

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

**Coney Super Corp,**

**Appellant,**

**v.**

**Retailer Operations Division,**

**Respondent.**

**Case Number: C0217150**

**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 deny Coney Super Corp a hardship Civil Money Penalty (CMP) in lieu of a three year disqualification from participating as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP) as a result of Women, Infants, and Children (WIC) Program violations.

**ISSUE**

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with Title 7 of the Code of Federal Regulations (CFR) § 278.6(e)(8) and § 278.6(f), in its administration of the SNAP, when it disqualified Appellant for a period of three years and denied assessing a hardship CMP in lieu of disqualification by letter dated September 10, 2019.

**AUTHORITY**

According to 7 U.S.C. § 2023 and the 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 23, 2019, the Retailer Operations Division informed Appellant that as the result of a March 11, 2019, New York WIC State Agency disqualification action due to violations of WIC program rules and regulations, the Retailer Operations Division was considering a SNAP reciprocal disqualification in accordance with 7 CFR § 278.6(e)(8). The WIC State Agency correspondence also cautioned Appellant that the WIC disqualification may

result in a disqualification from SNAP for three years that was not subject to administrative review.

Counsel for Appellant submitted a Freedom of Information Act (FOIA) request via email to USDA FNS on May 1, 2019. USDA FNS responded to this request in a letter dated May 22, 2019, that was received by counsel on May 23, 2019. Appellant also requested a two day extension to respond to the charges, which was granted, and responded in a letter dated August 21, 2019, that did request a hardship CMP. By letter dated September 10, 2019, the Retailer Operations Division informed Appellant that in accordance with Sections 278.6(e)(8)(iii) and 278.6(f)(1) it determined that Appellant's disqualification would not cause a hardship to SNAP households since there are other authorized retail stores in the area selling a variety of staple foods at comparable prices. This notification also stated that this disqualification determination was final and not subject to administrative review, but that appeal rights were available regarding the firm's eligibility for a hardship CMP.

By letter dated September 20, 2019, Appellant, through counsel, appealed the Retailer Operations Division's decision to deny the hardship CMP in lieu of a three year disqualification. The appeal was granted and implementation of the sanction has been held in abeyance pending completion of this review. Subsequent correspondence has been received from Appellant.

### **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 law in this matter is contained in the Food and Nutrition Act of 2008, as amended (7 U.S.C. § 2021), and implemented through regulation under Title 7 CFR Part 278. In particular, 7 CFR Part 278.6, 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 CMP 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) establishes, among other things, the kind of violations that warrant a reciprocal disqualification and reads, inter alia, "FNS shall disqualify from the Supplemental Nutrition Assistance Program (SNAP) any firm which is disqualified from the WIC Program." Stipulations are added to this regulation requiring that 1) the firm was provided individual and specific notice that it could be disqualified from the SNAP based on the WIC violations committed by the firm, 2) a signed and dated copy of such notice is provided to FNS by the WIC administering agency, and 3) a determination is made which ensures that such disqualification action will not cause a hardship for participating SNAP households.

7 CFR § 278.6(e)(8)(iii)(C) states that reciprocal SNAP disqualifications shall not be subject to administrative or judicial review. FNS may, in lieu of a disqualification, subject a firm to a CMP if the agency determines that a disqualification would cause hardship to participating SNAP households. In interpretation of the regulations, agency policy provides, inter alia, that “even though the action to disqualify on the basis of the WIC disqualification is, by statute and regulation, un-appealable, the determination to deny a firm a hardship CMP in lieu of the reciprocal disqualification, or the amount of the hardship CMP, remains subject to appeal in the Supplemental Nutrition Assistance Program.”

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 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**

The following may represent a 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:

- The firm is a freestanding building of 1,200 SF in a residential area providing the community with a variety of food including fresh/frozen fruits and vegetables, snacks, bread, milk, cheese, meat, eggs, nuts, and spices. Importantly, the firm offers the local community both kosher and non-kosher food items. The USDA 9<sup>th</sup> Congressional District Profile of Households shows that approximately 22 percent of households receive SNAP with about 33 percent having children under 18 years of age. The community also has a poverty rate of 52.7 percent;
- The FNS charge letter did not include a copy of the alleged WIC disqualification letter nor was there a citation to the specific WIC violation that allegedly occurred. As such, FNS exceeded its authority by issuing a reciprocal disqualification without providing proof that the requirements for said disqualification were met;
- SNAP regulations state that FNS shall not disqualify a firm on the basis of a WIC disqualification unless such action would not cause a hardship for participating households. The retailer will be granted a hardship CMP where a hardship exists. The USDA website shows only three other SNAP retailers on Coney Island Avenue within a one mile radius. All of the other retailers are located past Avenue P which is a highly congested four lane road that would pose a grave danger to cross due to its size and volume of traffic. None of the three other retailers are comparable to the convenient location of the firm which is located in an apartment complex providing nearby recipients safe accessibility without having to cross major roads. Shopping at the other stores would cause significant and unnecessary hardship to households with limited modes of transportation who have to walk to stores;
- The firm is, to the owner’s knowledge, the only retail store in the surrounding area that provides the community with such an expansive and diverse selection of grocery

products, specifically including kosher and non-kosher food items. In the absence of meaningful local competition with regard to the diverse food selection offered at the firm, local SNAP participants rely more significantly on the firm than on the other nearby SNAP retailers. The owner engages in numerous business strategies to accommodate and attract their clientele. Specifically, the firm offers fresh deli meats and cheeses customized per order, stocks kosher foods in addition to non-kosher foods, hot and cold sandwiches, a large variety of fresh fruits and vegetables, and even function as a small florist. Additionally, the hours are extremely convenient for customers, as it is open daily from 6:00 AM to 11:00 PM. The firm also offers delivery for its customers as well, which is ideal for many SNAP participants who do not have access to personal transportation; and,

- In conclusion, none of the surrounding stores offer even a remotely comparable inventory nor do they offer the same or better hours of operation than does the firm which is open from 6:00 AM to 12:00 AM daily. Accordingly, the firm presents an ideal store for a hardship exception to be granted and a hardship CMP should be issued in lieu of the three year reciprocal disqualification based on the safe location of the firm, the lack of nearby authorized retailers, the variety and quantity of foods sold, and the convenient hours combined with the firm having no accusations of SNAP violations for 12+ years;

Appellant submitted no evidence or other rationales in support of these contentions.

