

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

**Habibi Grocery,**

**Appellant,**

**v.**

**Retailer Operations Division,**

**Respondent.**

**Case Number: C0225232**

**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 denial of a hardship civil money penalty, in lieu of a three (3) year disqualification from the Supplemental Nutrition Assistance Program (SNAP) as a result of WIC Program violations, was properly rendered by the Retailer Operations Division against Habibi Grocery (hereinafter “Habibi Grocery” or “Appellant”).

**ISSUE**

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with 7 CFR § 278.6(f)(1) in its administration of the SNAP, when it denied assessing a civil money penalty in lieu of a three year disqualification against Habibi Grocery.

**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**

In a letter dated January 14, 2020, the Retailer Operations Division informed the Appellant of the agency’s intention to impose a three year disqualification against the Appellant firm from participating as an authorized retailer in the SNAP. The firm was disqualified for three years from the WIC Program for violations that included, pursuant to 7 CFR § 278.6(e)(8)(i)(F) of the SNAP regulations, “A pattern of claiming reimbursement for the sale of an amount of a specific food item that exceeds the store’s documented inventory of that food item for a specific period” and “A pattern of exchanging non-food items for a WIC food instrument”.

FNS was advised by the Louisiana Department of Health Office of Public Health (Louisiana WIC State Agency) that the Appellant was being disqualified from the WIC Program for three years effective August 15, 2019 and that the Appellant's appeal rights had been exhausted. The WIC State Agency provided FNS with a copy of a letter dated August 14, 2019 that it had sent to the Appellant advising it that Habibi Grocery could be disqualified from the SNAP based on the WIC Program violations that occurred at the firm. The letter also informed the Appellant of its appeal rights regarding the WIC Program disqualification. The Louisiana WIC State Agency informed FNS that Habibi Grocery had exhausted all of its appeal rights with regard to the three year WIC disqualification.

In responses to the Retailer Operations Division of January 21, 2020 and January 24, 2020, the Appellant, through counsel, replied to the charges therein stating that while Habibi Grocery has been disqualified from WIC, there has been no history of any previous disqualifications. Moreover, the June 10, 2018 violations fail to show a pattern and the monies owed to the Louisiana WIC Program 5 U.S.C. § 552 (b)(6) & (b)(7)(C). This seems to be disproportionate to the three year penalty imposed on Habibi Grocery. Habibi Grocery has operated at its current location for 18 years and has faithfully served the community. The WIC disqualification is the first instance of wrong doing and to disqualify the store for three years would be a severe hardship on the surrounding area. According to USDA's SNAP Retailer Locator there are 17 SNAP retailers within a two mile radius of Habibi Grocery. Of those 17 retailers, 12 primarily sell non-food items and gasoline. Habibi Grocery is a neighborhood store with walk-in customers from nearby apartment complexes. Many of these customers have transportation problems. The current population for the firm's zip code is approximately 22,000 people. Of that number, 93% or more are African American. The school system is comprised of no less than 98% African American. The median household income is \$38,642. These are essentially single parent families who will be significantly impacted by a three year SNAP disqualification. The Louisiana WIC Program Notice of Disqualification fails to cite any events or incidents where Habibi Grocery was warned of certain past practices involving the grounds for disqualification. The Notice's statement "Based upon the nature and frequency of the violations..." is an overreach and unsupported by any facts. The Appellant questions where is the pattern based in the two WIC program violations cited. The Appellant requests that it be assessed a civil money penalty in lieu of a SNAP disqualification. In addition, the Appellant is willing to undertake any corrective measures recommended by USDA to insure a repeat of these violations never occur again. A three year SNAP disqualification will impose an economic hardship to the Appellant.

After considering the Appellant's responses and the evidence in the case, the Retailer Operations Division informed the Appellant, by letter dated March 17, 2020, that Habibi Grocery was not eligible for imposition of a hardship civil money penalty in lieu of disqualification and would be disqualified from participation as a retail store in the SNAP for a period of three years. The Appellant was also informed that the determination to disqualify Habibi Grocery from the SNAP on the basis of the WIC Program disqualification is not subject to administrative review; rather, the firm only has appeal rights with regards to its eligibility for a 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 March 26, 2020, the Appellant, through counsel, appealed the Retailer Operations Division's decision to deny assessing a civil money penalty and requested an administrative review of this action. FNS granted the Appellant's request for administrative review by letter dated April 7, 2020 and implementation of the sanction has been on hold pending completion of this review.

