

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

All Asian Grocery and Halal Meat,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0219373

FINAL AGENCY DECISION

It is the decision of the USDA that there is sufficient evidence to support that the Retailer Operations Division properly imposed a reciprocal three-year disqualification of All Asian Grocery and Halal Meat as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP) as a result of violations in the Women, Infants and Children (WIC) Program. There is also sufficient evidence to support that the denial of a hardship civil money penalty (CMP) is appropriate and in accordance with the SNAP regulations at 7 CFR § 278.6(f)(1).

ISSUE

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with 7 CFR § 278.6(e)(8) and 7 CFR § 278.6(f)(1), when it disqualified the Appellant for a reciprocal three-year disqualification period and denied a hardship CMP in lieu of disqualification.

AUTHORITY

7 U.S.C. § 2023 and the 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 July 19, 2019, the New York Department of Health informed the Retailer Operations Division that the Appellant was disqualified from the WIC Program for a period of three-years effective June 25, 2019. The State agency informed FNS that the decision was final and not subject to further administrative appeal.

In a charge letter dated July 23, 2019, the Retailer Operations Division notified the Appellant that it was considering a three-year reciprocal disqualification from the SNAP under 7 CFR § 278.6(e)(8) as a result of the three-year WIC disqualification. The letter informed the Appellant that it “may present any information, explanation, or evidence indicating that: (1) your firm has not been disqualified from the WIC Program; (2) you were not informed of the possibility of Supplemental Nutrition Assistance Program disqualification in response to the WIC disqualification action; and (3) all opportunities for appeal of the WIC State agency action have not been exhausted or expired.” The charge letter was delivered to the Appellant on July 24, 2019.

The Appellant responded in a letter dated July 26, 2019. The Appellant stated that it was unable to provide certain documents to the WIC Program due to a damaged steam pipe at the store. The Appellant stated that it has been on WIC for 20 years and has had no SNAP violations. However, the Appellant did not present any contentions or evidence regarding the three factors cited in the Retailer Operations Division letter of July 23, 2019.

After considering the evidence in the case, the Retailer Operations Division informed the Appellant, in a letter dated August 13, 2019, that it was previously informed of a possible reciprocal SNAP disqualification as a result of the WIC disqualification action. In addition, all opportunities for a review of the WIC disqualification had been exhausted or had expired. Therefore, the three-year disqualification from the SNAP was final and not subject to administrative review as provided by 7 CFR § 278.6(e)(8)(iii). The determination letter also stated that the firm was not eligible for a hardship CMP under 7 CFR § 278.6(f)(1) as there are other authorized retail stores in the area selling as large a variety of staple foods at comparable prices. The determination letter noted that a SNAP administrative review was only available regarding the firm’s eligibility for a hardship CMP.

In a letter dated August 21, 2019, the Appellant requested an administrative review of the Retailer Operation Division’s decision. The appeal was granted and implementation of the three-year disqualification from the SNAP was 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 action should be reversed. That means an appellant has the burden of providing relevant evidence which a reasonable mind, considering the record as a whole, would accept as sufficient to support a conclusion that the matter asserted is more likely to be true than not true.

CONTROLLING LAW AND REGULATIONS

The controlling law in this matter is contained in the Food and Nutrition Act of 2008, as amended, 7 U.S.C. § 2021 and 278 of Title 7 of the Code of Federal Regulations (CFR). In particular, 7 CFR § 278.6 establishes the authority upon which FNS may disqualify any authorized retail food store from further participation in the SNAP if the firm fails to comply

with the Act including disqualification of a firm from the WIC Program as specified in 7 CFR § 278.6(e)(8).

7 CFR § 278.6(e)(8)(i) reads, in part:

FNS **shall** disqualify from the Supplemental Nutrition Assistance Program (SNAP) any firm which is disqualified from the WIC Program ... Based in whole or in part on any act which constitutes a violation of that program's regulation and which is shown to constitute a misdemeanor or felony violation of law, or for any of the following specific program violations (A) A pattern of claiming reimbursement for the sale of an amount of a specific food item which exceeds the store's documented inventory of that food item for a specified period of time [Emphasis added.]

7 CFR § 278.6(e)(8)(ii) states:

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; and
(C) A determination is made in accordance with paragraph (a) of this section that such action will not cause a hardship for participating SNAP households.

