

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

Beehive Market,

Appellant,

V.

Retailer Operations Division,

Respondent.

Case Number: C0217411

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 three (3) year disqualification from Supplemental Nutrition Assistance Program (SNAP) as a result of Women, Infants and Children (WIC) Program violations, was properly rendered by the Retailer Operations Division against Beehive Market (hereinafter 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 the Supplemental Nutrition Assistance Program (SNAP) when it denied assessing a civil money penalty in lieu of a three (3) year disqualification against Appellant on June 17, 2019.

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

FNS was advised by the California WIC State Agency, via correspondence dated April 29, 2019, that Appellant was being disqualified from the WIC Program for three (3) years identified as the period January 17, 2019 through January 16, 2022, and that Appellant’s appeal was denied. The correspondence was appended with the Ohio Department of Health letter dated December 17, 2018, addressed to Appellant and that included information on violations committed against the terms and conditions contained in the Vendor Agreement. Those violations included ones

pursuant to 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 the current shelf price;” and, 278.6(e)(8)(i)(F) “A pattern of charging for food items not received by the WIC customer or for foods provided in excess of those listed on the food instrument.”

In a letter dated May 20, 2019, the Retailer Operations Division informed ownership of the agency’s intention to disqualify Appellant from participation in the SNAP for a period of three (3) years as a reciprocal administrative action on the basis of the store’s disqualification from the WIC Program. The Charge letter stated in relevant part:

“SNAP regulations Section 278.6(b) explain your right to reply to the charges, and Sections 278.6(c) through (m) describes the procedures we will follow in making a decision in this case. You 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.”

In correspondence dated May 25, 2018, Appellant replied to the charge letter and generally stated that Beehive Market is located in a labor town and as a result most of its customers are on EBT. It is a residential area where it gets a lot of foot traffic because people do not have cars and it would be troublesome for them to go far to another store. We also offer fresh meat and have a number of customers buying meat packages to last them through the month. Appellant indicated that disqualification would cause a dramatic decrease in sales causing a financial hardship. Appellant stated that it understood that the original violations took place under the WIC regulation and after having WIC for a number of years they were disqualified for overcharging a gallon of milk. WIC offers no incentives to the retailers and we have to constantly train our employees on ever-changing requirements and mistakes are made. We would kindly request that you not cancel our FNS as we have a great need for it. This will make a huge negative impact on both our customers as well as our business.

In correspondence dated June 17, 2019, Retailer Operations Division notified Appellant that it was disqualified from the SNAP. The Determination letter stated in relevant part:

“Your firm has been disqualified from the Special Supplemental Nutrition Program for Women, Infants, and Children (WIC). You were informed of a possible reciprocal Supplemental Nutrition Assistance Program (SNAP) disqualification as a result of the WIC disqualification action. All opportunities for appeal of the WIC State agency action have been exhausted or have expired. Therefore, in accordance with Section 278.6(e)(8)(iii) of the SNAP regulations, your firm shall be disqualified from the Supplemental Nutrition Assistance Program for a period of 3 years. This determination is final and is not subject to administrative 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, would 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, 7 U.S.C. § 2023 and Section 278 of Title 7 of the Code of Federal Regulations (CFR).

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 specific 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 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.”

7 CFR § 278.6(f)(1) states, 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.”

7 CFR § 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 § 278.1(b)(4)(D) states, in part, “The collateral bond of irrevocable letter of credit must have a face value of \$1,000 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 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 postmarked June 27, 2019, and in subsequent correspondence dated August 1, 2019, Appellant made the following summarized contentions in response to the Retailer Operations Division's determination that Appellant was not eligible for a CMP in lieu of disqualification, in relevant part:

1. Our appeal is in consideration of the financial hardship Beehive Market will suffer as a result of SNAP disqualification.
2. Beehive invested in building a fresh hot food and fresh produce section to accommodate families under such welfare programs. Beehive Market also enrolled in the Cal Fresh Program administered by California Department of Public Health.

Appellant provided a copy of its grocery sales report, renovation and remodel construction invoices, a campaign for change report, and five color photographs of the inside and outside of the store. The preceding may represent only a brief 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.

ANALYSIS AND FINDINGS

The record shows that Appellant was informed in the FNS letter of charges dated May 20, 2019, as well as in the FNS letter of determination dated June 17, 2019, that the determination to disqualify Appellant 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 California 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 immediate appeal is focused strictly* on the firm's eligibility for a hardship civil money penalty.

It is important to clarify that Appellant was duly notified that the WIC Program disqualification may result in a reciprocal SNAP authorization disqualification in the notice from the California WIC State Agency dated December 17, 2018. Page 3, second paragraph, of the WIC disqualification notice dated December 17, 2018, states "You are further advised that as stated in Title 7, CFR, Section 246.18(b)(1), this disqualification from WIC may result in disqualification as a retailer in the Supplemental Nutrition Assistance Program (SNAP) in accordance with Title 7, CFT, Section 278.6(e) of the SNAP regulations. Such disqualification shall not be subject to administrative or judicial review under the SNAP."

CIVIL MONEY PENALTY

Appellant contends that a three year disqualification of SNAP will result in an extreme hardship to the community and Beehive invested in building a fresh hot food and fresh produce section to accommodate families under such welfare programs. With regard to Appellant's contentions,

and as previously detailed above, the determination to disqualify Appellant 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 California 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).

Moreover, 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.” The imposition of a CMP 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 regulations do not refer to the availability of WIC vendors but rather to the availability of SNAP authorized retailers. The SNAP regulations do not define hardship as inconvenience, but specifically defines it as a condition that results 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, the Retailer Operations Division has noted Appellant as a small grocery store, as defined in accordance with SNAP regulations, and is located in an area where four alternative SNAP authorized firms are located within a one (1) mile radius. The alternative SNAP authorized firms include one medium grocery store, two supermarket and one additional small grocery store; and that the alternative SNAP authorized firms are identified as selling as large a variety or staple food items at prices comparable to those of Appellant. Therefore, by definition, there is no hardship that will result as there is no lack of comparable stores in the area.

CONCLUSION

Based on the discussion herein, the decision to deny the imposition of a hardship CMP in lieu of a three (3) year SNAP disqualification against Beehive Market Foods is sustained.

In accordance with the Food and Nutrition Act of 2008, as amended, and the SNAP regulations, the period of disqualification shall become affective 30 days after receipt of this letter. A new application for participation may be submitted by the firm 10 days prior to the expiration of this three (3) 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 once more being authorized to participate in the program.

RIGHTS AND REMEDIES

Your attention is called to Section 14 of the Food and Nutrition Act of 2008, as amended, (7 U.S.C. § 2023) and to Title 7, Code of Federal Regulations, Part 279.7 (7 CFR § 279.7) with

respect to 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 (FOIA), 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.

Monique Brooks
ADMINISTRATIVE REVIEW OFFICER

December 12, 2019