

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

El Progreso Supermarket #4,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0224358

FINAL AGENCY DECISION

The USDA, Food and Nutrition Service (FNS) finds that the decision of the Retailer Operations Division (Retailer Operations) to impose a three year disqualification of El Progreso Supermarket #4 (Appellant), from the Supplemental Nutrition Assistance Program (SNAP) as a result of Women, Infants, and Children (WIC) Program violations was proper. There is also sufficient evidence to support a finding that the denial of a civil money penalty (CMP) was appropriate, and in accordance with Section 278.6(f)(1) of the SNAP regulations.

ISSUE

The issue accepted for review is whether Retailer Operations took appropriate action, consistent with 7 CFR § 278.6(e)(8), in its administration of the SNAP. Appellant was disqualified as a SNAP retailer for a period of three years, and denied a 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 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

The record supports that as a result of WIC violations of program rules and regulations at Appellant, the WIC State Agency issued a letter dated May 30, 2019, that Appellant was disqualified from participation in the WIC Program for three years. The letter advised the owner

that disqualification from WIC, could result in disqualification from the SNAP. The State notice also informed the owner of the right to appeal the WIC disqualification.

By Charge letter dated January 8, 2020, Retailer Operations notified Appellant that in accordance with 7 CFR § 278.6(e)(8), it was being considered for disqualification from the SNAP for three years, or for the imposition of a CMP in lieu of disqualification. One of the violations described in the WIC letter is also a violation of the SNAP regulations at Section 278.6(e)(8). Such a disqualification is not subject to SNAP administrative review. The record shows there was no response by the owner to the Charge letter.

By Determination letter dated February 13, 2020, Retailer Operations informed Appellant that in accordance with Section 278.6(f)(1) of the regulations, it determined that Appellant's disqualification would not cause hardship to SNAP households since there are other authorized retail stores in the area selling as large a variety of staple foods at comparable prices. This letter stated that appeal rights were available to Appellant regarding its eligibility for a hardship CMP.

By letter dated February 19, 2020, Appellant appealed Retailer Operations' decision. The appeal was granted by letter dated February 27, 2020.

STANDARD OF REVIEW

In an appeal of an adverse action, the Appellant bears the burden of proving by a preponderance of the evidence, that the administrative action should be reversed. That means the Appellant has the burden of providing credible, relevant evidence which 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 not true.

CONTROLLING LAW AND REGULATIONS

The controlling statute in this matter is contained in the Food and Nutrition Act of 2008, as amended, 7 U.S.C. § 2021, and Section 278 of Title 7 of the Code of Federal Regulations (CFR).

7 U.S.C. § 2021(a)(1) states: "An approved retail food store that violates a provision of this Act or a regulation under this Act may be: (A) disqualified for a specified 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: "FNS shall disqualify from the Supplemental Nutrition Assistance Program 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) states that FNS shall disqualify any firm from the SNAP which is disqualified from the WIC Program: “(A) Shall be for the same length of time as the WIC disqualification; (B) May begin at a later date than the WIC disqualification.”

7 CFR § 278.6(e)(8)(iii)(C) states that such a disqualification: “Shall not be subject to administrative or judicial review under the SNAP.”

7 CFR § 278.6(f)(1) states: “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 the contentions however, in reaching a decision consideration has been given to all contentions, including any not specifically referenced here.

- The WIC disqualification was due to unintentional and accidental actions from one of our cashiers who overcharged WIC vouchers on 2 separate occasions, totaling **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** in errors.
- We would never jeopardize the livelihoods of our employees and my family’s only source of income for mere pennies.
- As the store owner, I accept the responsibility and the reasoning behind our disqualifications of our WIC privileges, but we would appreciate the consideration of a CMP and further analysis of our situation.
- Disqualification of our SNAP privileges shall result in the closure of our store due to the imminent severe decline of revenues.
- We are within walking distance from over 10+ apartment complexes (including housing projects), two elementary schools, and one middle school within a one-mile radius. Most residents in our community do not own or have regular access to a vehicle, therefore other stores-although within minutes of driving-are less convenient and a hardship to reach, forcing consumers to walk and carry their groceries an additional 1.19 miles one way.
- Our store is located on a well-travelled route, and the majority of our business comes from SNAP participants, should they be forced to shop elsewhere they would be burdened with a mile or two further to walk and an additional 45-60 minutes added to their commute.
- Families often travel with children or the elderly and these circumstances are not ideal.
- There are other stores in the area that accept EBT but they lack in their varieties of fresh food. According to the SNAP Retailer Locator, out of the 11 eligible stores within a one-mile radius, at least five are liquor/small convenience stores that do not have the space to maintain the same levels of groceries.
- **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** shall not be a valid replacement to the variety of Mexican and Central American products, fresh meat, dairy, cheese, and fresh produce our community demands.

- The store carries a vastly superior selection of SNAP eligible items, thus being better qualified to satisfy the needs and cultural values of the respective participants in our community.
- We do believe that our appeal has merit, given all of the other factors outlined above. We do not want our community to suffer immensely from the implementation of a three-year suspension for our inadvertent input error.
- It would be a significant hardship on the local SNAP families in the area because they depend on the wide variety of Mexican and Central American products.
- The best option is to monetarily penalize the store under the hardship provision and permit our dedicated SNAP trained employees to continue to do the good it does for our community.

ANALYSIS AND FINDINGS

The WIC disqualification, and the three year reciprocal disqualification from SNAP are not subject to administrative review. The sole appealable issue, and matter under consideration, is if Retailer Operations properly considered Appellant's eligibility for a civil money penalty.

The record shows that Retailer Operations properly determined that there are stores in the area that sell as large a variety of staple food items at comparable prices as Appellant. This includes ethnic foods.

CIVIL MONEY PENALTY

The record documents that Retailer Operations properly considered Appellant's eligibility for a hardship CMP according to the terms of Section 278.6(f)(1) of the SNAP regulations. The evidence supports that authorized firms selling as large a variety of staple food items, including ethnic foods, at comparable prices as Appellant are located within a proximate area of Appellant. Thus, while it may cause inconvenience for SNAP customers if Appellant is disqualified, inconvenience does not rise to the level of hardship as required for a CMP.

CONCLUSION

The sole matter for consideration in this review is the civil money penalty. The evidence under review supports Retailer Operations' decision to deny the imposition of a hardship civil money penalty. The three year SNAP disqualification against Appellant is herein sustained. In accordance with the Food and Nutrition Act of 2008, and the regulations there under, this penalty shall become effective thirty (30) days after receipt of this decision.

RIGHTS AND REMEDIES

A new application for participation as a SNAP retailer 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 new application for SNAP participation, and if the firm meets eligibility requirements stated in the regulations for such authorization, the firm would be required, as a previously sanctioned store, to submit a collateral bond or irrevocable letter of credit as a condition for being authorized to participate in the SNAP.

Attention is called to Section 14 of the Food and Nutrition Act of 2008, (7 U.S.C. § 2023), and to the Regulations at 7 CFR § 279.7 with respect to applicable rights to judicial review of this decision. 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 the Appellant's owner resides or is 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.

M. Viens
ADMINISTRATIVE REVIEW OFFICER

March 26, 2020