7 CFR § 278.6(e)(8)(iii) states, in part, that the SNAP disqualification:

(A) Shall be for the same length of time as the WIC disqualification;
(B) May begin at a later date than the WIC disqualification; and
(C) **Shall not** be subject to administrative or judicial review under SNAP. [Emphasis added.]

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....

APPELLANT'S CONTENTIONS

The Appellant made the following summarized contentions in its administrative review request:

- As stated during the WIC appeal, the documents requested by WIC were damaged due to a steam pipe leak at the store. The Appellant was unable to obtain copies of purchase receipts from its suppliers. The owner had explained this to the WIC State agency.
- The store will go out of business if disqualified from the SNAP. About 25 percent of the store business is from WIC customers and an additional 25 percent is from SNAP customers. It will be a major loss for the owner and store employees.
- The store should be considered for hardship CMP.

The preceding may represent only a brief summary of the 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.

ANALYSIS AND FINDINGS

Reciprocal Disqualification

The case record documents that All Asian Grocery and Halal Meat was (1) disqualified from the WIC Program; (2) was informed of the possibility of SNAP disqualification in response to the WIC disqualification action; and (3) all opportunities for appeal of the WIC State agency action have been exhausted or expired. The New York Department of Health stated in its Disqualification Notice dated June 5, 2019 that:

Pursuant to 7 CFR 278.6(e)(8), WIC disqualification may result in a Supplemental Nutrition Assistance Program (SNAP) reciprocal disqualification without the opportunity for a separate administrative or judicial review under the SNAP.

The New York Department of Health informed the Retailer Operations Division that the Appellant failed to appeal the three-year disqualification from WIC. Therefore, as stated in the Retailer Operations Division letter dated July 23, 2019, all opportunities for a review of the WIC disqualification have been exhausted or have expired.

7 CFR § 278.6(e)(8)(iii)(C) states that the SNAP reciprocal disqualification shall not be subject to administrative or judicial review. The determination letter dated August 13, 2019 properly noted that a SNAP administrative review was only available regarding the firm's eligibility for a hardship CMP. Therefore, the three-year reciprocal disqualification from the SNAP is final and not subject to administrative review.

Hardship to the Firm

The Appellant contends that a three-year disqualification from the SNAP will create a hardship for the store as it relies on the SNAP for a significant portion of its business. With regard to this contention, it is recognized that some degree of economic hardship is a likely consequence whenever a store is disqualified from participation in the SNAP. However, there is no provision in the SNAP regulations for a waiver or reduction of an administrative penalty assessment on the basis of possible economic hardship to either the owner(s) or employees personally or the firm resulting from the imposition of such penalty. To allow stores to be excused from assessed administrative penalties based on a purported economic hardship would render virtually meaningless the enforcement provisions of the Food and Nutrition Act of 2008 and the enforcement efforts of the USDA.

Hardship Civil Money Penalty

The Appellant requests a hardship CMP in lieu of a three-year disqualification. A review of the case record documents that the Retailer Operations Division considered the Appellant's eligibility for a hardship CMP under 7 CFR § 278.6(f)(1). That regulation 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." [Emphasis added.]

The Retailer Operations Division properly determined that a three-year disqualification of All Asian Grocery and Halal Meat, a small grocery store offering halal meat, would not cause a hardship to SNAP households, as opposed to a mere inconvenience. Agency mapping systems show that there are six (6) comparable or larger SNAP authorized stores offering halal foods within a one-mile radius of All Asian Grocery and Halal Meat. Therefore, the Retailer Operations Division decision not to assess a hardship CMP in lieu of a three-year disqualification is **sustained** as appropriate under 7 CFR § 278.6(f)(1).

CONCLUSION

Based on the analysis above, the decision to deny a hardship CMP in lieu of a three-year reciprocal SNAP disqualification against All Asian Grocery and Halal Meat is sustained. In accordance with the Food and Nutrition Act of 2008, and the SNAP regulations, the three-year period of disqualification from the SNAP shall become effective thirty (30) days after receipt of this letter. A new application for SNAP may be submitted by the firm ten (10) days prior to the expiration of this three-year SNAP disqualification period.

RIGHTS AND REMEDIES

Section 14 of the Food and Nutrition Act of 2008 (7 U.S.C. § 2023) and Title 7, Code of Federal Regulations, Part 279.7 (7 CFR § 279.7) addresses 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

RONALD C. GWINN
Administrative Review Officer

November 5, 2019