

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

Bayshore Market,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0216388

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 assess a civil money penalty against Bayshore Market (“Appellant”) in the amount of \$19,980 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 assessed a civil money penalty in the amount of \$19,980 in lieu of a three-year disqualification against Appellant on April 18, 2019.

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 April 4, 2019, the Retailer Operations Division informed Appellant of the agency’s intention to assess three-year disqualification against Appellant. The firm was disqualified for three years from the WIC Program for violations that included, pursuant to 7 CFR § 278.6(e)(8)(i)(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.”

Appellant replied to the Retailer Operations Division's charges in writing. Appellant stated that disqualification would pose a hardship to SNAP participants who relied on the store. The record reflects that the Retailer Operations Division received and considered the information provided prior to making a determination.

After considering the evidence, the Retailer Operations Division informed Appellant by letter dated April 18, 2019, that it determined that a three-year period of disqualification from participating as an authorized retail food store in SNAP as a result of WIC program violations was warranted. This determination letter also stated that an assessment of a hardship civil money penalty (CMP) was appropriate. Therefore, a civil money penalty in the amount of \$19,980, in lieu of a three-year disqualification, was offered as an option to the Appellant. 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 April 22, 2019, Appellant, appealed the Retailer Operations Division's decision 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 amount of the CMP is very large.
- The CMP would pose a hardship to Appellant.

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

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 contended that the CMP is too high. The calculation of the amount of a CMP is based on regulations that delineate the exact formula to be used when calculating a CMP. These regulations at 7 CFR § 278.6(g) state, in relevant part:

FNS shall determine the amount of the civil money penalty as follows:

- (1) Determine the firm's average monthly redemptions of coupons for the 12-month period ending with the month immediately preceding that month during which the firm was charged with violations.
- (2) Multiply the average monthly redemption figure by 10 percent.
- (3) Multiply the product arrived at in paragraph (g)(2) by the number of months for which the firm would have been disqualified under paragraph (e) of this section. The civil money penalty may not exceed an amount specified in §3.91(b)(3)(i) of this title for each violation.

5 U.S.C. § 552 (b)(6) & (b)(7)(C)

As stated above, the formula for the calculating the CMP is specific per 7 CFR § 278.6(g) and does not allow for any reductions. However, the regulations do provide the option of an installment plan for paying the CMP over the period of disqualification. The regulations at 7 CFR § 278.6(h), state the following:

A firm has 15 days from the date the FNS regional office notifies the firm in writing in which to pay the civil money penalty or to notify the regional office in writing of its intent to pay in installments as specified by the regional officeThe civil money

penalty must be paid in full by the end of the period for which the firm would have been disqualified.

Appellant can contact Financial Management at 703-305-2830 to discuss payment of this penalty in installment payments or online in one lump sum.

No Undue Hardship to Appellant

Appellant maintains that disqualification would pose an extreme hardship to the firm. Economic hardship is a likely consequence whenever a store is assessed a civil money penalty in the amount levied in this case. However, there is no provision in the SNAP regulations for reducing an administrative penalty on the basis of possible economic hardship to the firm resulting from such a penalty. To excuse Appellant from an assessed administrative penalty based on purported economic hardship would render the enforcement provisions of the Food and Nutrition Act of 2008 and the enforcement efforts of the USDA virtually meaningless.

Moreover, giving special consideration to the firm for economic hardship would forsake fairness and equity to competing stores and other participating retailers who are complying fully with program regulations, and also to those retailers who have been assessed civil money penalties in the past for similar violations. Therefore, Appellant's contention that it will incur economic hardship due to an administrative penalty does not provide any valid basis for dismissing the charges or for mitigating the imposed penalty.

CONCLUSION

Based on the discussion above, the determination by the Retailer Operations Division to assess a civil money penalty against Bayshore Market of \$19,980 in lieu of a three-year disqualification from participating as a retailer in SNAP as a result of WIC program violations is sustained.

In accordance with the Food and Nutrition Act, and the regulations thereunder, this penalty shall become effective thirty (30) days after receipt of this letter. To pay the civil money penalty, Appellant should refer to the information provided in the determination letter dated April 18, 2019. Should Appellant choose to accept disqualification rather than pay the civil money penalty, a new application for participation in the SNAP may be submitted ten (10) days prior to the expiration of the three-year period of disqualification. 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 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

June 10, 2019