The record indicates that in an email correspondence to the Administrative Review Officer of April 28, 2020, the Appellant, through counsel, submitted additional information in support of the request for administrative review and requested an extension in time for providing additional response. The Appellant's counsel was granted the requested extension to May 12, 2020. In an email correspondence of May 12, 2020, the Appellant, through counsel, submitted additional information in support of its request for administrative 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 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)(i)(F) states, in part, "FNS shall disqualify from the SNAP any firm which is disqualified from the WIC Program ...for any of the following specific program violations: 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)(A) and (B) state "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”.

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 § 278.1(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 of 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 responses to the Charge Letter, in the administrative review request and in subsequent email correspondences, the Appellant, through counsel, stated the following summarized contentions, in relevant part:

- While Habibi Grocery has been disqualified from WIC, there has been no history of any previous disqualifications. Habibi Grocery has operated at its current location for 18 years and has faithfully served the community. The WIC disqualification is the first instance of wrong doing and to disqualify the store for three years would be a severe hardship on the surrounding area. The Louisiana WIC Program Notice of Disqualification of August 14, 2019 fails to cite any events or incidents where Habibi Grocery was warned of certain past practices involving the grounds for disqualification.

The Notice's statement "Based upon the nature and frequency of the violations..." is an overreach and unsupported by any facts. The Notice only points to two violations on June 10, 2018. Neither violation can hardly be considered a "pattern" of practices. The Appellant has been provided no evidence of past infractions by the firm. A three year SNAP disqualification seems a rather harsh penalty for infractions that occurred on the same day and amounted to no more than 5 U.S.C. § 552 (b)(6) & (b)(7)(C). This is not a trafficking case. A three year period of disqualification is out of proportion with the losses sustained by the WIC program. Such a penalty assessment is arbitrary and capricious.

- **7 CFR § 278.6 "Disqualification of retail food stores and wholesale food concerns, and imposition of civil money penalties in lieu of disqualifications" provides in pertinent part that. . .** (a) Authority to disqualify or subject to a civil money penalty. FNS may disqualify any authorized retail food store or authorized wholesale food concern from further participation in the program if the firm fails to comply with the Food and Nutrition Act of 2008, as amended, or this part. Such disqualification shall result from a finding of a violation on the basis of evidence that may include facts established through on-site investigations, inconsistent redemption data, evidence obtained through a transaction report under an electronic benefit transfer system, or the disqualification of a firm from the Special Supplemental Nutrition Program for Women, Infants and Children (WIC), as specified in paragraph (e)(8) of this section. *Disqualification shall be for a period of 6 months to 5 years for the firm's first sanction; . . .*
- The Appellant is willing to undertake any corrective measures recommended by USDA to insure a repeat of these violations never occur again.
- A three year SNAP disqualification will impose an economic hardship to the Appellant.
- According to USDA's SNAP Retailer Locator there are 17 SNAP retailers within a two mile radius of Habibi Grocery. Of those 17 retailers, 12 primarily sell non-food items and gasoline. Habibi Grocery is a neighborhood store with walk-in customers from nearby apartment complexes. Many of these customers have transportation problems. The current population for the firm's zip code is approximately 22,000 people. Of that number, 93% or more are African American. The school system is comprised of no less than 98% African American. The median household income is \$38,642. These are essentially single parent families who will be significantly impacted by a three year SNAP disqualification.
- The Appellant requests that it be assessed a civil money penalty in lieu of a SNAP disqualification, if not a warning, as this was a one-time offense and the firm has no previous warnings or history of this conduct. Denial of a civil money penalty is arbitrary and capricious.

## ANALYSIS AND FINDINGS

### WIC Program Violations

With regard to the Appellant's contentions regarding the firm's WIC Program violations, in accordance with 7 CFR § 278.6(e)(8)(ii)(A) and (B), the Appellant was provided with specific notice that Habibi Grocery could be disqualified from the SNAP based on the WIC

violations committed by the firm. This notice was given to the firm by the Louisiana WIC State Agency in a letter dated August 14, 2019. A copy of that notice was provided to FNS by the Louisiana Department of Health Office of Public Health (Louisiana WIC State Agency) and FNS was notified that the Appellant's appeal rights had been exhausted. Additionally, in accordance with 7 CFR § 278.6(e)(8), the Appellant was informed by both the Louisiana WIC State Agency and the FNS Retailer Operations Division that the decision to reciprocally disqualify Habibi Grocery from the SNAP on the basis of the WIC disqualification would not be subject to administrative or judicial review. The Appellant contends that 7 CFR § 278.6 provides that . . . "Disqualification shall be for a period of 6 months to 5 years for the firm's first sanction". However, 7 CFR § 278.6(e)(8) 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.

