

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

**Home Run Foods,**

**Appellant,**

**V.**

**Retailer Operations Division,**

**Respondent.**

**Case Number: C0218235**

**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 Supplemental Nutrition Assistance Program (SNAP) as a result of Women, Infants and Children (WIC) Program violations, was properly rendered by the Retailer Operations Division against Home Run Foods (hereinafter Appellant).

**ISSUE**

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with 7 CFR § 278.6(e)(8) in its administration of the Supplemental Nutrition Assistance Program (SNAP) when it denied assessing a civil money penalty in lieu of a three (3) year disqualification against Appellant on July 25, 2019.

**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**

FNS was advised by the Wisconsin WIC State Agency in email correspondence dated July 23, 2019, that Appellant was being disqualified from the WIC Program for three (3) years identified as the period starting January 14, 2019, and that Appellant failed to file an appeal. The correspondence was appended with a Wisconsin WIC State Agency letter dated June 22, 2018, addressed to Appellant and that included information on violations committed against the terms and conditions contained in the Vendor Agreement. Those violations included ones pursuant to

7 CFR § 278.6(e)(8)(i)(A) “A pattern of claiming reimbursement for the sale of an amount of specific food items for a specific period.”

In a letter dated January 30, 2019, the Retailer Operations Division informed ownership of the agency’s intention to disqualify 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. In correspondence dated February 5, 2019, Appellant, through counsel, requested an extension in which to respond to the charge letter. In correspondence dated February 6, 2019, received on February 7, 2019, Retailer Operations Division granted the extension to February 27, 2019.

In correspondence dated February 7, 2019, Appellant, through counsel submitted a Freedom of Information Act (FOIA) request for documentation. The record reflects that the requested documentation was received by counsel on February 26, 2019. Counsel was also informed in email correspondence dated September 10, 2019, that certain correspondence must be requested from the State of Wisconsin Department of Health Services and provided with the address in which to request documentation.

In correspondence dated May 24, 2019, Appellant, through counsel, responded to the charge letter and generally stated that the store is located in a residential area within a free standing building approximately 1,650 square feet in size. The store provides the surrounding community with a variety of foodstuffs, nearly all of which qualifies as eligible items under SNAP regulations. Counsel mentioned the household profiles for the 4th Congressional District of Wisconsin and the percentages of households that have children under 18 years of age, households that have one or more people aged 60 or greater, households that have disabled individuals and households that suffer from poverty. Appellant, through counsel, stated that none of the surrounding SNAP retailers are comparable to the convenient location of Home Run Foods nor are they comparable with regard to the variety and quantity of eligible SNAP items offered at the store or the operational hours of the store. Counsel stated that the location of the other authorized SNAP retailers would cause significant hardship on the local SNAP participants if they were forced to shop there rather than at Home Run Foods. The stores would create unnecessary hardship on the SNAP households who have limited modes of transportation and generally have no choice but to walk with their groceries and for the ones who require a safer access route to the grocery store, avoiding the main streets and/or intersections due to their elderly age, small children and/or their disabilities.

Appellant, through counsel, stated that a copy of the alleged WIC letter was not included with the charging letter nor was that a citation to the specific WIC violation which allegedly occurred at the store to support a disqualification under § 278.6(e)(8) and as such, FNS has exceeded the scope of § 278.6(e)(8) by issuing a reciprocal disqualification without providing proof thereof that the requirements for said disqualification were in fact met. Appellant, through counsel, requested that a hardship civil money penalty be granted in lieu of the disqualification.

Retailer Operations Division considered Appellant’s response to the charge letter and the facts of the case, and in correspondence dated July 25, 2019, notified Appellant that it was disqualified from the SNAP. The Determination letter stated in relevant part:

*“You were informed of a possible reciprocal Supplemental Nutrition Assistance Program (SNAP) disqualification as a result of the WIC disqualification action. All opportunities for appeal of the WIC State agency action have been exhausted or have expired. Therefore, in accordance with Section 278.6(e)(8)(iii) of the SNAP regulations, your firm shall be disqualified from the Supplemental Nutrition Assistance Program for a period of 3 years. This determination is final and is not subject to administrative review.*

*We considered your eligibility for a hardship civil money penalty (CMP) according to the terms of Section 278.6(f)(1) of the SNAP regulations. We have determined that you are not eligible for a CMP because there are other authorized retail stores in the area selling a variety of staple foods at comparable prices”*

### **STANDARD OF REVIEW**

In appeals of adverse actions, an appellant bears the burden of proving by a preponderance of the evidence that the administrative actions 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**

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)(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**

In correspondence dated August 2, 2019, ownership, through counsel, made the following summarized contentions in response to the Retailer Operations Division determination that Appellant was not eligible for a CMP in lieu of disqualification, in relevant part:

