

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

H & H Mart,

Appellant,

v.

Case Number: C0208169

Retailer Operations Division,

Respondent.

FINAL AGENCY DECISION

It is the decision of the USDA that there is sufficient evidence to support that the Retailer Operations Division properly imposed a reciprocal one-year disqualification of H & H Mart as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP) as a result of violations in the Women, Infants and Children (WIC) Program. There is also sufficient evidence to support that the denial of a hardship civil money penalty (CMP) is appropriate and in accordance with the SNAP regulations at 7 CFR § 278.6(f)(1).

ISSUE

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with 7 CFR § 278.6(e)(8)(iii) and 7 CFR § 278.6(f)(1), when it disqualified the Appellant for a reciprocal one-year disqualification period and denied a hardship 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 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 an e-mail dated June 7, 2017, the Connecticut Department of Public Health informed the Retailer Operations Division that H & H Mart had been disqualified from the WIC Program for one (1) year effective March 16, 2017. The WIC violations consisted of providing unauthorized food items in exchange for WIC benefits including charging for WIC food provided in excess of those listed on the WIC benefits in violation of 7 CFR § 246.12(1)(1)(iv)(A). The State agency informed FNS that the decision was final and not subject to further administrative appeal.

In a charge letter dated April 24, 2018, the Retailer Operations Division notified the Appellant that it was considering a one-year reciprocal disqualification from the SNAP under 7 CFR § 278.6(e)(8) as a result of the one-year WIC disqualification. The letter informed the Appellant that it “may present any information, explanation, or evidence indicating that (1) your firm has not been disqualified from the WIC Program; (2) you were 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 charge letter was delivered to the Appellant on April 25, 2018.

The Appellant responded to the charge letter but did not address the three (3) factors cited in the April 24, 2018 charge letter. Instead the Appellant made contentions regarding its history and background, sales information, and prospects for becoming a WIC vendor in the future among other contentions.

After considering the evidence in the case, the Retailer Operations Division informed the Appellant, in a letter dated May 23, 2018, that all opportunities for a review of the WIC disqualification had been exhausted or had expired. Therefore, the one-year disqualification from the SNAP was final and not subject to administrative review as provided by 7 CFR § 278.6(e)(8)(iii). The determination letter also stated that the firm was not eligible for a hardship CMP under 7 CFR § 278.6(f)(1) as there are other authorized retail stores in the area selling as large a variety of staple foods at comparable prices. The determination letter noted that a SNAP administrative review was only available regarding the firm’s eligibility for a hardship CMP.

In a letter dated June 4, 2018, the Appellant requested an administrative review of the Retailer Operation Division’s decision. The appeal was granted and implementation of the one-year disqualification from the SNAP has been held in abeyance pending completion of this review.

STANDARD OF REVIEW

In appeals of adverse actions, an appellant bears the burden of proving by a preponderance of the evidence that the administrative action should be reversed. That means 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 contained in the Food and Nutrition Act of 2008, as amended, 7 U.S.C. § 2021 and 278 of Title 7 of the Code of Federal Regulations (CFR). In particular, 7 CFR § 278.6 establishes the authority upon which FNS may disqualify any authorized retail food store from further participation in the SNAP if the firm fails to comply with the Food Stamp Act including disqualification of a firm from the WIC Program as specified in 7 CFR § 278.6(e)(8).

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

FNS shall disqualify from the Supplemental Nutrition Assistance Program (SNAP) any firm which is disqualified from the WIC Program ... 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 ... **(F) A pattern of charging for ... foods provided in excess of those listed on the food instrument.....** [Emphasis added.]

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 this section that such action will not cause a hardship for participating SNAP households.

7 CFR § 278.6(e)(8)(iii) states, in part, that the 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. [Emphasis added.]

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 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....

APPELLANT'S CONTENTIONS

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

- The Appellant does not understand why there was a one-year delay between the WIC disqualification and the SNAP disqualification. The firm's one-year disqualification from the SNAP should have run at the same time (or within a couple of months) as the firm's WIC disqualification.
- The store requests reconsideration for a hardship CMP.

- The store is willing to submit a collateral bond to stay in the SNAP.

The preceding may represent only a brief summary of the 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.

ANALYSIS AND FINDINGS

Reciprocal Disqualification

The Appellant admits that the State agency, in a letter dated March 1, 2017, previously informed the Appellant that it had committed a WIC violation and that a WIC disqualification might result in a SNAP reciprocal disqualification without the opportunity for a separate administrative or judicial review under the SNAP. The Appellant requested a hearing and, on May 23, 2017, the state hearings liaison issued its final memorandum of decision which upheld the State agency's decision. Therefore, as stated in the Retailer Operations Division letter dated May 23, 2018, all opportunities for a review of the WIC disqualification have been exhausted or have expired.

7 CFR § 278.6(e)(8)(iii)(C) states that the SNAP reciprocal disqualification shall not be subject to administrative or judicial review. The determination letter properly noted that a SNAP administrative review was only available regarding the firm's eligibility for a hardship CMP. Therefore, the one-year reciprocal disqualification from the SNAP is final and not subject to administrative review.

The Appellant contends that the SNAP disqualification should have run concurrently, or nearly at the same time, as the WIC disqualification. Regarding this contention, the SNAP regulations at 7 CFR § 278.6(e)(8)(iii)(B) states, that the SNAP disqualification "may begin at a later date than the WIC disqualification." There is no requirement that the SNAP disqualification be concurrent with the WIC disqualification or within a specified timeframe of the SNAP disqualification. The regulations only state that it shall be the same length of time as the WIC disqualification.

The Appellant states its willingness to submit a collateral bond to remain in the SNAP. However, there is no provision in the SNAP regulations that would allow a store to remain on the SNAP through a collateral bond under the circumstances of this case.

Civil Money Penalty

A review of the case record documents that the Retailer Operations Division considered the Appellant's eligibility for a hardship CMP under 7 CFR § 278.6(f)(1). That regulation reads, in part, "FNS may impose a civil money penalty as a sanction in lieu of disqualification when...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." [Emphasis added.]

The Retailer Operations Division properly determined that a one-year disqualification of H & H Mart, a convenience store, would not cause a hardship to SNAP households, as opposed to a mere inconvenience. Agency mapping systems show that there are 15 SNAP authorized stores within a one-mile radius of the Appellant store. These SNAP authorized stores include a small grocery store, two (2) medium grocery stores, and two (2) supermarkets. These grocery stores and supermarkets in particular carry a greater depth and breadth of stock at likely comparable or better prices than a convenience store like H & H Mart. In conclusion, the Retailer Operations Division decision not to assess a hardship CMP in lieu of a one-year disqualification is sustained as appropriate under 7 CFR § 278.6(f)(1).

CONCLUSION

Based on the analysis above, the decision to deny a hardship CMP in lieu of a one-year reciprocal SNAP disqualification against H & H Mart is sustained. In accordance with the Food and Nutrition Act of 2008, and the SNAP regulations, the one-year period of disqualification from the SNAP shall become effective thirty (30) days after receipt of this letter. A new application for SNAP may be submitted by the firm ten days prior to the expiration of this one-year SNAP disqualification period.

RIGHTS AND REMEDIES

Section 14 of the Food and Nutrition Act of 2008 (7 U.S.C. § 2023) and Title 7, Code of Federal Regulations, Part 279.7 (7 CFR § 279.7) addresses 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

RONALD C. GWINN
Administrative Review Officer

August 6, 2018