

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

**Kingsborough Deli Inc,**

**Appellant,**

**v.**

**Office of Retailer Operations and  
Compliance,**

**Respondent.**

**Case Number: C0216601**

**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 Kingsborough Deli Inc a hardship Civil Money Penalty (CMP) in lieu of a three-year disqualification from participating as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP) because of Women, Infants, and Children (WIC) Program violations.

**ISSUE**

The issue accepted for review is 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 § 278.6(f), in its administration of the SNAP, when it disqualified Appellant for a period of three years and denied assessing a hardship CMP in lieu of disqualification.

**AUTHORITY**

According to 7 U.S.C. § 2023 and the 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 April 16, 2019, the Office of Retailer Operations and Compliance informed Appellant that as the result of a January 31, 2019, New York Department of Health, the WIC State Agency, disqualification action due to violations of WIC program rules, the Office of Retailer Operations and Compliance was considering a SNAP reciprocal disqualification in accordance with 7 CFR § 278.6(e)(8). The WIC State Agency correspondence also cautioned

Appellant that the WIC disqualification may result in a disqualification from SNAP for three years that was not subject to administrative review.

Appellant, through counsel, responded to the charges in a letter dated April 26, 2019, that requested a hardship CMP and included a Freedom of Information Act (FOIA) request. The agency responded to this request on May 22, 2019. On August 14, 2019, Appellant, through counsel, appealed the FOIA response and the Office of Retailer Operations and Compliance suspended all work on this case pending the outcome of the appeal. The FOIA appeal decision was subsequently issued on February 17, 2021. The Office of Retailer Operations and Compliance sent a 10-day reminder of the opportunity to submit an additional response to the charges to counsel in a letter dated February 19, 2021, and received on February 22, 2021.

By letter dated April 15, 2021, the Office of Retailer Operations and Compliance informed Appellant that in accordance with Sections 278.6(e)(8)(iii) and 278.6(f)(1) it determined that Appellant's disqualification would not cause a hardship to SNAP households since there are other authorized retail stores in the area selling a variety of staple foods at comparable prices. This notification also stated that this disqualification determination was final and not subject to administrative review, but that appeal rights were available regarding the firm's eligibility for a hardship CMP.

By letter dated April 24, 2021, Appellant, through counsel, appealed the Office of Retailer Operations and Compliance's decision to deny the hardship CMP in lieu of a three-year disqualification. The appeal was granted, and implementation of the sanction has been held in abeyance pending completion of this review. No subsequent correspondence has been received from Appellant.

## **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, would accept as sufficient to support a conclusion that the argument asserted is more likely to be true than untrue.

## **CONTROLLING LAW**

The controlling law in this matter is contained in the Food and Nutrition Act of 2008, as amended (7 U.S.C. § 2021), and implemented through regulation under Title 7 CFR Part 278. 7 CFR Part 278.6 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 CMP 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) establishes, among other things, the kind of violations that warrant a reciprocal disqualification and reads, inter alia, "FNS shall disqualify from the Supplemental Nutrition Assistance Program (SNAP) any firm which is disqualified from the WIC Program."

Stipulations are added to this regulation requiring that 1) the firm was provided individual and specific notice that it could be disqualified from the SNAP based on the WIC violations committed by the firm, 2) a signed and dated copy of such notice is provided to FNS by the WIC administering agency, and 3) a determination is made which ensures that such disqualification action will not cause a hardship for participating SNAP households.

7 CFR § 278.6(e)(8)(iii)(C) states that reciprocal SNAP disqualifications shall not be subject to administrative or judicial review. FNS may, in lieu of a disqualification, subject a firm to a CMP if the agency determines that a disqualification would cause hardship to participating SNAP households. In interpretation of the regulations, agency policy provides, inter alia, that “even though the action to disqualify on the basis of the WIC disqualification is, by statute and regulation, unappealable, the determination to deny a firm a hardship CMP in lieu of the reciprocal disqualification, or the amount of the hardship CMP, remains subject to appeal in the Supplemental Nutrition Assistance Program.”

