

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

Estrella Meat Market,

Appellant,

v.

Case Number: C0205231

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 the Retailer Operations Division properly denied the imposition of a hardship civil money penalty (CMP) in lieu of disqualification from the Supplemental Nutrition Assistance Program (SNAP). Therefore, the Appellant, Estrella Meat Market, is disqualified from SNAP for a period of three years due to the firm's violations in the Special Supplemental Nutrition Program for Women, Infants and Children (WIC).

ISSUE

The issue accepted for review is whether or not the Retailer Operations Division took appropriate action, consistent with Title 7 Code of Federal Regulations (CFR) Part 278, in its administration of SNAP when it imposed a three-year disqualification against Estrella Meat Market and denied the imposition of a hardship CMP in lieu of disqualification.

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

FNS records show that the Appellant firm, Estrella Meat Market, was initially authorized for SNAP participation as a convenience store on June 17, 2008. In a letter dated July 28, 2017, the California Department of Public Health (CDPH) notified the Appellant that it was being disqualified from the WIC Program for three years due to two instances of overcharging the WIC program and two instances of charging the Program for supplemental food not received by the participant, resulting in an overcharge to the Program. These violations took place on April 12,

2017, and June 26, 2017, and are a violation of California Code of Regulations (CCR), Title 22, Sections 40740(e)(3) and (e)(5). In accordance with State regulations, such violations shall result in a three-year disqualification from the WIC Program. The July 28, 2017, letter further stated that the disqualification from WIC “may result in disqualification as a retailer in the Supplemental Nutrition Assistance Program.” The letter further stated that such a disqualification would not be subject to administrative or judicial review under SNAP.

It is noted that the WIC violations described in the previous paragraph are not only violations of State regulations but are violations of Federal regulations at 7 CFR § 246.12(h)(3). A firm that commits such violations is subject to a three-year disqualification from WIC in accordance with 7 CFR § 246.12(l)(1)(iii)(C) and (E). A reciprocal SNAP disqualification may be imposed in accordance with Federal regulations at 7 CFR § 246.12(h)(3)(xxvi).

According to the CDPH, the firm did not file an appeal of the State’s decision to disqualify the firm from WIC participation, and the three-year WIC disqualification took effect on August 28, 2017.

On December 27, 2017, the CDPH sent a letter to FNS’s Retailer Operation Division informing it that Estrella Meat Market has been disqualified from WIC for a period of three years. Along with the letter, the CDPH included a copy of the July 28, 2017, notice of disqualification, and a copy of an April 26, 2017, warning letter.

Consequently, in a letter dated January 23, 2018, the Retailer Operations Division informed the Appellant of FNS’s intention to disqualify Estrella Meat Market from participation in SNAP for a period of three years as a reciprocal administrative action on the basis of the store’s disqualification from the WIC Program. The letter stated that the firm was also being considered for the imposition of a civil money penalty in lieu of disqualification.

The January 23 letter offered the Appellant an opportunity to “present any information, explanation, or evidence indicating that (1) [the] firm has not been disqualified from the WIC Program; (2) [the firm was] not informed of the possibility of Supplemental Nutrition Assistance Program disqualification in response to the WIC disqualification action; and (3) all opportunities for appeal of the WIC State agency action have not been exhausted or expired.”

The Appellant did not respond to the January 23, 2018, letter.

After further consideration of the evidence in the case, the Retailer Operations Division determined that a three-year SNAP disqualification as a result of WIC violations was the appropriate penalty in accordance with 7 CFR § 278.6(e)(8)(iii). The Retailer Operations Division also evaluated the Appellant’s eligibility for a hardship civil money penalty in lieu of disqualification in accordance with 7 CFR § 278.6(a) and (f)(1), but determined that this alternative penalty was not an option because there were other SNAP-authorized retail stores in the area selling as large a variety of staple foods at comparable prices.

