

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

H K Market,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0219121

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 Retailer Operations Division to deny H K 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 Retailer Operations Division 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 August 9, 2019.

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 July 18, 2019, the Retailer Operations Division informed Appellant that as the result of a March 25, 2019, California WIC State Agency disqualification action due to violations of WIC program rules and regulations, the Retailer Operations Division 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 dated July 23, 2019, that did request a civil money penalty (CMP). By letter dated August 9, 2019, the Retailer Operations Division 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 August 18, 2019, Appellant, appealed the Retailer Operations Division'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:

- The owners apologize for the violations. They were not aware of the issue until they received the WIC disqualification letter dated March 25, 2019. The violations were made by the firm’s bookkeeper who had no knowledge of WIC and recorded the wrong amounts on the vouchers. The violations were not intentional and the overcharged amounts **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**;
- While the WIC disqualification letter did advise that WIC disqualification may result in SNAP disqualification, the owners were not aware of this due to their lack of understanding. The owners did not appeal the WIC disqualification since they did not understand the consequences until they received the FNS charge letter and also because they have very few customers using WIC and could not make any excuses since the violations were due to their bookkeeper’s mistake;
- The firm is a Korean supermarket with many SNAP customers that offers various substantial staple food items as well as authentic Korean foods. Many customers eat Korean foods since the firm has its own unique recipes and taste. There are multiple items that customers can only purchase at the firm within a certain distance. The firm also sells more Korean foods than any other Korean supermarket and offers fresh fruits and vegetables at very competitive prices. Many customers do not drive, but walk to the store so travelling even one or two blocks by foot would cause them a hardship. Many also do not speak English and the firm helps them to use their EBT cards and check their balances daily and wishes to continue being of assistance to them;
- The firm has been a SNAP retailer for more than 30 years with SNAP customers being a large part of their customer base. The owners do not want to cause any hardship to their customers who would have very limited or no choice to shop for their essential foods as well as Korean foods and are already complaining about the loss of SNAP. The numbers of SNAP customers are also growing due to the recent closure of a similar nearby market; and,
- The owners have also trained their cashiers and bookkeeper regarding SNAP eligible and

ineligible items to prevent any further violations. A penalty instead of the disqualification is requested so the firm can continue to serve their customers.

Appellant submitted sales summary reports for June – August 2019 showing that the firm averaged about 50 SNAP customers daily in August 2019 in support of these contentions.

ANALYSIS AND FINDINGS

By letter dated March 25, 2019, the California Department of Public Health, the WIC State Agency, disqualified Appellant from participating in the WIC program for three years. The firm did not appeal the WIC State Agency disqualification action. The subject firm was disqualified from the California WIC program for overcharging the WIC program for the sale of WIC foods, a violation that warrants a three year WIC disqualification period. The California Department of Public Health 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. Additionally, the California Department of Public Health letter noted that the Appellant firm had received a warning letter dated October 22, 2018, warning that if the overcharging continued the firm may be disqualified from the WIC Program and that a WIC disqualification may also result in disqualification as a SNAP retailer.

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 both applications. The reauthorization application specifically states 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.

It is important to clarify for the record that this review is limited to what circumstances were at the basis of the Retailer Operations Division’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. As cited herein, the disqualification from SNAP for three years as the result of WIC Program violations is not subject to administrative review. The sole appealable issue in this case is if the Retailer Operations Division properly considered the firm’s eligibility for a hardship CMP.

Regarding Appellant's contentions, it is noted that the firm's ownership received warning letters advising them of WIC program violations in 2007, 2012, and again in 2018. The October 22, 2018, warning letter that addressed overcharging specifically stated that the WIC program Vendor Agreement requires the vendor to enter the actual selling price of the specific quantity of supplemental foods on each food instrument or CVV at the time of purchase and before the participant signs each food instrument. Therefore, the firm's bookkeeper should not have been involved in entering the selling price on WIC food instruments.

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 six other SNAP authorized super stores located within 0.98 miles of Appellant's location with two of the six super stores specializing in Korean foods and a third super store specializing in Asian and Korean foods. The three super stores offering Korean foods are located 0.54, 0.75, and 0.93 miles from Appellant's location with the two closest being located about four and six blocks away with both stores located on Western Avenue that has fixed route scheduled bus service to facilitate shopping. All of the comparable super stores stock adequate varieties of food in all four staple food categories and in perishables as required by FNS with at least three stocking ethnic Korean foods.

The nearby super stores appear readily accessible to SNAP recipients and offer a variety of staple and ethnic 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.

CONCLUSION

Based on the discussion above, the determination by the Retailer Operations Division 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

November 25, 2019