

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

BP Norristown,

Appellant,

v.

Case Number: C0198721

Retailer Operations Division,

Respondent.

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 the Supplemental Nutrition Assistance Program (SNAP) as a result of WIC Program violations, was properly rendered by the Retailer Operations Division against BP Norristown.

ISSUE

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with 7 CFR § 278.6(f)(1) in its administration of the SNAP, when it denied assessing a civil money penalty in lieu of a three year disqualification against BP Norristown on April 27, 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

In a letter dated April 4, 2017, the Retailer Operations Division informed the Appellants of the Agency’s intention to impose a three year disqualification against the Appellants from participating as an authorized retailer in the 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.”

FNS was advised by the Pennsylvania WIC State Agency, via e:mail correspondence dated March 21, 2017, that the Appellants were being disqualified from the WIC Program for three years effective March 6, 2017 and that all of the Appellants’ appeal rights had been exhausted. The WIC State Agency also provided FNS with a copy of a certified letter dated February 3, 2017 that they had sent to the Appellants advising them that BP Norristown could be disqualified from the SNAP based on the WIC Program violations that occurred at the firm. The letter also informed the Appellants of their appeal rights regarding the WIC Program disqualification.

In a letter to the Retailer Operations Division dated April 12, 2017, the Appellants replied to the charges outlined in the April 4, 2017 Charge Letter indicating that they never received a letter from the Pennsylvania WIC State Agency informing them that they had been disqualified from the WIC Program for three years effective March 6, 2017. The Appellants also indicated that a three year SNAP disqualification of BP Norristown would impose a hardship on SNAP recipients as it is the only retail food store in the area that is open 24 hours per day, 7 days per week.

After considering the Appellants’ reply and the evidence in the case, the Retailer Operations Division informed the Appellants by letter dated April 27, 2017, that BP Norristown was not eligible for imposition of a hardship civil money penalty in lieu of disqualification and would be disqualified from participation as a retail store in the SNAP for a period of three years. The Appellants were also informed that the determination to disqualify BP Norristown from the 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. The April 27, 2017 Determination Letter stated in relevant part:

“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.”

On May 10, 2017, the Appellants, through counsel, appealed the Retailer Operations Division’s decision to deny assessing a civil money penalty and requested an administrative review of this action. FNS granted the Appellants’ request for administrative review by letter dated May 17, 2017 and implementation of the sanction has been on hold pending completion of this review.

After receiving FNS’ May 17, 2017 letter granting the Appellants’ request for administrative review, the Appellants’ counsel requested information and documents from FNS, via an e:mail

message dated June 12, 2017, with regard to the Agency's case against BP Norristown pursuant to the Freedom of Information Act (FOIA). The record indicates that the Retailer Operations Division provided a response to counsel's FOIA request, dated July 12, 2017, and received no further communication from the Appellants or counsel.

STANDARD OF REVIEW

In appeals of adverse actions, the Appellant bears the burden of proving by a preponderance of the evidence, that the administrative actions should be reversed. That means the 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, 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.”

APPELLANTS’ CONTENTIONS

The following represents a brief summary of the Appellants’ contentions in this matter. Please be assured, however, that in reaching a decision, full attention and consideration was given to all contentions presented, including any not specifically recapitulated or specifically referenced herein.

In the Appellants’ written reply to the Charge Letter, in the review request postmarked May 10, 2017, and in a subsequent e:mail message to the Administrative Review Officer dated August 2, 2017, the Appellants, through counsel, stated the following summarized contentions, in relevant part:

- The Appellants never received a letter from the Pennsylvania WIC State Agency informing them that they had been disqualified from the WIC Program for three years effective March 6, 2017. When the Appellants received the April 4, 2017 Charge Letter from FNS, they contacted the WIC State Agency and were informed that the Agency had conducted compliance buys at BP Norristown in June 2016 and September 2016 where two or more incidences of over-charges occurred. The WIC Program violations were unintentional and due to the lack of knowledge of the WIC Program regulations.
- A SNAP disqualification will impose a financial hardship on BP Norristown as the retention of the ability to accept SNAP benefits is essential to the continuation of the firm.
- BP Norristown is located at the main intersection of a highway and it is located in the middle of the neighborhood as well as being open 24 hours per day, 7 days per week.
- Many of the store’s customers and SNAP participants rely on BP Norristown’s operating hours for their supplemental and after hours food needs.
- Based upon USDA’s most recent numbers, Pennsylvania’s 6th Congressional District, where BP Norristown is located, approximately 15,084 of the local households receive SNAP benefits. Roughly 19.9% of the local population is considered impoverished and a little less than half of the impoverished population is over the age of 60 or under the age of 18.

