

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

Golden Bowl Inc,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0216475

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 assessment of a hardship civil money penalty in the amount of 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in lieu of a three (3) year disqualification from participating as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP), as a result of WIC Program violations, was improperly imposed against Golden Bowl Inc. (Appellant) by the Retailer Operations Division. However, although the violations do not warrant the assessment of a hardship civil money penalty in the amount of 5 U.S.C. § 552 (b)(6) & (b)(7)(C), it is the decision of the USDA that the assessment of a hardship civil money penalty in the amount of 5 U.S.C. § 552 (b)(6) & (b)(7)(C) is warranted.

ISSUE

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with 7 CFR §278.6(e)(8) and 7 CFR §278.6(f) in its administration of the SNAP, when it assessed a hardship civil money penalty in the amount of 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in lieu of a three (3) year SNAP disqualification against the Appellant on May 14, 2019.

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 was advised by the California Department of Health—Health and Human Services Agency (California WIC State agency) in correspondence of March 27, 2019 that the Appellant was being disqualified from the WIC Program for three (3) years effective September 27, 2018. FNS was provided with a copy of a letter from the California WIC State agency to the Appellant, dated August 27, 2018, in which the Appellant was notified of the three year WIC Program disqualification. The information provided to FNS from the California WIC State agency 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 charging for food items not received by the WIC customer or for foods provided in excess of those listed on the food instrument”.

In a letter dated April 25, 2019, the Retailer Operations Division informed ownership of the agency’s intention to disqualify the 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 Appellant did not reply to the charges outlined in the April 25, 2019 letter. After considering the evidence in the case, the Retailer Operations Division issued a Determination Letter, dated May 14, 2019, informing the Appellant that it was being assessed a hardship civil money penalty (CMP) in the amount of 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in lieu of a three year disqualification from participation as a retailer in the SNAP. The Appellant was also informed that all opportunities for appeal of the WIC State agency action have been exhausted or have expired and that the three year SNAP disqualification determination was on the basis of the WIC Program disqualification and is not subject to administrative review; rather the firm has appeal rights with regards to the firm’s eligibility for and the calculation of a hardship civil money penalty. This is in accord with the Food and Nutrition Act of 2008, as amended, and 7 CFR §278.6(e)(8) of the SNAP regulations.

In a letter postmarked May 24, 2019, the Appellant appealed the Retailer Operations Division’s assessment and requested an administrative review of this action. FNS granted the Appellant’s request for administrative review by letter dated June 4, 2019, and implementation of the sanction has been on hold pending completion of this review.

STANDARD OF REVIEW

In appeals of adverse actions, the Appellant bears the burden of proving by a preponderance of the evidence, that the administrative actions should be reversed. That means the Appellant has the burden of providing relevant evidence which a reasonable mind, considering the record as a whole, might 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 1977, 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

The following represents a brief summary of the Appellant’s contentions in this matter. Please be assured, however, that in reaching a decision, full attention and consideration was given to all contentions presented, including any not specifically recapitulated or specifically referenced herein.

In the request for administrative review and in subsequent correspondence to FNS, the Appellant stated the following summarized contentions, in relevant part:

- The Appellant has made some honest mistakes during the processing of the WIC Program. The Appellant’s officers printed out pricing sheets every Monday for the cashiers to use that week. The officers were not aware that WIC prices change on a daily basis. Once they became aware of this issue, they printed out the corrected daily price sheets and confirmed by double checking every night what was entered prior to sending the WIC checks back.
- Some of the store’s cashiers are slow learners and may not comprehend English very well. Due to the fact that the majority of the store’s customers are older **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**, the Appellant chose to hire them so that they can have better communication and understanding with customers. That is also why from time to time, the store’s cashiers forget to ask the customers for their voucher sheet and have it signed in front of them.
- Another issue was also overlooking the dates on the WIC checks, whether it was too early or if they had already passed the expiration date. The Appellant continued to do a lot of training with the cashiers weekly to ensure that they did not make the same mistakes again.
- One of the main reasons why the Appellant did not appeal or reapply for reinstatement is because it entered into the WIC program too late. Another factor is that the store did not have enough WIC customers to keep the inventory going which resulted in inventory loss. The store’s cost for the inventories was **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** for 2017 and the total sales were **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. For these reasons, the Appellant decided not to reapply for WIC reinstatement. However, the Appellant failed to inform the WIC agency of its decision not to continue to participate in the program.
- The Appellant has not violated any SNAP laws or regulations.
- Based on the Appellant’s record and continued outstanding service to the community since 2003, the Appellant is requesting that FNS consider either reducing or dismissing the imposed hardship CMP.