1. There are nine (9) other participating SNAP retailers within a one mile radius however none of these stores are comparable to the convenient location of Home Run Foods nor are they comparable with regard to the variety and quantity of eligible SNAP items offered at the store or the operational hours.
2. The location of the other authorized SNAP retailers would cause significant hardship on the local SNAP participant if they were forced to shop there rather than at Home Run Foods.
3. FNS Failed to satisfy the requirements of § 278.6(e)(8)(ii) as there was no “individual and specific notice” sent to the Appellant’s informing them that they could be disqualified from SNAP based on the WIC violations. There was no “signed and dated copy” of this notice provided to the Department b the WIC administering agency. It is entirely unclear to the Appellants whether or not the Department actually made a determination in accordance with the applicable regulations regarding the eligibility of the Appellant’s for a hardship civil money penalty.
4. FNS Exceeded the scope of § 278.6(e)(8) in that the reason for Appellants’ WIC disqualifications did not fall within the requisite categories set forth under § 278.6(e)(8)(i)(A)-(F) to trigger a reciprocal SNAP disqualification.

The preceding may represent only a brief 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.

## ANALYSIS AND FINDINGS

The record shows that Appellant was informed in the FNS letter of charges dated January 30, 2019, as well as in the FNS letter of determination dated July 25, 2019, that the determination to disqualify 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 Wisconsin 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 Appellant was duly notified that the WIC Program disqualification may result in a reciprocal SNAP authorization disqualification in the notice from the Wisconsin WIC State Agency dated June 22, 2018 and received via certified mail on June 25, 2018. Page 9, Paragraph C, of the WIC disqualification notice dated June 22, 2018 states "C. Disqualification from WIC may also result in disqualification as a retailer in the Supplemental Nutrition Assistance Program (SNAP), formerly known as the Food Stamp Program. Such disqualification is not subject to administrative or judicial appeal under SNAP. *See* 7 CFR 246.18(b)(1). Accordingly, WIC has disqualified you as an authorized WIC vendor for a period of three (3) years."

## CIVIL MONEY PENALTY

With regard to Appellant's contentions, Retailer Operations Division has rendered a finding pursuant to 7 CFR § 278.6(f) that it would not be appropriate to impose a CMP in lieu of a period of disqualification because of its determination that Appellant is not the only authorized retail food store in the area "selling as large a variety of staple food items at comparable prices."

It is noted that a store visit was conducted on Appellant to ascertain its depth and breadth of stock compared to the surrounding SNAP authorized retailers. The record reflects that Appellant had no optical scanners at checkout and there was one (1) shopping basket and no shopping carts for customer use and the store does not sell one food type such as meat, poultry, dairy, seafood, fruits, baked goods or vegetables. The store's condition included empty/broken/unused coolers/freezers, expired/outdated/spoiled food, ice crystals on frozen food and empty shelves. The deli case that would normally have meat and cheeses available was broken. The FNS contractor was informed that the display of cereal near the front door was not for sale because it was expired but that it was free to customers. The FNS contractor also found other expired food items throughout the store as well as moldy bread items and expired cans of Similac Neosure and cans of Gerber Gentle that were coming up on expiration. This is indicative of low demand from EBT households as well as other non-EBT shoppers.

A comparison of the USDA store visit of Appellant's store to that of the other SNAP authorized retailers does not show that Appellant had a superior variety, quantity, and quality of food inventories and that Appellant does not offer any specialty or ethnic foods not found at the other nearby SNAP authorized retailers. There also was nothing to indicate that Appellant had lower food prices or that a disqualification would cause hardship to SNAP households.

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 Appellant as a convenience store, as defined in accordance with SNAP regulations, and is located in an area where nine (9) alternative SNAP authorized firms are located within a one (1) mile radius. The alternative SNAP authorized firms include five (5) additional convenience stores, two (2) supermarkets and one (1) medium grocery store; and that the alternative SNAP authorized firms are identified as selling as large a variety or staple food items at prices comparable or better than those of Appellants’. Therefore, by definition, there is no hardship that will result as there is no lack of comparable stores in the area.

### **CONCLUSION**

Based on the discussion herein, the decision to deny the imposition of a hardship CMP in lieu of a three (3) year SNAP disqualification against Home Run Foods is sustained. In accordance with the Food and Nutrition Act of 2008, as amended, and the SNAP regulations, the period of disqualification shall become affective 30 days after receipt of this letter. A new application for participation may be submitted by the firm 10 days prior to the expiration of this three (3) 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 once more 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, as amended, (7 U.S.C. § 2023) and to Title 7, Code of Federal Regulations, Part 279.7 (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 (FOIA), 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.

Monique Brooks  
ADMINISTRATIVE REVIEW OFFICER

January 27, 2020