

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

Brown Deer Mobil,

Appellant,

v.

Case Number: C0218953

Retailer Operations Division,

Respondent.

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 six-year disqualification of Brown Deer Mobil 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)(iii) and 7 CFR § 278.6(f)(1), when it disqualified the Appellant for a reciprocal six-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

During a routine reauthorization process, the Retailer Operations Division discovered that the Appellant firm was disqualified for a period of six (6) years from the WIC Program by the Wisconsin Department of Health Services in 2015. The State agency provided the Retailer Operations Division with a letter dated March 12, 2015 that Brown Deer Mobil had been disqualified from the WIC Program for six (6) years. The WIC violations consisted of the Appellant providing tobacco products and unauthorized food in exchange for a WIC draft,

charging for food not received, and buying formula from an unauthorized source. The case record documents that the Appellant firm appealed and a settlement was reached in which the six (6) year disqualification remained in place although the State agency reduced the forfeiture and enforcement assessment. The State agency informed FNS that the decision was final and not subject to further administrative appeal.

In a charge letter dated July 3, 2019, the Retailer Operations Division notified the Appellant that it was considering a six-year reciprocal disqualification from the SNAP under 7 CFR § 278.6(e)(8) as a result of the six-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 5, 2019.

The Appellant, through counsel, responded in a letter dated July 15, 2019. The Appellant stated that, without the knowledge of the owner, the WIC violations were committed by an employee who was subsequently fired. Among other contentions, the Appellant requested that the six-year SNAP disqualification be mitigated due to the settlement with the WIC State agency as the store immediately repaid the money, fines and assessments.

After considering the evidence in the case, the Retailer Operations Division informed the Appellant, in a letter dated July 23, 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 six-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 July 25, 2019, the Appellant, through counsel, requested an administrative review of the Retailer Operation Division’s decision. The appeal was granted and implementation of the six-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)(F) 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 (C) A pattern of receiving, transacting and /or redeeming WIC food instruments outside of authorized channels; (D) A pattern of exchanging non-food items for a WIC food instrument ... (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. [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:

- The store owner is 60 years old and his only source of income is proceeds from the store. He has owned the store for six years, is active in the community and does not have a criminal background.
- The store is open 24 hours a day, seven (7) days a week. The owner has two other employees to whom he has stressed the importance of accuracy and honesty when doing their job.
- The WIC violations were committed without the owner's knowledge by an employee who was immediately fired when the owner was made aware of the violations.
- The Appellant resolved the WIC disqualification, forfeiture and enforcement with the State of Wisconsin and immediately repaid the money, fines and assessments.
- The Appellant requests that the six-year disqualification be mitigated or that the store be assessed a hardship CMP in lieu of the six-year disqualification.

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 Brown Deer Mobil 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 Wisconsin Department of Health Services stated in its Summary Suspension Notice dated March 12, 2015 that:

Disqualification from WIC may result in disqualification as a retailer in the Supplemental Nutrition Assistance Program (SNAP), formerly known as the Food Stamp Program. Such disqualification is not subject to administrative or judicial review under SNAP. See 7 CFR § 246.18(b)(1).

The case record documents that the Appellant reached a settlement with the State agency in which the six-year disqualification from WIC and reimbursement payment remained in place in exchange for a reduction in the forfeiture and enforcement assessment. The State of Wisconsin Division of Hearings and Appeals entered an Order for Dismissal dated November 11, 2015 which stated that this was a final administrative decision. 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 properly noted that a SNAP administrative review was only available regarding the firm's eligibility for a hardship CMP. Therefore, the six-year reciprocal disqualification from the SNAP is final and not subject to administrative review.

Hardship Civil Money Penalty

The Appellant requests a hardship CMP in lieu of a six-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 six-year disqualification of Brown Deer Mobil, a convenience store, would not cause a hardship to SNAP households, as opposed to a mere inconvenience. Agency mapping systems show that there are eight (8) SNAP authorized stores within a one-mile radius of the Appellant store. These SNAP authorized stores include two (2) combination grocery stores that likely carry a greater depth and breadth of stock at likely comparable or better prices than a convenience store like Brown Deer Mobil. In addition, Brown Deer Mobil does not carry any international or specialty food items that cannot be obtained at these other nearby stores. Therefore, the Retailer Operations Division decision not to assess a hardship CMP in lieu of a six-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 six-year reciprocal SNAP disqualification against Brown Deer Mobil is sustained. In accordance with the Food and Nutrition Act of 2008, and the SNAP regulations, the six-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 days prior to the expiration of this six-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

October 16, 2019