

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

Don Juan Tienda Mexicana #2,

Appellant,

v.

Case Number: C0209910

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 hardship civil money penalty, in the amount of \$11,000.00, 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 assessed by the Retailer Operations Division against Don Juan Tienda Mexicana #2 (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) and (f)(1) in its administration of the Supplemental Nutrition Assistance Program (SNAP) when it assessed a civil money penalty in lieu of a three (3) year disqualification against Appellant on July 5, 2018.

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 North Carolina WIC State Agency, via email correspondence dated June 19, 2018, that Appellant was being disqualified from the WIC Program for three (3) years identified as the period effective April 30, 2018. The letter also stated that the disqualification period is calculated from the date the store’s WIC vendor stamp is returned to the Yadkin County Health Department WIC Office. The vendor stamps must be returned no later than 4:00 P.M. on April 30, 2018. The store may no longer accept WIC food instruments or cash-value vouchers

after this date. The memorandum included information on violations of the terms and conditions contained in the Vendor Agreement. Those violations included ones pursuant to 7 CFR § 278.6(e)(8)(A) “A pattern of claiming reimbursement for the sale of an amount of a specific food item that exceeds the store’s documented inventory of the food items for a specific period.”

In a letter dated June 20, 2018, 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 record reflects that Appellant did not reply to the charge letter.

In correspondence dated July 5, 2018, Retailer Operations Division notified Appellant that it was 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. The Determination letter also stated in relevant part:

“All opportunities for appeal of the WIC State agency action have been exhausted or have expired. We have determined that the assessment of a civil money penalty (CMP) of \$11,000.00 in lieu of a 3 year period of disqualification is the appropriate penalty for these violations. We have assessed this CMP because your firm is selling a substantial variety of staple food items and the firm's disqualification would cause hardship to SNAP households. This is in accordance with Section 278.6(e)(8) and (f)(1) of the SNAP regulations. This determination is final and is not subject to administrative review. However, appeal rights are available regarding the calculation of the CMP amount.”

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 § 278.6(g), provides for the amount of civil money penalties for hardship and transfer of ownership. It reads, "FNS shall determine the amount of the civil money penalty as follows:

(1) Determine the firm's average monthly redemptions of coupons for the 12-month period ending with the month immediately preceding that month during which the firm was charged with violations.

(2) Multiply the average monthly redemption figure by 10 percent.

(3) Multiply the product arrived at in paragraph (g)(2) by the number of months for which the firm would have been disqualified under paragraph (e) of this section. The civil money penalty may not exceed an amount specified in § 3.91(b)(3)(i) of this title for each violation."

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

In correspondence dated July 9, 2018, and in its request for review, ownership made the following summarized contentions in response to the Retailer Operations Division determination, in relevant part:

1. The purchases of milk are sporadic and can be depleted quickly. We acknowledge that we did not maintain proper receipts of various purchases of these products.
2. We assert that we maintain meticulous records of all purchases and sales of all other SNAP products. In the case of milk purchases, maintaining proper purchase receipts was an oversight on our part.

3. We would like consideration of a penalty of \$5,000.

No other documentation or information was provided during this review. 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 June 20, 2018, as well as in the FNS letter of determination dated July 5, 2018, 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 North Carolina 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 North Carolina WIC State Health and Human Services dated August 26, 2016. The next to last paragraph indicates "... this disqualification from WIC may result in disqualification as a retailer in the Supplemental Nutrition Assistance Program ("SNAP"). Such disqualification is not subject to administrative or judicial review under the SNAP."

CIVIL MONEY PENALTY

In its request for administrative review, Appellant is appealing the amount of the CMP. A review of the case record confirms that the Retailer Operations Division correctly calculated the amount of the CMP as specified in 7 CFR § 278.6(g). That regulation states that the CMP is to be calculated on a formula which includes the SNAP redemption volume of the store during the 12 months prior to the firm being notified of the violations that led to the store's disqualification. Modifications to the CMP may occur only when there is an error in calculation or the amount exceeds the agency limit.

The Retailer Operations Division correctly determined that, using the methodology described in 7 CFR § 278.6(g), the initial calculated amount of the CMP was 5 U.S.C. § 552 (b)(6) & (b)(7)(C). However, the initial calculated CMP of 5 U.S.C. § 552 (b)(6) & (b)(7)(C) is above the agency limit, which is \$11,000 per violation. The June 20, 2018, charge letter identified one pattern of WIC violations based on correspondence dated March 27, 2018 from the North Carolina WIC State Agency. Therefore, the CMP was correctly assessed at \$11,000.00 which is the agency limit per violation multiplied by the number violations (\$11,000.00 x 1 WIC violation pattern).

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 convenience store, as defined in accordance with SNAP regulations, and selling a substantial variety of staple food items and the firm’s disqualification would cause hardship to SNAP households. It was also noted that Appellant carries international specialty items unavailable at other nearby retailers. By definition, there is a perceived hardship that will result as there is a lack of comparable stores in the area.

CONCLUSION

Based on the discussion herein, the decision to assess a hardship CMP, in the amount of \$11,000, in lieu of a three (3) year SNAP disqualification from Supplemental Nutrition Assistance Program (SNAP) as a result of Women, Infants and Children (WIC) Program violations against Don Juan Tienda Mexicana #2 is sustained.

In accordance with 7 CFR § 278.1(b)(4)(i), and as a condition of future authorization, Appellant is required to present a collateral bond or irrevocable letter of credit in the amount of \$1,000.00. Appellant will be further advised, on the submission of the collateral bond or irrevocable letter of credit by Retailer Operations Division.

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

November 5, 2018