ANALYSIS AND FINDINGS

With regard to the Appellant’s contentions with respect to the WIC Program violations and its contention that it has not violated any SNAP laws or regulations, the record shows that the Appellant was informed in the FNS letter of charges dated April 25, 2019, as well as in the FNS

letter of determination dated May 14, 2019, that the determination to disqualify the 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 California Department of Health—Health and Human Services Agency (California 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 the Appellant was duly notified that the WIC Program disqualification may result in a reciprocal SNAP authorization disqualification in the notice from the California Department of Health—Health and Human Services Agency (California WIC State agency) dated August 27, 2018. The last page of the WIC State agency letter indicates “... this disqualification from the WIC Program may result in disqualification as a retailer in the Supplemental Nutrition Assistance Program.”

Consequently, this administrative review has no authority to render an opinion regarding the WIC violations that were uncovered by the state of California. According to the state’s records, the Appellant firm engaged in “A pattern of charging the Program for supplemental food not received by the participant, resulting in an overcharge to the program”. Pursuant to the state’s administrative regulations, such a violation warrants a three year WIC disqualification. The record also shows that the Appellant’s appeal rights have been exhausted and the WIC Program disqualification was upheld.

With all of these facts clearly in place and because the Retailer Operations Division’s decision to impose a hardship civil money penalty in lieu of a three SNAP disqualification, as a result of WIC Program violations, is wholly in line with Federal regulations, this administrative review has no authority to further review such a determination. This is pursuant to 7 CFR § 278.6(e)(8)(iii)(C).

CIVIL MONEY PENALTY

The Appellant contends that based on the store’s record and continued outstanding service to the community since 2003, it is requesting that FNS consider either reducing or dismissing the imposed hardship CMP. The Appellant has not violated any SNAP laws or regulations.

7 CFR §278.6(g) provides, in relevant part, the CMP formula as, “. . . 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.

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 \$11,000.00 per violation. Of the violation(s) and reason(s) that the Appellant was disqualified from the WIC Program, only one single pattern violates the SNAP regulations—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. As such, the statutory limit for this hardship civil money penalty would be capped at \$11,000.00 per violation. While the Determination Letter, issued by the Retailer Operations Division on May 14, 2019, reflected a CMP amount of 5 U.S.C. § 552 (b)(6) & (b)(7)(C), the correct calculation would instead be 5 U.S.C. § 552 (b)(6) & (b)(7)(C) per 7 CFR §278.6(g) above.

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 the Appellant as a super store selling a substantial variety of Asian staple foods, as defined in accordance with SNAP regulations, and is located in an urban area where there are no other similarly sized or larger SNAP authorized firms located within a one (1) mile radius that sell as large a variety of Asian staple food items at comparable prices. By definition, there is a perceived hardship that will result as there is a lack of comparable stores in the area.

With regard to the Appellant’s contention that it has had an unblemished record since 2003, a record of participation in the SNAP with no previously documented instance of violations does not constitute valid grounds for dismissal of the current charges of violations or for mitigating the impact of those charges.

CONCLUSION

The SNAP regulations, specifically 7 CFR §278.6(e)(8), are quite specific that “FNS shall disqualify from the SNAP any firm which is disqualified from the WIC Program.” Unless a civil money penalty is warranted, a firm disqualified from the WIC Program must be disqualified for an equal term from the SNAP.

As such, a review of the evidence in this case indicates that the Retailer Operations Division’s initial decision to impose a hardship civil money penalty in the amount of 5 U.S.C. § 552 (b)(6)

& (b)(7)(C) in lieu of a three year SNAP disqualification was improper. However, it is the decision of the USDA that the assessment of a hardship civil money penalty is hereby modified to reflect the correct hardship civil money penalty in the amount of 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in lieu of a three year SNAP disqualification.

In accordance with the Food and Nutrition Act of 2008, and the regulations thereunder, this penalty shall become effective thirty (30) days after receipt of this letter. In addition, the Appellant had previously been advised by the Retailer Operations Division of the further requirement, pursuant to 7 CFR §278.1(b)(4), to post a collateral bond or irrevocable letter of credit as a further condition for continued participation in the SNAP. If the option to pay the civil money payment is not accepted, thereby enforcing the three year disqualification, a new application for participation in the SNAP may be submitted ten (10) days prior to the expiration of the three year period of disqualification.

RIGHTS AND REMEDIES

Your attention is called to Section 14 of the Food and Nutrition Act of 2008 (7 U.S.C. 2023) and to Section 279.7 of the Regulations (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, FNS is 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.

LORIE L. CONNEEN
ADMINISTRATIVE REVIEW OFFICER

July 25, 2019