

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

**Joseph's Food Corp,**

**Appellant,**

**v.**

**Case Number: C0206152**

**Retailer Operations Division,**

**Respondent.**

**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 six (6) 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 Joseph's Food Corp.

**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 six year disqualification against Joseph's Food Corp. on March 26, 2018.

**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 February 7, 2018, the Retailer Operations Division informed the Appellant of the agency's intention to impose a six year disqualification against the Appellant firm from participating as an authorized retailer in the SNAP. The firm was disqualified for six years from the WIC Program for violations that included, pursuant to 7 CFR § 278.6(e)(8)(i)(A) 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 of time".

FNS was advised by the New York WIC State Agency, via correspondence dated February 2, 2018, that the Appellant was being disqualified from the WIC Program for six years effective January 18, 2018 and that all of the Appellant's appeal rights had been exhausted. The WIC State Agency also provided FNS with a copy of a letter dated December 29, 2017 that they had sent to the Appellant advising him that Joseph's Food Corp. could be disqualified from the SNAP based on the WIC Program violations that occurred at the firm. The letter also informed the Appellant of his appeal rights regarding the WIC Program disqualification.

In telephone conversations with Retailer Operations staff on February 14, 2018, February 15, 2018, March 8, 2018, and March 15, 2018 and in a letter received by the Retailer Operations Division on March 21, 2018, the Appellant, through counsel, replied to the charges outlined in the February 7, 2018 Charge Letter indicating that the WIC Program violations were unintentional mistakes resulting from poor record keeping. The Appellant requested that FNS impose a hardship civil money penalty in lieu of a six year SNAP disqualification as a SNAP disqualification will impose a substantial hardship to the nearby population.

After considering the Appellant's replies and the evidence in the case, the Retailer Operations Division informed the Appellant by letter dated March 26, 2018, that Joseph's Food Corp. 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 six years. The Appellant was also informed that the determination to disqualify Joseph's Food Corp. 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. The March 26, 2018 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 6 years. This determination is final and is not subject to administrative review.”

In a letter postmarked April 3, 2018, 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 16, 2018 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 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)(A) 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 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 of time ...

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 the Appellant’s replies to the Charge Letter and in the review request postmarked April 3, 2018, the Appellant stated the following summarized contentions, in relevant part:

- The WIC Program violations were unintentional mistakes resulting from poor record keeping. The Appellant contests its WIC disqualification and he was not aware that he had the opportunity to appeal the disqualification. In addition, the Appellant was not informed by the WIC Program of the possibility that Joseph’s Food Corp. could be disqualified from the SNAP as no correspondence was provided to him in Spanish, his native language, or by any other means of communication informing him of the possibility of such disqualification.
- FNS did not warn or inform the Appellant about the possibility that WIC Program violations could warrant a disqualification of Joseph’s Food Corp. from the SNAP.
- A SNAP disqualification will impose a financial hardship on Joseph’s Food Corp. and may result in the store having to close.
- As indicated in the numerous customer affidavits provided to FNS, a SNAP disqualification will impose a hardship on SNAP customers as there is a lack of authorized retail food stores in the area selling a comparable staple food stock at comparable prices.

In support of the Appellant’s contentions, the following documents were submitted to FNS:

- 17 signed and notarized affidavits from SNAP customers attesting that a SNAP disqualification of Joseph’s Food Corp. will impose a hardship on them.

### **ANALYSIS AND FINDINGS**

In accordance with 7 CFR § 278.6(e)(8)(ii)(A) and (B), the Appellant was provided with specific notice that Joseph’s Food Corp. could be disqualified from the SNAP based on the WIC violations committed by the firm. This notice was given to the firm by the New York WIC State Agency in a letter dated December 29, 2017. A copy of that notice was provided to FNS by the New York State Department of Health in a letter dated February 2, 2018.

Additionally, in accordance with 7 CFR § 278.6(e)(8), the Appellant was informed by both the New York WIC State Agency and the FNS Retailer Operations Division that the decision to reciprocally disqualify Joseph’s Food Corp. from the SNAP on the basis of the WIC disqualification would not be subject to administrative or judicial review. Further, the

regulations state 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 New York. 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 of time. Pursuant to the state's administrative regulations, such a violation warrants a six 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 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 six year disqualification from the SNAP.

### **WIC Program Violations Unintentional**

The Appellant contends that the WIC Program violations were unintentional mistakes resulting from poor record keeping. The Appellant contests its WIC disqualification and he was not aware that he had the opportunity to appeal the disqualification. In addition, the Appellant was not informed by the WIC Program of the possibility that Joseph's Food Corp. could be disqualified from the SNAP as no correspondence was provided to him in Spanish, his native language, or by any other means of communication informing him of the possibility of such disqualification.

With regard to the Appellant's contentions, this administrative review has no authority to render an opinion regarding WIC violations that were uncovered by the state of New York. Pursuant to the state's administrative regulations, such a violation warrants a six year WIC disqualification. The record also shows that the Appellant's appeal rights have been exhausted and the WIC Program disqualification was appropriately upheld.

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 six year disqualification from the SNAP.

## **Unaware WIC Program Disqualification Results in SNAP Disqualification**

The Appellant contends that FNS did not warn or inform him about the possibility that WIC Program violations could warrant a disqualification of Joseph's Food Corp. from the SNAP. However, in the December 29, 2017 letter that was sent from the New York Department of Health and received by the Appellant, the WIC State Agency advised the Appellant that Joseph's Food Corp. could be disqualified from the SNAP based on the WIC Program violations that occurred at the firm. The letter also informed the Appellant of his appeal rights regarding the WIC Program disqualification.

The SNAP retailer training materials that had been provided to the Appellant by FNS also advised him of this potential for a SNAP disqualification. In addition, the Certification and Signature page of the firm's SNAP Reauthorization Application for Stores that was signed on January 16, 2016 advised the Appellant that a WIC Program disqualification may result in Joseph Food Corp.'s disqualification from the SNAP as stated below:

- 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.

As such, the Appellant's contention that FNS did not warn or inform him about the possibility that WIC Program violations could warrant a disqualification of Joseph's Food Corp. from the SNAP is unfounded.

## **Imposed Financial Hardship**

The Appellant contends that a SNAP disqualification will impose a financial hardship on Joseph's Food Corp. and may result in the store having to close. 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 as indicated in the numerous customer affidavits provided to FNS, a SNAP disqualification will impose a hardship on SNAP customers as there is a lack of

authorized retail food stores in the area selling a comparable staple food stock at comparable prices. 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 Joseph's Food Corp., 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. Agency mapping systems document that there are 56 similar or larger SNAP authorized retail stores located within a one mile radius of Joseph's Food Corp. including 12 super stores and 12 supermarkets. These area authorized stores offer a variety and quality of staple foods comparable to, or better than, those offered by Joseph's Food Corp. Joseph's Food Corp. does not carry any unique items or foods that cannot be found at these other area SNAP authorized retail stores.

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 Joseph Food Corp.'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 Joseph's Food Corp. a hardship civil money penalty in lieu of a six 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

July 6, 2018