

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

**A&M Grocery,**

**Appellant,**

**v.**

**Case Number: C0192110**

**Retailer Operations Division,**

**Respondent.**

**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 Retailer Operations Division to deny A&M Grocery (“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 Retailer Operations Division 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 November 15, 2016.

**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 September 14, 2016, the Retailer Operations Division 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)(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.”

Although afforded the opportunity to do so, Appellant did not reply to the Retailer Operations Division's charges in writing. After considering the evidence, the Retailer Operations Division informed Appellant by letter dated November 15, 2016, 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 November 23, 2016, Appellant, appealed the Retailer Operations Division'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:

- The owner was forced to take over a mismanaged business with some dishonest staff. Appellant provided ~33 pages of court documents and four pages of documents regarding the WIC disqualification; and,
- The dishonest staff have been removed and compliance policy and procedures put into place. Appellant provided six pages of training documents.

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**

Appellant contends that the owner was forced to take over a mismanaged business with some dishonest staff, and the owner has subsequently removed the dishonest staff instituted compliance policy and procedures. While Appellant's situation may be deserving of sympathy, no findings or conclusions are herein rendered regarding these circumstances. Those matters dealing with the WIC Program disqualification are not subject to this particular administrative review process. The matter of the WIC Program disqualification cannot properly be re-addressed in the present context except to conclude on a fact-finding basis that 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 Retailer Operations Division 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 Retailer Operations Division 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." 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 convenience store. That database also shows

there are eight SNAP retailers located within a two-mile radius of Appellant's store including a medium grocery store. This store is easily accessible to customers and offers 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 this store. 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 Retailer Operations Division to deny A&M Grocery 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

November 29, 2017