

**U.S. Department of Agriculture  
Food and Nutrition Service  
Administrative Review  
Alexandria, VA 22302**

**AB Convenience Store,**

**Appellant,**

**v.**

**Retailer Operations Division,**

**Respondent.**

**Case Number: C0199500**

**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 one (1) year disqualification from the Supplemental Nutrition Assistance Program as a result of Special Supplemental Nutrition Program for Women, Infants, and Children (WIC) program violations, was properly imposed by the Retailer Operations Division (hereinafter, "Retailer Operations Division") against AB Convenience Store (hereinafter, "AB Convenience Store" / "Appellant").

**ISSUE**

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with 7 CFR § 278.6(e)(8) in its administration of Supplemental Nutrition Assistance Program (SNAP) when it denied assessing a civil money penalty in lieu of a one (1) year disqualification against AB Convenience Store in a letter dated September 20, 2017.

**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 was advised by the Connecticut WIC State Agency that Appellant was being disqualified from participation as a WIC vendor for a period of one (1) year and that Appellant had failed to appeal that disqualification within the allowable timeframes. WIC provided a copy of the letter dated March 1, 2017 wherein Appellant was advised that it was being disqualified from the WIC Program for one (1) year effective from March 16, 2017 through March 16, 2018.

Retailer Operations Division identified that, in addition to representing violations of the terms and conditions contained in the WIC vendor agreement, the same violations are identified as having violated SNAP regulations at 7 CFR §278.6(e)(8)(i)(E) “A pattern of charging WIC customers more for food than non-WIC customers or charging WIC customers more than current shelf price.” Therefore, in a letter dated August 23, 2017 Appellant was advised by the Retailer Operations Division that it was being considered for either reciprocal disqualification from SNAP based on the WIC violations that also violated the SNAP regulations at 7 CFR §278.6(e)(8); or, the imposition of a civil money penalty in lieu of that disqualification.

The record indicates that Appellant did not respond to the Retailer Operations Division. Appellant was informed in a letter dated September 20, 2017, that it was not eligible for imposition of a hardship civil money penalty in lieu of disqualification and would be reciprocally disqualified from participation as a retail store in the SNAP for a period of one (1) year. The September 20, 2017 letter also informed Appellant that the determination to disqualify AB Convenience Store from the SNAP on the basis of the WIC Program disqualification is not subject to administrative review; rather only appeal rights with regards to the firm’s eligibility for a hardship civil money penalty are afforded. This is in accordance with the Food and Nutrition Act of 2008, as amended, and 7 CFR § 278.6(e)(8) of the SNAP regulations.

In a letter dated September 27, 2017, Appellant requested an appeal of the Retailer Operations Division’s decision to deny the assessment of a hardship civil money penalty. The appeal was granted and implementation of the SNAP disqualification has been held in abeyance pending completion of this review.

## **STANDARD OF REVIEW**

In appeals of adverse actions, an appellant bears the burden of proving by a preponderance of the evidence, that the administrative actions should be reversed. That means an 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 (the “Act”)<sup>1</sup>, 7 USC 2023 and 278 of Title 7 of the Code of Federal Regulations (CFR).<sup>2</sup>

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 specified 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 [SNAP] any firm which is disqualified from the WIC Program”

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 [SNAP]”

7 CFR § 278.6(e)(8)(i) states, in part, that such a disqualification shall be based on “any of the following specific program violations...(E) A pattern of charging WIC customers more for food than non-WIC customers or charging WIC customers more than the current shelf price;”

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 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. FNS may disqualify a store which meets the criteria for a civil money penalty if the store had previously been assigned a sanction.”

7 CFR Part § 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 Part § 278.1(b)(4)(D) states, in part, “The collateral bond or irrevocable letter of credit must have a face value of \$1000 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

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<sup>1</sup> Effective October 1, 2008, the Food Stamp Act of 1977 was superseded by the Food and Nutrition Act of 2008, as amended through P.L. 110-246 with subsequent amendment enacted through P.L. 113-79 effective February 7, 2014.

<sup>2</sup> Title 7 of the Code of Federal Regulations may be accessed in its entirety via the Internet at [https://www.ecfr.gov/cgi-bin/text-idx?tpl=/ecfrbrowse/Title07/7tab\\_02.tpl](https://www.ecfr.gov/cgi-bin/text-idx?tpl=/ecfrbrowse/Title07/7tab_02.tpl)

date of the most recent sanction which necessitated the collateral bond or irrevocable letter of credit, whichever amount is greater.”