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 following may represent a summary of Appellant’s contentions 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 herein:

- Pursuant to Section 278.6(8), while the FNS shall disqualify from the Food Stamp Program any firm which is disqualified from the WIC Program; however, the FNS shall not disqualify a firm based on a WIC disqualification where the firm was not provided individual and specific notice that it could be disqualified from the Food Stamp Program based on the WIC violations committed by the firm. In this case, the owner himself was never provided individual notice that he personally could be disqualified from the Food Stamp Program, nor was this firm notified that the store itself could be disqualified from the Food Stamp Program. It is further submitted that this owner never received a signed or dated a copy of any individual or specific notice advising him that the firm could be disqualified from the Food Stamp Program based on the WIC violations allegedly committed by the firm. It was only upon receipt of the Letter of Charges, dated April 16, 2019, that this owner realized that by agreeing to participate in the WIC Program there could be any ramifications of disqualification from the Food Stamp Program.
- A CMP should be imposed as it would be a hardship to the participating households in the community as there are no other authorized retail stores in the area selling the variety of staple foods at comparable prices. The store is open 20 hours per day seven days per week and sells Halal foods to members of the community as well as offering delivery. The closest supermarket is several blocks away.

- This decision would also deprive this vendor of his business and cause him to sustain irreparable injury and damage and cause his workers who also live in the community to lose their jobs.
- As to the fact that this owner was unaware of the consequences of his participation and potential violations of the WIC Program, it is submitted that this vendor has not been afforded the opportunity to fully answer and challenge the charges lodged against it and has been deprived of due process. It would also be expected and required in so serious a matter where a 3-year disqualification may be imposed, that the FNS would investigate and evaluate the specific activities in this vendor's business, which has an unblemished record as a participant in the Food Stamp Program/Supplemental Nutrition Assistance Program before issuing a disqualification; and,
- The firm meets the criteria for a CMP in accordance with Section 278.6(i).

Appellant submitted no evidence or other rationales in support of these contentions.

### **ANALYSIS AND FINDINGS**

By letter dated January 31, 2019, the New York Department of Health, the WIC State Agency, disqualified Appellant from participating in the WIC program for three years. The New York Department of Health letter properly gave notice of Appellant's right to file a formal appeal, and clearly states that the disqualification from WIC may result in disqualification as a retailer in the SNAP. It also states that such reciprocal disqualification is not subject to administrative or judicial review under the SNAP Program. Appellant did not appeal the WIC State Agency disqualification. The subject firm was disqualified from the New York WIC program for claiming reimbursement for the sale of WIC food items that exceeded the store's documented inventory of those food items.

The FNS SNAP retailer application and reauthorization applications contain a certification page whereby applicants must confirm their understanding of and agreement with SNAP retailer requirements to complete the application process. Store ownership did certify its understanding and agreement when it completed the SNAP retailer application in 2016. The Certification and Signature section of the FNS-252 SNAP Application for Stores dated and signed by the store owner on March 3, 2016, states, "Disqualification from the WIC Program may result in Supplemental Nutrition Assistance Program disqualification and a disqualification from the Supplemental Nutrition Assistance Program may result in WIC Program disqualification". The "SNAP Training Guide for Retailers" is also provided to all retailers upon their authorization and clearly states that store owners or operators are legally responsible for their own actions as well as the actions of everyone working in their store and that violations may include being disqualified from SNAP. This training guide specifically states that, "Stores that are disqualified from WIC may be disqualified from SNAP for an equivalent period of time". The SNAP retailer applications and training materials clearly state that regardless of whom the ownership of a store may utilize to handle store business or their degree of involvement in store operations, the ownership is accountable for the proper training of staff and the monitoring and handling of benefit transactions. The ownership remains liable for all violative transactions handled by store personnel, whether paid or unpaid, new, full-time or part-time.