- None of the other SNAP retail stores located within at least a half mile of BP Norristown are open 24 hours per day. Therefore, suspending BP Norristown from the SNAP for three years will impose a significant hardship on the local SNAP households that do not conform to normal, daytime and weekend grocery shopping habits. With no retail stores open in the middle of the night for the surrounding area, the availability of groceries to these SNAP participants does not exist.
- As noted in *Collazo v. U.S.*, 668 F.2d 60 (FD Puerto Rico 1981), USDA’s considerations for purposes of evaluating a hardship CMP include (1) the availability of staple foods in other local stores and (2) at comparable prices. Per *Collazo v. U.S.*, BP Norristown should qualify for a hardship civil money penalty (CMP) in lieu of a three year SNAP disqualification as the availability of staple foods in other local stores does not exist in the middle of the night.
- Therefore, the Appellants are requesting that FNS impose a hardship CMP in lieu of a three year SNAP disqualification of BP Norristown as the disqualification will impose a hardship on the many area SNAP customers who rely on the store’s operating hours for their supplemental and after hours food needs.

In support of the Appellants’ contentions, the following documents were submitted to FNS:

- A copy of USDA FNS’ “Profile of SNAP Households” Pennsylvania Congressional District 6, dated January 2017;
- Four pages from American Fact Finder (U.S. Census Bureau) entitled “Poverty Status in the Past 12 Months---2011-2015 American Community Survey 5-Year Estimates”; and
- A page from the United States Census Bureau—Community Facts stating that in the zip code 19401, individuals below poverty level is 19.9%.

ANALYSIS AND FINDINGS

In accordance with 7 CFR § 278.6(e)(8)(ii)(A) and (B), the Appellants were provided with specific notice that they could be disqualified from the SNAP based on the WIC violations committed by the firm. This notice was given to the firm by the Pennsylvania Department of Health, Bureau of Women, Infants and Children (WIC) in a certified letter dated February 3, 2017. A copy of that notice was provided to FNS by the Pennsylvania Department of Health on March 21, 2017.

Additionally, in accordance with 7 CFR § 278.6(e)(8)(iii), the Appellants were informed by both the Pennsylvania WIC State Agency and the FNS Retailer Operations Division that the decision to reciprocally disqualify BP Norristown from the SNAP on the basis of the WIC disqualification would not be subject to administrative or judicial review. Further, the regulations state that the SNAP disqualification shall be for the same length of time as the WIC disqualification and may begin at a later date than the WIC disqualification.

Consequently, this administrative review has no authority to render an opinion regarding the WIC violations that were uncovered by the state of Pennsylvania. According to the state’s records, the Appellant firm engaged in a pattern of charging WIC customers more for food than

non-WIC customers or charging WIC customers more than the current shelf price. Pursuant to the state's administrative regulations, such a violation warrants a three year WIC disqualification. The record also shows that BP Norristown did not appeal this decision; therefore, the disqualification was upheld.

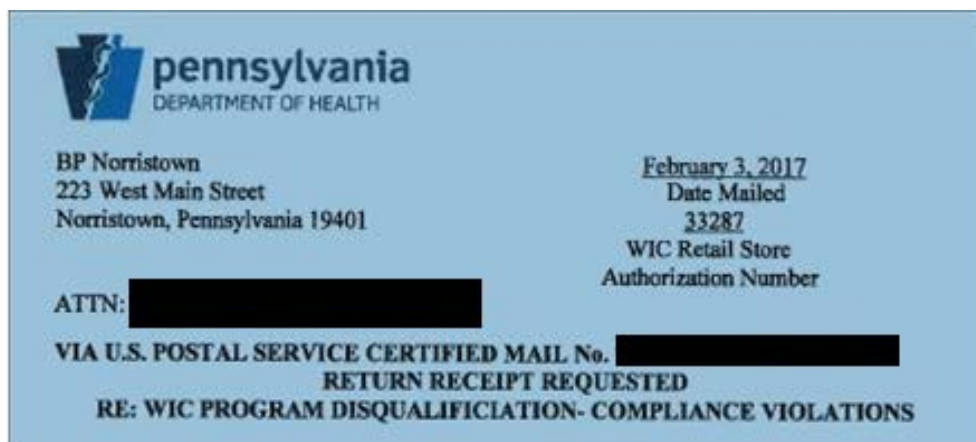
With all of these facts clearly in place and because the Retailer Operations Division's decision to reciprocally disqualify the firm from the SNAP is wholly in line with Federal regulations, this administrative review has no authority to further review such a determination. This is pursuant to 7 CFR § 278.6(e)(8)(iii)(C).

