

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

Dean Mini Market Corp,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0253900

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 denial of a hardship civil money penalty, in lieu of a three (3) year disqualification from the Supplemental Nutrition Assistance Program (SNAP) as a result of WIC Program violations, was properly rendered by the Retailer Operations Division against Dean Mini Market Corp (hereinafter “Dean Mini Market Corp” or “Appellant”).

ISSUE

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with 7 CFR § 278.6(f)(1) in its administration of the SNAP, when it denied assessing a hardship civil money penalty in lieu of a three year disqualification against Dean Mini Market Corp.

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 10, 2022, the Retailer Operations Division informed the Appellant of the agency’s intention to impose a three year disqualification against the Appellant firm from participating as an authorized retailer in the 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)(A) of the SNAP regulations, “A pattern of claiming reimbursement for the sale of an amount of a

specific food item that exceeds the store's documented inventory of that food item for a specific period".

In a letter dated July 15, 2021, FNS was advised by the 5 U.S.C. § 552 (b)(6) & (b)(7)(C) State Department of Health, 5 U.S.C. § 552 (b)(6) & (b)(7)(C) (5 U.S.C. § 552 (b)(6) & (b)(7)(C) WIC State Agency) that the Appellant was being disqualified from the WIC Program for three years effective July 11, 2021 and that the Appellant's appeal rights had been exhausted. The 5 U.S.C. § 552 (b)(6) & (b)(7)(C) WIC State Agency provided FNS with a copy of a letter dated June 21, 2021 that it had sent to the Appellant advising it that Dean Mini Market Corp could be disqualified from the SNAP based on the WIC Program violations that occurred at the firm. The letter also informed the Appellant of its appeal rights regarding the WIC Program disqualification. The 5 U.S.C. § 552 (b)(6) & (b)(7)(C) WIC State Agency informed FNS that Dean Mini Market Corp had exhausted all of its appeal rights with regard to the three year WIC disqualification.

The record reflects that via telephone conversation with Retailer Operations Division staff on June 24, 2022, the Appellant's counsel requested an extension in time for providing a response to the letter of charges. Via letter of June 24, 2022, the Retailer Operations Division granted counsel's time extension request to July 5, 2022.

In responses to the Retailer Operations Division of June 24, 2022 and July 7, 2022, the Appellant, through counsel, replied to the letter of charges. The record reflects that the Retailer Operations Division received and considered the information provided prior to making a determination.

After considering the Appellant's replies and the evidence in the case, the Retailer Operations Division informed the Appellant, by letter dated August 9, 2022, that Dean Mini Market Corp was not eligible for the imposition of a hardship civil money penalty in lieu of disqualification and would be disqualified from participation as a retail store in the SNAP for a period of three years. The Appellant was also informed that the determination to disqualify Dean Mini Market Corp from the 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.

In an email correspondence of August 22, 2022, the Appellant, through counsel, appealed the Retailer Operations Division's decision to deny assessing a hardship civil money penalty in lieu of a three year SNAP disqualification and requested an administrative review of this action. FNS granted the Appellant's request for administrative review by letter dated September 11, 2022 and implementation of the sanction has been on hold pending completion of this review.

STANDARD OF REVIEW

In appeals of adverse actions, the Appellant bears the burden of proving by a 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, might 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 U.S.C. § 2023 and Section 278 of Title 7 of the Code of Federal Regulations (CFR).

Section 12 [7 U.S.C § 2021] (a)(1) states, in part, “An approved retail food store or wholesale food concern that violates a provision of this Act or a regulation under this Act may be: (A) disqualified for a specific period of time from further participation in the supplemental nutrition assistance program; (B) assessed a civil penalty of up to \$100,000 for each violation; or (C) both.”

7 CFR § 278.6(e)(8) states, in part, “FNS shall disqualify from the Food Stamp Program any firm which is disqualified from the WIC program.”

7 CFR § 278.6(e)(8)(i)(A) states, in part, “FNS shall disqualify from the SNAP any firm which is disqualified from the WIC Program ...for any of the following specific program violations: A pattern of claiming reimbursement for the sale of an amount of a specific food item that exceeds the store’s documented inventory of that food item for a specified period of time...”

7 CFR § 278.6(e)(8)(ii)(A) and (B) state “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”.

7 CFR § 278.6(e)(8)(iii)(A) states, in part, 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, in part, that such a disqualification: “Shall not be subject to administrative or judicial review under the Food Stamp Program.”

7 CFR § 278.6(f)(1) states, 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 food stamp 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.”

7 CFR § 278.1(b)(4)(i) states, in part, “If the applicant firm has been sanctioned for violations of this part, by withdrawal or disqualification for a period of more than six months, or by a civil money penalty in lieu of a disqualification period of more than six months, or if the applicant firm has been previously sanctioned for violations and incurs a subsequent sanction, regardless

of the disqualification period, FNS shall, as a condition of future authorization, require the applicant to present a collateral bond or irrevocable letter of credit...”