The Appellant was informed of this determination in a letter dated February 12, 2018. This letter further informed the Appellant that the determination to reciprocally disqualify Estrella Meat

Market from SNAP was final and was not subject to administrative or judicial review. However, appeal rights were available with regard to the denial of a hardship CMP.

In a letter postmarked February 22, 2018, the Appellant requested an administrative review of the Retailer Operations Division's decision. The request was granted and implementation of the SNAP disqualification has been held in abeyance pending completion of this review.

STANDARD OF REVIEW

In an appeal of adverse action, such as disqualification from SNAP or the denial of a civil money penalty in lieu of disqualification, an appellant bears the burden of proving by a preponderance of the evidence that the administrative action should be reversed. This means that 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 AND REGULATIONS

The controlling law in this matter is found in the Food and Nutrition Act of 2008, as amended (7 U.S.C. § 2021), and promulgated through regulation under Title 7 CFR Part 278. In particular, 7 CFR § 278.6(a) and (e)(8) establish the authority upon which FNS may disqualify any authorized retail food store from further participation in SNAP if the firm fails to comply with the provisions of the Act, including reciprocal disqualification from SNAP on the basis of a WIC disqualification. Section 278.6(f)(1) establishes the authority upon which a civil money penalty may be imposed against a disqualified retail food store when the firm's disqualification would cause hardship to SNAP households.

7 CFR § 278.6(e)(8)(i) reads, in part:

FNS shall disqualify from SNAP any firm which is disqualified from the WIC Program:

(i) Based in whole or in part on any act which constitutes a violation of that program's regulation and which is shown to constitute a misdemeanor or felony violation of law, or for any of the following specific program violations:

(E) A pattern of charging WIC customers more for food than non-WIC customers or charging WIC customers more than the current shelf price.

(F) 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.

7 CFR § 278.6(e)(8)(ii) states:

FNS shall not disqualify a firm from SNAP on the basis of a WIC disqualification unless:

(A) Prior to the time prescribed for securing administrative review of the WIC disqualification action, the firm was provided individual and specific notice that it could be disqualified from SNAP based on the WIC violations committed by the firm;

(B) A signed and dated copy of such notice is provided to FNS by the WIC administering agency; and

(C) A determination is made in accordance with paragraph (a) of [Section 278.6] that such action will not cause a hardship for participating SNAP households.

7 CFR § 278.6(e)(8)(iii) states:

Such a SNAP disqualification:

(A) Shall be for the same length of time as the WIC disqualification;

(B) May begin at a later date than the WIC disqualification; and

(C) Shall not be subject to administrative or judicial review under SNAP.

7 CFR § 278.6(a) reads, in part:

...FNS may, in lieu of a disqualification, subject a firm to a civil money penalty...if FNS determines that a disqualification would cause hardship to participating households....

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 Appellant made the following summarized contentions in its request for administrative review, in relevant part:

- If the store is disqualified from SNAP, it will go out of business.
- Appellant understands now that there are guidelines that it needs to follow at all times.
- The Appellant's actions were not intentional. One of the main reasons there was an issue is that the cost of products changed often and the Appellant was not able to make the changes on the sales side of the business.
- SNAP is one of the firm's main sources of income, and without it, the store may not be able to stay open.
- Appellant knows it made a mistake, but it will do whatever is needed to continue to serve its customers, which will also help keep the business open.

- Appellant will be more attentive in the future so that it can be a better business owner.

The preceding may represent only a brief summary of the Appellant's contentions presented in this matter. However, in reaching a final decision, full attention was given to all contentions presented, including any not specifically summarized or explicitly referenced herein.

ANALYSIS AND FINDINGS

In accordance with 7 CFR § 278.6(e)(8)(ii)(A) and (B), the Appellant was provided with specific notice that it could be disqualified from SNAP based on the WIC violations committed by the firm. This notice was given to the firm by the California Department of Public Health in a letter dated July 28, 2017. A copy of that notice was provided to the Retailer Operations Division by the CDPH on December 27, 2017.

