

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

**Clarke Food,**

**Appellant,**

**v.**

**Case Number: C0204654**

**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 six (6) 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 Clarke Food (Appellant).

**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 hardship civil money penalty in lieu of a six year disqualification against Clarke Food on July 12, 2019.

**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 June 26, 2019, the Retailer Operations Division informed the Appellant of the agency’s intention to impose a six year disqualification against the Appellant firm from participating as an authorized retailer in the SNAP. The firm was disqualified for six years from the WIC Program for violations that included, pursuant to 7 CFR § 278.6(e)(8)(i)(A) of the SNAP regulations: (1) A pattern of claiming reimbursement for the sale of an amount of a specific food item that exceeds the store’s documented inventory of that food item for a specific period; (2) Exchanging cash, credit, or consideration other than eligible food; or exchange of

firearms, ammunition/explosives/controlled substances for WIC food instruments; (3) A pattern of exchanging non-food items for a WIC food instrument; and (4) 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.

FNS was advised by the State of Wisconsin Department of Health Services (Wisconsin WIC State Agency) that the Appellant was being disqualified from the WIC Program for six years effective September 19, 2017 and that the Appellant's appeal rights had been exhausted. The Wisconsin WIC State Agency provided FNS with a copy of a letter dated September 19, 2017 that it had sent to the Appellant advising it that Clarke Food could be disqualified from the SNAP based on the WIC Program violations that occurred at the firm. The letter also informed the Appellant of its appeal rights regarding the WIC Program disqualification. The Wisconsin WIC State Agency informed FNS on December 5, 2017 that Clarke Food had exhausted all of its appeal rights with regard to the six year WIC disqualification.

In a response to the Retailer Operations Division of July 3, 2019, the Appellant replied to the charges outlined in the June 26, 2019 Charge Letter stating that a former employee is responsible for the WIC violations. The Appellant has made up for the WIC violations in the fees it has paid and by letting the responsible employee go. SNAP sales are a big part of the store's revenues and the business depends upon it. A SNAP disqualification will force the owner to close the store. Since being informed of the WIC violations, the owner has been working 14 hour days to ensure that everything is kept in order and the store is running correctly.

After considering the Appellant's reply and the evidence in the case, the Retailer Operations Division informed the Appellant, by letter dated July 12, 2019, that Clarke Food 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 six years. The Appellant was also informed that the determination to disqualify Clarke Food 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.

In a letter postmarked July 22, 2019, the Appellant 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 Appellant's request for administrative review by letter dated August 7, 2019 and implementation of the sanction has been on hold pending completion of this review.

## **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)(i)(A) states, in part, FNS shall disqualify from the SNAP any firm which is disqualified from the WIC Program ...for any of the following specific program violations: A pattern of claiming reimbursement for the sale of an amount of a specific food item that exceeds the store’s documented inventory of that food item for a specific period of time ...

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 or 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

The following represents a brief summary of the Appellant's 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 reply to the Charge Letter and in the administrative review request, the Appellant stated the following summarized contentions, in relevant part:

- The Appellant apologizes for the actions of the business and a previous store employee.
- The Appellant acknowledges the WIC Program violations but believes it has made up for them in the 5 U.S.C. § 552 (b)(6) & (b)(7)(C) fees paid in full and by letting the responsible employee go. The employee tried to ruin the owner's livelihood. The Appellant re-signed its lease thinking that the storm had passed and the business could grow and move forward.
- SNAP sales are a big part of the store's sales and the owner depends upon it to keep the doors open and to support his family. A SNAP disqualification will force the owner to close the store.
- Since being informed of the WIC violations, the owner has been working 14 hour days to ensure that everything is kept in order and the store is running correctly. The Appellant also let the responsible employee go.

## ANALYSIS AND FINDINGS

### WIC Violations

The Appellant contends that it apologizes for the actions of the business and a previous store employee. The Appellant acknowledges the WIC Program violations but believes it has made up for them in the 5 U.S.C. § 552 (b)(6) & (b)(7)(C) fees paid in full and by letting the responsible employee go. The employee tried to ruin the owner's livelihood. The Appellant re-signed its lease thinking that the storm had passed and the business could grow and move forward.

In accordance with 7 CFR § 278.6(e)(8)(ii)(A) and (B), the Appellant was provided with specific notice that Clarke Food could be disqualified from the SNAP based on the WIC violations committed by the firm. This notice was given to the firm by the Wisconsin WIC State Agency in a letter dated September 19, 2017. A copy of that notice was provided to FNS by the State of Wisconsin Department of Health Services in addition to a correspondence dated December 5, 2017 stating that the Appellant's appeal rights had been exhausted.

Additionally, in accordance with 7 CFR § 278.6(e)(8), the Appellant was informed by both the Wisconsin WIC State Agency and the FNS Retailer Operations Division that the decision to reciprocally disqualify Clarke Food 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 Wisconsin. According to the state's records, the Appellant firm engaged in: (1) A pattern of claiming reimbursement for the sale of an amount of a specific food item that exceeds the store's documented inventory of that food item for a specific period; (2) Exchanging cash, credit, or consideration other than eligible food; or exchange of firearms, ammunition/explosives/controlled substances for WIC food instruments; (3) A pattern of exchanging non-food items for a WIC food instrument; and (4) 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. Pursuant to the state's administrative regulations, such a violation warrants a six year WIC disqualification. The record also shows that the Appellant's appeal rights have been exhausted and the WIC Program 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 Appellant firm was not eligible for a hardship civil money penalty in lieu of a six year disqualification from the SNAP.

### **Financial Hardship**

The Appellant contends that SNAP sales are a big part of the store's sales and the owner depends upon it to keep the doors open and to support his family. A SNAP disqualification will force the owner to close the store. 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 Appellant's 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.

## **Corrective Action**

The Appellant contends that since being informed of the WIC violations, the owner has been working 14 hour days to ensure that everything is kept in order and the store is running correctly. The Appellant also let the responsible employee go. It is important to clarify for the record that the purpose of this review is to either validate or to invalidate the earlier decision of the Retailer Operations Division. This review is limited to what circumstances were at the basis of the Retailer Operations Division action at the time such action was made. It is not the authority of this review to consider what subsequent remedial actions may have been taken so that the store may begin to comply with program requirements. 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 after-the-fact corrective action implemented subsequent to investigative findings of program violations. Therefore, the Appellant's contention that it has taken corrective actions, though they would have been valuable towards preventing future program violations, does not provide any valid basis for dismissing the charges or for mitigating the penalty imposed.

## **CIVIL MONEY PENALTY**

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 (CMP) 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.]

### **5 U.S.C. § 552 (b)(7)(E).**

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 Clarke Food'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.

## **CONCLUSION**

Based on the discussion above, the determination by the Retailer Operations Division to deny Clarke Food a hardship civil money penalty in lieu of a six 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, 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.

LORIE L. CONNEEN  
ADMINISTRATIVE REVIEW OFFICER

October 7, 2019