that there are several factors that support the eligibility of Appellant for a CMP as an optional penalty in lieu of disqualification. These factors include: Appellant's store is well stocked and sells meat bundles; Appellant's prices are lower than those of a nearby superstore; and the nearby superstore is much more than a mile away by foot.

SNAP regulations define hardship specifically as a condition that results because "there is no other authorized retail food store in the area selling as large a variety of staple food items at comparable prices." That is what "hardship" means with regards to consideration of a firm's eligibility for a CMP. The subject store is classified in the FNS SNAP retailer database as a medium grocery store. That database also shows there are eight SNAP retailers located within a one-mile radius of Appellant's store including two medium grocery stores, one supermarket, and one superstore. A review of a map of the area does not show any obstacles which would impede individuals from walking to the store, though some of the adjacent dirt footpaths might not be incorporated into Google Maps. Appellant did not provide evidence to support that the purchase of meat packages at Appellant would be cheaper than purchasing the same amount of meat at the nearby superstore or at a similarly-stocked medium grocery store located nearby which also offers meat packages. Therefore, by definition, there is no hardship that will result as there is no lack of comparable stores in the area.

All of these stores are easily accessible to customers and offer a variety and quality of staple foods comparable to, or better than, those offered by Appellant. Appellant does not carry any unique items or foods that cannot be found at other stores. Therefore, the earlier determination that Appellant's disqualification would not create a hardship to customers, as differentiated from potential inconvenience, is sustained, and a CMP in lieu of disqualification is not appropriate in this case.

CONCLUSION

Based on the discussion above, the determination by the Office of Retailer Operations and Compliance to deny Brothers Of Chalmette a hardship civil money penalty in lieu of a three-year disqualification from SNAP as a result of WIC program violations is sustained.

In accordance with the Food and Nutrition Act of 2008, and the regulations thereunder, this period of disqualification shall become effective thirty (30) days after receipt of this letter. A new application for participation may be submitted by the firm ten (10) days prior to the expiration of this three-year period. In accordance with 7 CFR § 278.1(b)(4), at the time of any such new application for program participation, the firm would be advised by the office receiving such an application of the necessity, as a store previously sanctioned for program violations, to post a collateral bond or irrevocable letter of credit as a condition for again being authorized to participate in the program.

RIGHTS AND REMEDIES

Applicable rights to a judicial review of this decision are set forth in 7 U.S.C. § 2023 and 7 CFR § 279.7. If Appellant desires a judicial review, the complaint must be filed in the U.S. District Court for the district in which Appellant's owner resides, is engaged in business, or in any court of record of the State having competent jurisdiction. This complaint, naming the United States as the defendant, 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.

RICH PROULX
ADMINISTRATIVE REVIEW OFFICER

May 15, 2023