Additionally, in accordance with 7 CFR § 278.6(e)(8)(iii), the Appellant was informed by both the State agency and the Retailer Operations Division that the decision to reciprocally disqualify Estrella Meat Market from SNAP on the basis of the WIC disqualification would not be subject to administrative or judicial review. Further, the regulation states 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.

According to the State's records, the Appellant firm engaged in a pattern of overcharging the WIC Program and a pattern of charging the Program for supplemental food not received by the participant, resulting in an overcharge to the Program. Pursuant to State and Federal regulations, such violations warrant a three-year WIC disqualification. The record also shows that Estrella Meat Market did not appeal this decision to the State of California.

With all of these facts clearly in place and because the Retailer Operations Division's decision to reciprocally disqualify the firm from SNAP is wholly in line with Federal regulation, this review has no authority to further review such a determination or to respond to any contentions related to the reciprocal SNAP disqualification. This is pursuant to 7 CFR § 278.6(e)(8)(iii)(C).

Therefore, the only remaining issue for this review to consider is whether or not the Retailer Operations Division took appropriate action by determining that the Appellant was not eligible for a hardship civil money penalty in lieu of a three-year disqualification from SNAP.

Hardship Civil Money Penalty

The Appellant has made several arguments related to hardship if the disqualification were to be upheld. However, all of the arguments center on hardship to the firm, not SNAP recipients. Unfortunately, there are no provisions in the SNAP regulations for waiver or reduction of an administrative penalty on the basis of possible economic hardship to either the ownership personally or to the firm resulting from the imposition of a disqualification.

As to the possibility that SNAP households would experience hardship as a result of the firm's disqualification, a review of the agency's case record shows that the Retailer Operations Division

properly considered this issue. Under the provisions found in 7 CFR § 278.6(f)(1), FNS may impose a civil money penalty in lieu of disqualification when hardship to SNAP households exists. 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.”

It is the determination of this review that a disqualification of Estrella Meat Market, a convenience store, would not cause hardship to SNAP households because there are many other comparable or larger SNAP-authorized stores located in the area of the Appellant firm. According to agency records, there are nearly 30 similar or larger SNAP-authorized retail stores located within a one-mile radius of Estrella Meat Market, including two superstores, and one supermarket.

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 regulation 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, pursuant to 7 CFR § 278.6(f)(1), a hardship civil money penalty in lieu of disqualification cannot be granted in this case.

CONCLUSION

Because the conditions found in 7 CFR 278.6(e)(8)(i) and (ii) have been met, this review has no authority to reconsider the three-year reciprocal SNAP disqualification, which was imposed on the Appellant on the basis of a WIC disqualification.

As for the Retailer Operations Division’s determination to deny the imposition of a hardship civil money penalty in lieu of a disqualification against Estrella Meat Market, this decision is sustained. A preponderance of the evidence shows that SNAP households will not incur hardship as a result of the firm’s disqualification.

In accordance with the Food and Nutrition Act of 2008 and associated regulations, the three-year period of disqualification from SNAP shall become effective 30 days after receipt of this letter. A new application for SNAP may be submitted by the firm no earlier than 10 days prior to the expiration of the three-year disqualification period. In accordance with 7 CFR § 278.1(b)(4), at the time of any new application for participation in SNAP, the firm will be required to submit a collateral bond or irrevocable letter of credit as a condition for again being authorized to participate in the Program. This bond requirement is due to the firm’s sanction of a period longer than six months.

RIGHTS AND REMEDIES

Applicable rights to a judicial review of this decision are set forth in Section 14 of the Food and Nutrition Act of 2008 (7 U.S.C. § 2023) and in Section 279.7 of the SNAP regulations. 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 owner resides or is engaged

in business, or in any court of record of the State having competent jurisdiction. If a complaint is filed, it must be filed within 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.

JON YORGASON
Administrative Review Officer

August 13, 2018