

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

Elite Mini Market,

Appellant,

v.

**Office of Retailer Operations and
Compliance,**

Respondent.

Case Number: C0230723

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 Office of Retailer Operations and Compliance to deny Elite Mini Market 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 Office of Retailer Operations and Compliance 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 July 1, 2020.

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 June 16, 2020, the Office of Retailer Operations and Compliance informed Appellant that as the result of a March 11, 2019, Wisconsin Department of Health Services, the

WIC State Agency, disqualification action due to violations of WIC program rules, the Office of Retailer Operations and Compliance 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.

Appellant responded to the charges in a letter sent via fax on June 23, 2020, that did not request a hardship CMP. By letter dated July 1, 2020, the Office of Retailer Operations and Compliance 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 July 6, 2020, Appellant appealed the Office of Retailer Operations and Compliance'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:

- Business is at an all-time low due to the pandemic and the owner is struggling to make payments for his home and business so he does not have funds to hire an attorney to prove his innocence;
- It is true that the owner lost the receipts and that is why WIC thinks he wronged them, but he has never taken extra money. Due to the pandemic, WIC won’t allow him to prove that some receipts were lost because the owner bought them from Pick-n-Save and Walmart. WIC also almost denied the owner’s appeal. The owner was not informed of the possibility of SNAP disqualification in response to the WIC disqualification as he was informed that he would stay a SNAP vendor due to the pandemic;
- The owner has the proof for all the receipts for WIC, but they said they are unable to re-open the case. The amount of money WIC claims was reported missing was a small amount and the owner has had the business for 12 years with no violations; and,
- The owner requests a hardship CMP. The Covid 19 cases in Racine are on the rise and the neighborhood around the store is in dire need of the store because they do not have any transportation. Many customers do not have the means to travel so they will live in difficulty and at a major loss.

Appellant submitted 12 handwritten customer statements asking that the business not be disqualified from SNAP in support of these contentions.

ANALYSIS AND FINDINGS

By letter dated March 11, 2020, the Wisconsin Department of Health Services, the WIC State Agency, disqualified Appellant from participating in the WIC program for three years. The Wisconsin Department of Health Services 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. Appellant did appeal the WIC State Agency disqualification and signed a Stipulated Settlement Agreement on May 31, 2020, agreeing to a three year WIC disqualification effective June 1, 2020. The subject firm was disqualified from the Wisconsin WIC program for claiming reimbursement for the sale of WIC food items that exceeded the store's documented inventory of those food items.

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 the SNAP retailer application in 2009 and the most recent retailer reauthorization application in 2018. These applications specifically state 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.

Regarding Appellant's contentions, it is important to clarify for the record that this review is limited to what circumstances were at the basis of the Office of Retailer Operations and Compliance'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 and that this disqualification action was upheld by administrative appeal as evidenced by the Stipulated Settlement Agreement signed by Appellant. As cited herein, the disqualification from SNAP for three years as the result of WIC Program violations is not subject to administrative or judicial review as explicitly stated in SNAP regulations at 7 CFR § 278.6(e)(8)(iii)(C). The sole appealable issue in this case is if the Office of Retailer Operations and Compliance 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 19 comparably sized or larger SNAP authorized grocery stores located within 1.0 miles of Appellant's location that includes one large grocery store, three medium grocery stores, and 15 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 the many larger firms offering a greater quantity and variety of staple foods at better prices than could be found at a convenience store. The two nearest medium grocery stores are located approximately one and six blocks away from Appellant's location. There is also fixed route scheduled bus service that would facilitate SNAP recipients shopping at more distant SNAP retailers.

The nearby stores appear readily accessible to SNAP recipients and offer a variety of staple 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. The customer statements submitted by Appellant provide no evidence to prove eligibility for a hardship CMP under the requirements contained in SNAP regulations.

CONCLUSION

Based on the discussion above, the determination by the Office of Retailer Operations and Compliance 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

August 24, 2020