Consequently, this administrative review has no authority to render an opinion regarding the WIC violations that were uncovered by the state of Louisiana. According to the state's records, the Appellant firm engaged in a pattern of claiming reimbursement for the sale of an amount of a specific food item that exceeds the store's documented inventory of that food item for a specific period and a pattern of exchanging non-food items for a WIC food instrument. 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.

With all of these facts clearly in place and because the Retailer Operations Division's decision to reciprocally disqualify the firm from the SNAP 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).

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

### **Remedial Action**

The Appellant contends that it is willing to undertake any corrective measures recommended by USDA to insure a repeat of these violations never occur again.

It is important to clarify for the record that the purpose of this review is to either validate or to invalidate the earlier decision of the Retailer Operations Division. This review is limited to what circumstances were at the basis of the Retailer Operations Division action at the time such action was made. It is not the authority of this review to consider what subsequent remedial actions may have been taken so that the store may begin to comply with program requirements. There is no provision in the SNAP regulations or internal agency policy directives for waiver or reduction of an administrative penalty assessment on the basis of after-the-fact corrective action implemented subsequent to investigative findings of program violations. Therefore, the Appellant's contention that it has taken or will take corrective actions, though they would have

been valuable towards preventing future program violations, does not provide any valid basis for dismissing the charges or for mitigating the penalty imposed.

### **Financial Hardship**

The Appellant contends that a three year SNAP disqualification will impose an economic hardship to the firm. However, there is no provision in the SNAP regulations or internal agency policy directives for waiver or reduction of an administrative penalty assessment on the basis of possible economic hardship to the firm resulting from imposition of such penalty. To allow store ownership from being excused from assessed administrative penalties based on purported economic hardship to the firm would render virtually meaningless the enforcement provisions of the Food and Nutrition Act of 2008 and the enforcement efforts of the USDA.

Moreover, giving special consideration to economic hardship to the firm would forsake fairness and equity, not only to competing stores and other participating retailers who are complying fully with program regulations, but also to those retailers who have been disqualified from the program in the past for similar violations. Therefore, the Appellant's contention that the firm may incur financial hardship based on the assessment of an administrative penalty does not provide any valid basis for dismissing the charges or for mitigating the penalty imposed.

### **Hardship Civil Money Penalty**

The Appellant contends that according to USDA's SNAP Retailer Locator there are 17 SNAP retailers within a two mile radius of Habibi Grocery. Of those 17 retailers, 12 primarily sell non-food items and gasoline. Habibi Grocery is a neighborhood store with walk-in customers from nearby apartment complexes. Many of these customers have transportation problems. The current population for the firm's zip code is approximately 22,000 people. Of that number, 93% or more are African American. The school system is comprised of no less than 98% African American. The median household income is \$38,642. These are essentially single parent families who will be significantly impacted by a three year SNAP disqualification. The Appellant requests that it be assessed a civil money penalty in lieu of a SNAP disqualification, if not a warning, as this was a one-time offense and the firm has no previous warnings or history of this conduct. Denial of a civil money penalty is arbitrary and capricious.

However, a review of the agency's case record shows that the Retailer Operations Division properly considered whether or not SNAP recipients would experience hardship as a result of the firm's disqualification. Under the provisions found in 7 CFR § 278.6(f)(1), FNS may impose a civil money penalty (CMP) in lieu of disqualification when hardship to SNAP households exists. However, 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." [Emphasis added.]

It is the determination of this review that a disqualification of Habibi Grocery, a medium grocery store, would not cause hardship to SNAP households because there are other comparable or larger SNAP authorized stores located in the area of the Appellant firm. **5 U.S.C. § 552 (b)(7)(E).**

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 the regulations 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, the earlier determination that Habibi Grocery's disqualification would not create a hardship to customers, as differentiated from potential inconvenience, is sustained and a CMP in lieu of SNAP disqualification is not appropriate in this case.

### **CONCLUSION**

Based on the discussion above, the determination by the Retailer Operations Division to deny Habibi Grocery a hardship civil money penalty in lieu of a three year disqualification from the SNAP as a result of WIC Program violations is sustained.

In accordance with the Food and Nutrition Act of 2008, and the regulations thereunder, this 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 (10) days prior to the expiration of this three year period. In accordance with 7 CFR § 278.1(b)(4), at the time of any such new application for program participation, the firm would be advised by the office receiving such an application of the necessity, as a store previously sanctioned for program violations, also to post a collateral bond or irrevocable letter of credit as a condition for again being authorized to participate in the program.

### **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

May 26, 2020