Therefore, the only remaining issue for this administrative review to consider is whether or not the Retailer Operations Division took appropriate action by determining that the Appellants were not eligible for a hardship civil money penalty in lieu of a three year disqualification from the SNAP.

WIC Program Violations Unintentional

The Appellants contend that they never received a letter from the Pennsylvania WIC State Agency informing them that they had been disqualified from the WIC Program for three years effective March 6, 2017. When the Appellants received the April 4, 2017 Charge Letter from FNS, they contacted the WIC State Agency and were informed that the Agency had conducted compliance buys at BP Norristown in June 2016 and September 2016 where two or more incidences of over-charges occurred. The WIC Program violations were unintentional and due to the lack of knowledge of the WIC Program regulations.

With regard to the Appellants' contention that they never received a letter from the Pennsylvania WIC State Agency informing them that they had been disqualified from the WIC Program for three years effective March 6, 2017, a copy of the February 3, 2017 certified letter from the Pennsylvania WIC State Agency to the Appellants was provided to the Retailer Operations Division via an e:mail message from the WIC State Agency on March 21, 2017. On the top of the February 3, 2017 certified letter, the WIC State Agency included the following information: **"VIA U.S. POSTAL SERVICE CERTIFIED MAIL No. 7015 0640 0007 0461 3769 RETURN RECEIPT REQUESTED RE: WIC PROGRAM DISQUALIFICATION-COMPLIANCE VIOLATIONS"**. A copy of that excerpt from the February 3, 2017 letter is included below:



Therefore, the Appellants' claim that they never received a letter from the Pennsylvania WIC State Agency informing them that they had been disqualified from the WIC Program for three years effective March 6, 2017 is unfounded.

With regard to the Appellants' contention that the WIC Program violations were unintentional and due to the lack of knowledge of the WIC Program regulations, this administrative review has no authority to render an opinion regarding the WIC violations that were uncovered by the state of Pennsylvania. Pursuant to the state's administrative regulations, such a violation warrants a three year WIC disqualification. The record also shows that BP Norristown did not appeal this decision; therefore, the disqualification was appropriately upheld.

With all of these facts clearly in place and because the Retailer Operations Division's decision to reciprocally disqualify the firm from the SNAP is wholly in line with Federal regulations, this administrative review has no authority to further review such a determination. This is pursuant to 7 CFR § 278.6(e)(8)(iii)(C).

Therefore, the only remaining issue for this administrative review to consider is whether or not the Retailer Operations Division took appropriate action by determining that the Appellants were not eligible for a hardship civil money penalty in lieu of a three year disqualification from the SNAP.

Imposed Financial Hardship

The Appellants contend that a SNAP disqualification will impose a financial hardship on BP Norristown as the retention of the ability to accept SNAP benefits is essential to the continuation of the firm. However, there is no provision in the SNAP regulations or internal agency policy directives for waiver or reduction of an administrative penalty assessment on the basis of possible economic hardship to the firm resulting from imposition of such penalty. To allow store ownership from being excused from assessed administrative penalties based on purported economic hardship to the firm would render virtually meaningless the enforcement provisions of the Food and Nutrition Act of 2008 and the enforcement efforts of the USDA.

Moreover, giving special consideration to economic hardship to the firm would forsake fairness and equity, not only to competing stores and other participating retailers who are complying fully with program regulations, but also to those retailers who have been disqualified from the program in the past for similar violations. Therefore, the Appellants' contention that the firm may incur financial hardship based on the assessment of an administrative penalty does not provide any valid basis for dismissing the charges or for mitigating the penalty imposed.