Appellant's claim that the store owner was deprived of due process because he had no prior knowledge that a WIC program disqualification may result in a SNAP disqualification is refuted since the evidence clearly shows that the owner was informed of this on multiple occasions prior to the charge letter issuance. Specifically, the owner was informed of this in the SNAP retailer application, in the SNAP training materials, and in the New York Department of Health determination letter dated January 31, 2019, advising him of the WIC program disqualification.

Appellant submitted no evidence supporting that the Appellant firm sells Halal foods. The firm is not listed as a purveyor of Halal foods by zabihah.com, the world's largest guide to Halal restaurants and markets. Additionally, the USDA FNS store visit report conducted March 1, 2019, shows no Halal foods for sale and, in fact, does show that the firm sells ham, bacon, and pork sausages. It would be unusual for a Halal store to offer any pork products. Additionally, an image of the firm on Google maps dated November 2020 does not show any exterior signage advertising Halal foods. Lastly, although authorized, the Appellant firm has not redeemed SNAP benefits since July 2019 therefore the loss of SNAP would not impose any undue hardship on the community, the employees, or on the owner.

It is important to clarify for the record that this review is limited to what circumstances were at the basis of the Office of Retailer Operations and Compliance's action at the time such action was made. The record is clear that Appellant was disqualified from the WIC Program for a period of three years and that the Appellant failed to appeal this disqualification action by the New York Department of Health. As cited herein, the disqualification from SNAP for three years as the result of WIC Program violations is not subject to administrative or judicial review as explicitly stated in SNAP regulations at 7 CFR § 278.6(e)(8)(iii)(C). The sole appealable issue in this case is if the Office of Retailer Operations and Compliance properly considered the firm's eligibility for a hardship CMP as discussed in the next section.

### **CIVIL MONEY PENALTY**

Appellant is not eligible for a trafficking CMP as these only apply in cases of permanent disqualifications involving trafficking. The matter under review is a term disqualification of three years and does not involve trafficking therefore a trafficking CMP cannot be considered under 7 CFR § 278.6.

A hardship CMP as an optional penalty in lieu of a three-year disqualification was considered in this case. Such a finding is appropriate only if a store sells a substantial variety of staple food items and 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. FNS records show there are 17 comparably sized or larger SNAP authorized grocery stores located within 0.3 miles of Appellant's location that includes one supermarket, one medium grocery store, four small grocery stores, and 11 convenience stores with the closest small grocery store located on the same block just steps away from the Appellant firm. All the comparable stores stock adequate varieties of food in all four staple food categories and in perishables as required by FNS with the many larger firms offering a greater quantity and variety of staple foods at better prices than could be found at a convenience store. There are many larger

stores within a 1.0-mile radius as well as fixed route scheduled bus service and a nearby Metro station that would facilitate SNAP recipients shopping at more distant SNAP retailers.

Appellant's claim to selling Halal foods as a basis for approval of a hardship CMP has been previously discussed and is found to be baseless and without merit.

The nearby stores appear readily accessible to SNAP recipients and offer a variety of staple foods comparable to, or better than, those offered by Appellant. It is recognized that some degree of inconvenience to SNAP users is inherent in the disqualification from SNAP of any participating food store as the normal shopping pattern of such SNAP benefit holders may be altered. Inconvenience, however, does not rise to the level of hardship required by the regulations.

### **CONCLUSION**

Based on the discussion above, the determination by the Office of Retailer Operations and Compliance to deny the imposition of a hardship CMP in lieu of a three-year SNAP disqualification is sustained. In accordance with the Food and Nutrition Act of 2008, as amended, and the pursuant regulations, the three-year 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 days prior to the expiration of this three-year disqualification period. In accordance with 7 CFR §278.1(b)(4), at the time of any such new application for participation in the SNAP, the firm would be required, as a store previously sanctioned for program violations, to submit a collateral bond or irrevocable letter of credit as a condition for again being authorized to participate in the program. Questions regarding the application process can be answered by the FNS Retailer Service Center at 877-823-4369.

### **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 a judicial review is desired, 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.

ROBERT T. DEEGAN  
ADMINISTRATIVE REVIEW OFFICER

August 17, 2021