### **APPELLANT’S CONTENTIONS**

In a letter dated September 27, 2017 Appellant, through its owner of record, conveys that:

- a SNAP disqualification would place a hardship on SNAP customers who lack transportation or gas money and have to walk to Appellant, which in the winter is dangerous due to weather conditions.
- The employee who committed the WIC violations is no long employed at Appellant.
- Was not participating in SNAP at the time of the WIC violations.

The preceding may represent only a summary of Appellants’ contentions as presented by counsel 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.

### **SUMMARY OF THE CHARGES**

The record shows that Appellant was informed in the FNS letter of charges dated August 23, 2017 as well as in the FNS letter of determination dated September 20, 2017 that the decision to disqualify AB Convenience Store from the SNAP on the basis of the WIC Program disqualification is not subject to administrative review.

Notwithstanding any new or repeated arguments the WIC disqualification is a matter decided within the Connecticut WIC State Agency and the basis for that decision is not a consideration in the instant case per SNAP regulations at 7 CFR § 278.6(e)(8)(iii)(C); rather the instant appeal is focused strictly on the firm’s eligibility for a hardship civil money penalty.

Appellant was duly notified that WIC Program disqualification may result in a reciprocal SNAP authorization disqualification in the notice from the Connecticut WIC State Agency dated March 1, 2017, in the last paragraph on page four (4).

### **ANALYSIS AND FINDINGS**

#### **Civil Money Penalty:**

The Retailer Operations Division has rendered a finding pursuant to 7 CFR §278.6(f) that it would not be appropriate to impose a civil money penalty in lieu of a period of disqualification

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

The imposition of a civil money penalty in lieu of disqualification 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.

The Retailer Operations Division has documented that AB Convenience Store is a convenience store, as defined in accordance with SNAP regulations.

The regulations do not refer to the availability of WIC vendors but rather to the availability of SNAP authorized retailers. Further, the SNAP regulations do not define hardship as inconvenience, but define it rather specifically as a condition that results because "there is no [emphasis added] other authorized retail food store in the area selling as large a variety of staple food items at comparable prices."

Appellant is located in an area where Retailer Operations Division identified two (2) alternative competitor convenience stores both located within 0.51 miles of Appellant.

On review the determination of the availability of alternative SNAP authorized retailers within a one-mile radius identified by Retailer Operations Division is further affirmed with review of the USDA-FNS SNAP Retailer Locator tool at <https://www.fns.usda.gov/snap/retailerlocator> identifying two (2) alternative SNAP authorized retailers located within one (1) mile of AB Convenience Store.

Although the temporary disqualification of Appellant might cause inconvenience to some of the area SNAP customers; there is no **hardship** that will result as there are alternative comparable stores in the area.

#### **Violating Employee no Longer Employed at Appellant:**

Although Appellant has reported that the person who committed the WIC violations is no longer employed at Appellant this does not serve to mitigate the current charges under review as this is not a factor for consideration provided in the SNAP regulations.

#### **Not Participating in SNAP during WIC violations:**

Although the record shows that Appellant was serving a temporary six (6) month disqualification from SNAP for SNAP violations during the time that the WIC violations are documented to have occurred: August 27, 2016, November 1, 2016, and December 23, 2016; it is not reasonable to consider that Appellant was not an authorized SNAP retailer during that time.

The record indicates that Appellant was initially authorized as a SNAP retailer on August 26, 1998; and, with the exception of the temporary disqualification in discussion, has remained a SNAP authorized retailer from that date until now. That the WIC violations in consideration coincidentally occurred during the time that Appellant was serving a SNAP temporary disqualification does not mitigate the conditions necessary for the imposition of a SNAP disqualification as a reciprocal disqualification for WIC violations

## **CONCLUSION**

Based on the discussion above, the decision to deny the imposition of a hardship civil money penalty in lieu of a one (1) year SNAP disqualification against AB Convenience Store is sustained.

In accordance with the Food and Nutrition Act of 2008, and the pursuant regulations, the 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 one (1) 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**

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 provisions of the Freedom of Information Act (FOIA), FNS is releasing this information in a redacted format as appropriate. FNS will protect, to the extent provided by law, personal information that if released could constitute an unwarranted invasion of privacy.

NANCY BACA-STEPAN  
Administrative Review Officer

January 29, 2018