Hardship Civil Money Penalty

The Appellants have presented a number of arguments related to their position that suspending BP Norristown from the SNAP for three years will impose a significant hardship on the local SNAP households that do not conform to normal, daytime and weekend grocery shopping habits as none of the other SNAP retail stores located within at least a half mile of BP Norristown are open 24 hours per day. (See pages 4-5 of this document for the full list of contentions regarding this point.)

With regard to these contentions, a review of the Agency's case record shows that the Retailer Operations Division properly considered whether or not SNAP recipients would experience hardship as a result of the firm's disqualification. Under the provisions found in 7 CFR § 278.6(f)(1), FNS may impose a civil money penalty in lieu of disqualification when hardship to SNAP households exists. However, according to this regulation, hardship is defined as "no other authorized retail food store in the area selling as large a variety of staple food items at comparable prices." [Emphasis added.]

It is the determination of this review that a disqualification of BP Norristown, a convenience store, would not cause hardship to SNAP households because there are other comparable or larger SNAP authorized stores located in the area of the Appellant firm. Agency mapping systems document that there are currently 28 similar or larger SNAP authorized retail stores located within a one mile radius of BP Norristown, including one super store, one large grocery store, one medium grocery store, 12 small grocery stores, and 13 convenience stores. These stores offer a variety and quality of staple foods comparable to, or better than, those offered by BP Norristown. BP Norristown does not carry any unique items or foods that cannot be found at these other area SNAP authorized retail stores.

The Appellants have argued that BP Norristown is open 24 hours per day, 7 days per week; however, none of the other SNAP retail stores located within at least a half mile of the subject store are open 24 hours per day. Therefore, a SNAP disqualification of BP Norristown will impose a significant hardship on the local SNAP households that do not conform to normal, daytime and weekend grocery shopping habits.

As is indicated above, 7 CFR § 278.6(f)(1) states that FNS may impose a civil money penalty in lieu of disqualification when hardship to SNAP households exists. However, according to this regulation, hardship is defined as "no other authorized retail food store in the area selling as large a variety of staple food items at comparable prices." [Emphasis added.] However, that regulation does not mandate that the required "other authorized retail food store in the area" must

have the same business operating hours as the SNAP authorized firm seeking a CMP as a sanction in lieu of a term disqualification. Therefore, the business operating hours of an authorized retail store is not germane to whether the firm qualifies for a hardship CMP in lieu of a SNAP disqualification.

It is also important to note that of the 28 authorized SNAP stores (discussed above) that are located within a one mile radius of BP Norristown, a review of FNS' records indicates that five of the stores are open 24 hours per day, 7 days per week. All of these stores are actively conducting SNAP transactions during their 24 hour per day business hours. Additionally, three of these five authorized stores are located within 0.5 miles of BP Norristown and include a convenience store, a small grocery store, and a large grocery store. Therefore, the Appellants' contention that there are no other authorized SNAP stores located within at least a half mile of BP Norristown is unfounded.

It is recognized that some degree of inconvenience for SNAP households is likely whenever a SNAP authorized store is disqualified and the household is forced to use its SNAP benefits elsewhere. However, in accordance with the regulations cited above, hardship exists only when there are no other authorized stores in the area selling as large a variety of staple foods at comparable prices. Therefore, the earlier determination that BP Norristown's disqualification would not create a hardship to customers, as differentiated from potential inconvenience, is sustained and a CMP in lieu of SNAP disqualification is not appropriate in this case.

Case Law

The Appellants also cited *Collazo v. U.S.*, 668 F.2d 60 (FD Puerto Rico 1981) with regard to USDA's required considerations for purposes of evaluating a hardship CMP. With regard to the case law cited by the Appellants, considerations of relevant legal precedent through case laws, or the lack thereof in relation to the present case, are beyond the scope of this review. This review relies upon the statute and regulations governing the SNAP and evaluates whether the decision of the Retailer Operations Division to impose a disqualification upon the Appellants was in accordance with same and sustainable by a preponderance of the evidence. The Appellants' case law reference is acknowledged in this context only.

CONCLUSION

Based on the discussion above, the determination by the Retailer Operations Division to deny BP Norristown a hardship civil money penalty in lieu of a three year disqualification from the 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, 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

Your attention is called to Section 14 of the Food and Nutrition Act of 2008 (7 U.S.C. 2023) and to Section 279.7 of the Regulations (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, 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.

LORIE L. CONNEEN
Administrative Review Officer

March 1, 2018