7 CFR § 278.1(b)(4)(D) states, in part, “The collateral bond of irrevocable letter of credit must have a face value of \$1,000 or an amount equal to ten percent of the average monthly SNAP redemption volume of the applicant firm for the immediate twelve months prior to the effective date of the most recent sanction which necessitated the collateral bond or irrevocable letter of credit, whichever amount is greater.”

APPELLANT’S CONTENTIONS

The following represents a brief summary of the Appellant’s contentions in this matter. Please be assured, however, that in reaching a decision, full attention and consideration was given to all contentions presented, including any not specifically recapitulated or specifically referenced herein.

In the replies to the charge letter and in the administrative review request, the Appellant, through counsel, stated the following summarized contentions, in relevant part:

- The Appellant requests an immediate hearing of the imposed three year SNAP disqualification determination.

ANALYSIS AND FINDINGS

WIC Program Violations

In accordance with 7 CFR § 278.6(e)(8)(ii)(A) and (B), the Appellant was provided with specific notice that Dean Mini Market Corp could be disqualified from the SNAP based on the WIC violations committed by the firm. This notice was given to the firm by the 5 U.S.C. § 552 (b)(6) & (b)(7)(C) WIC State Agency in a letter dated June 21, 2021. A copy of that notice was provided to FNS by the 5 U.S.C. § 552 (b)(6) & (b)(7)(C) (5 U.S.C. § 552 (b)(6) & (b)(7)(C) WIC State Agency) and FNS was notified that the Appellant’s appeal rights had been exhausted.

Additionally, in accordance with 7 CFR § 278.6(e)(8), the Appellant was informed by both the 5 U.S.C. § 552 (b)(6) & (b)(7)(C) WIC State Agency and the FNS Retailer Operations Division that the decision to reciprocally disqualify Dean Mini Market Corp from the SNAP on the basis of the WIC disqualification would not be subject to administrative or judicial review. Further, the regulations state 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.

Consequently, this administrative review has no authority to render an opinion regarding the WIC violations that were uncovered by the state of 5 U.S.C. § 552 (b)(6) & (b)(7)(C). According to the state’s records, the Appellant firm engaged in a pattern of claiming reimbursement for the sale of an amount of a specific food item that exceeds the store’s documented inventory of that food item for a specific period. Pursuant to the state’s

administrative regulations, such a violation warrants a three year WIC disqualification. The record also shows that the Appellant's appeal rights have been exhausted.

7 CFR § 278.6(e)(8)(i)(A) states, in part, "FNS shall disqualify from the SNAP any firm which is disqualified from the WIC Program ...for any of the following specific program violations: A pattern of claiming reimbursement for the sale of an amount of a specific food item that exceeds the store's documented inventory of that food item for a specified period of time...". In accordance with 7 CFR 278.6(e)(8)(iii)(C), the SNAP reciprocal disqualification shall not be subject to administrative or judicial review. The determination letter of August 9, 2022 properly noted that a SNAP administrative review was only available regarding the firm's eligibility for a hardship civil money penalty. Therefore, the three year reciprocal disqualification from the SNAP is wholly in line with Federal regulations and is final and not subject to review.

With regard to the Appellant's request for an immediate hearing of the imposed three year SNAP disqualification determination, this disqualification is an administrative action and the SNAP regulations do not provide for a hearing, but rather for an administrative review of the action. As noted previously, the Act and regulations provide that any firm aggrieved by an administrative review determination may seek judicial review of the determination in Federal court or a State court of record having competent jurisdiction. In such event, trial de novo proceedings ensure the firm of a full evidentiary hearing on the agency action at issue.

Hardship Civil Money Penalty

A review of the agency's case record shows that the Retailer Operations Division properly considered whether or not SNAP recipients would experience hardship as a result of the firm's disqualification. Under the provisions found in 7 CFR § 278.6(f)(1), FNS may impose a civil money penalty (CMP) in lieu of disqualification when hardship to SNAP households exists. However, according to this regulation, hardship is defined as "no other authorized retail food store in the area selling as large a variety of staple food items at comparable prices." [Emphasis added.] 5 U.S.C. § 552 (b)(7)(E).

It is recognized that some degree of inconvenience for SNAP households is likely whenever a SNAP authorized store is disqualified and the household is forced to use its SNAP benefits elsewhere. However, in accordance with the regulations cited above, hardship exists only when there are no other authorized stores in the area selling as large a variety of staple foods at comparable prices. Therefore, the earlier determination that Dean Mini Market Corp's disqualification would not create a hardship to customers, as differentiated from potential inconvenience, is sustained and a CMP in lieu of SNAP disqualification is not appropriate in this case.

CONCLUSION

Based on the discussion above, the determination by the Retailer Operations Division to deny Dean Mini Market Corp a hardship civil money penalty in lieu of a three (3) year disqualification from the 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, also 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

Your attention is called to Section 14 of the Food and Nutrition Act of 2008 (7 U.S.C. 2023) and to Section 279.7 of the Regulations (7 CFR § 279.7) with respect to 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.

LORIE L. CONNEEN
ADMINISTRATIVE REVIEW OFFICER

November 10, 2022