### **ANALYSIS AND FINDINGS**

By letter dated March 11, 2019, the New York Department of Health, the WIC State Agency, disqualified Appellant from participating in the WIC program for three years. The firm did not appeal the WIC State Agency disqualification action. The subject firm was disqualified from the New York WIC program for claiming reimbursement for the sale of infant powdered formula that exceeded the store's documented inventory of that item for a specific period of time, a violation that warrants a three year WIC disqualification period. The New York Department of Health letter properly gave notice of Appellant's right to file a formal appeal, and clearly states that the disqualification from WIC may result in disqualification as a retailer in the SNAP. It also states that such reciprocal disqualification is not subject to administrative or judicial review under the SNAP Program.

The FNS SNAP retailer application and reauthorization application contain a certification page whereby applicants must confirm their understanding of and agreement with SNAP retailer requirements in order to complete the application process. Store ownership did certify its understanding and agreement when it completed both applications. The reauthorization application specifically states that, "Disqualification from the WIC Program may result in Supplemental Nutrition Assistance Program disqualification, and a disqualification from the Supplemental Nutrition Assistance Program may result in WIC Program disqualification". The "SNAP Training Guide for Retailers" is also provided to all retailers upon their authorization and clearly states that store owners or operators are legally responsible for their own actions as well as the actions of everyone working in their store and that violations may include being disqualified from SNAP. This training guide specifically states that, "Stores that are disqualified from WIC may be disqualified from SNAP for an equivalent period of time". The SNAP retailer

applications and training materials clearly state that regardless of whom the ownership of a store may utilize to handle store business or their degree of involvement in store operations, the ownership is accountable for the proper training of staff and the monitoring and handling of benefit transactions. The ownership remains liable for all violative transactions handled by store personnel, whether paid or unpaid, new, full-time or part-time.

It is important to clarify for the record that this review is limited to what circumstances were at the basis of the Retailer Operations Division's action at the time such action was made. The record is clear that Appellant was disqualified from the WIC Program for a period of three years. As cited herein, the disqualification from SNAP for three years as the result of WIC Program violations is not subject to administrative review. The sole appealable issue in this case is if the Retailer Operations Division properly considered the firm's eligibility for a hardship CMP.

### **CIVIL MONEY PENALTY**

A hardship CMP as an optional penalty in lieu of a three year disqualification was considered in this case. Such a finding 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. FNS records show there are 105 comparably sized or larger SNAP authorized stores located within 1.0 miles of Appellant's location that includes seven super stores, eight supermarkets, five large grocery stores, 24 medium grocery stores, 18 small grocery stores, and 43 convenience stores. All of the comparable stores stock adequate varieties of food in all four staple food categories and in perishables as required by FNS with many stocking kosher foods. There is a medium grocery store offering kosher foods located just steps away from Appellant's location as well as a large grocery store, a small grocery store, and a super store located within approximately five blocks on the other side of Avenue P. The kosher medium grocery store and three convenience stores are located in the immediate vicinity and would not require households to cross Avenue P.

The "grave danger" and perils of crossing Avenue P are grossly exaggerated by counsel as it is nothing more than a typical four lane urban street with parking on both sides, traffic lights, pedestrian walk/don't walk signals, curb ramps for the disabled, and designated crosswalks. It is by no means a serious enough geographical obstacle to be considered a hardship. Examples of such serious geographical obstacles would be a highway or other busy roadway with no designated place for a pedestrian to cross, a body of water with no pedestrian bridge, a forested area with no pedestrian path, a wall or fence with no pedestrian pass-through, etc. There is also fixed route scheduled bus service on Coney Island Avenue that would facilitate SNAP recipients shopping at more distant SNAP retailers.

The many nearby stores appear readily accessible to SNAP recipients and offer a variety of staple and ethnic foods comparable to, or better than, those offered by Appellant. It is recognized that some degree of inconvenience to SNAP users is inherent in the disqualification from SNAP of any participating food store as the normal shopping pattern of such SNAP benefit holders may be altered. Inconvenience, however, does not rise to the level of hardship required by the regulations.

## **CONCLUSION**

Based on the discussion above, the determination by the Retailer Operations Division to deny the imposition of a hardship CMP in lieu of a three year SNAP disqualification is sustained. In accordance with the Food and Nutrition Act of 2008, as amended, and the pursuant regulations, the three year 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 days prior to the expiration of this three year disqualification period. In accordance with 7 CFR §278.1(b)(4), at the time of any such new application for participation in the SNAP, the firm would be required, as a store previously sanctioned for program violations, to submit a collateral bond or irrevocable letter of credit as a condition for again being authorized to participate in the program. Questions regarding the application process can be answered by the FNS Retailer Service Center at 877-823-4369.

## **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 a judicial review is desired, 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.

ROBERT T. DEEGAN  
ADMINISTRATIVE REVIEW OFFICER

December 9, 2019