

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

Keefe & 3rd Supermarket,

Appellant,

v.

Case Number: C0228592

Retailer Operations Division,

Respondent.

FINAL AGENCY DECISION

The USDA, Food and Nutrition Service (FNS) finds that the decision of the Retailer Operations Division to impose a three year disqualification from the Supplemental Nutrition Assistance Program (SNAP) as a result of Women, Infants, and Children (WIC) program violations, was properly rendered against Keefe & 3rd Supermarket (Appellant). There is also sufficient evidence to support a finding that the denial of a hardship Civil Money Penalty (CMP) is appropriate and in accordance with Section 278.6(f)(1) of the SNAP regulations.

ISSUE

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with 7 CFR § 278.6(e)(8)(iii) in its administration of the SNAP when it disqualified Appellant for a period of three years and denied assessing a hardship civil money penalty in lieu of disqualification by letter dated April 19, 2019.

AUTHORITY

7 USC § 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 a letter dated April 15, 2020, the Retailer Operations Division informed Appellant that as the result of the December 12, 2017, Wisconsin WIC program disqualification for three years, 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).

Appellant replied to the charge letter by phone on April 20, 2020, and stated it was not aware of the SNAP disqualification.

The Retailer Operations Division reviewed all documents provided by the Wisconsin Department of Health, and determined the State Agency's actions met the regulatory requirements, and that the firm received proper notification of the potential that it could be reciprocally disqualified from SNAP in response to the WIC disqualification. On April 29, 2020, the Retailer Operations Division informed Appellant that in accordance with Section 278.6(e)(8)(iii) of the SNAP regulations, Appellant's disqualification would not cause 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 postmarked May 7, 2020, ownership appealed the Retailer Operations Division's decision to deny the 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.

STANDARD OF REVIEW

In appeals of adverse actions, the Appellant bears the burden of proving by a clear 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, 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. § 2021 and 278 of Title 7 of the Code of Federal Regulations (CFR). 7 CFR § 278.6 establishes the authority upon which a reciprocal SNAP disqualification may be imposed against a firm disqualified from the WIC program.

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

FNS **shall disqualify** from the Supplemental Nutrition Assistance Program (SNAP) any firm which is disqualified from the WIC Program: (i) 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 ... a pattern of claiming reimbursement for the sale of an amount of a specific food item which exceeds the store's documented inventory of that food item for a specified period of time [Emphasis added.]

7 CFR § 278.6(e)(8)(ii) states:

FNS shall not disqualify a firm from the Food Stamp Program 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 the Food Stamp Program 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 Food Stamp [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 the Food Stamp Program. [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 . . . 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 store in the area selling as large a variety of staple food items at comparable prices. (Emphasis Added)

APPELLANT'S CONTENTIONS

In the administrative review request dated May 7, 2020, Appellant provided the following summarized contentions, in relevant part:

- Appellant has owned the store since 2003 and this is the first incident in over 17 years.
- Appellant's attorney provided Appellant with wrong advice about not appealing the WIC disqualification.
- Appellant does not know why it took two years after the WIC disqualification.
- Appellant will not be able to survive in business if it loses its SNAP authorization.
- Appellant's family of six will also suffer if the firm is disqualified.

The preceding may represent only a brief summary of the Appellant's contentions presented in this matter. However, in reaching a decision, full attention was given to all contentions presented, including any not specifically recapitulated or specifically referenced.

ANALYSIS AND FINDINGS

Regarding Appellant's contention, it is important to clarify for the record that this review is limited to what circumstances were at the basis of the Retailer Operation Division's action at the time such action was made. As cited, the disqualification from SNAP for three years 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. Appellant contends that the SNAP disqualification came two years after 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.

No Previous Violations

Appellant contends that this is the first time that it has had any violations in 17 years. Regarding this contention, a record of participation in the SNAP with no previously documented instance of violations does not constitute valid grounds for dismissal of the current charges of violations or for mitigating the impact of the violations upon which they are based. There is no provision in the Act or regulations that reverses or reduces a sanction based upon a lack of prior violations by a firm and its owners, managers and/or employees.

Appellant Hardship

Appellant contends that it will lose its business if it is disqualified. It is recognized that economic hardship is a likely consequence whenever a store is disqualified from participation in SNAP. However, there is no provision in the SNAP regulations for a 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 excuse ownership 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, Appellant's contention that the firm will incur economic hardship based on the assessment of an administrative penalty does not provide any valid basis for dismissing the charges or for mitigating the penalty imposition.

Civil Money Penalty

The Retailer Operations Division reviewed whether or not Appellant was eligible for a hardship CMP in lieu of the three year disqualification. For a determination of hardship, as opposed to inconvenience, there must be an absence of any other authorized retail food store comparable to

the disqualified store, in the area of consideration. The Retailer Operations Division determined that there of 39 authorized stores located within a one-mile radius of Appellant including five combination groceries, 27 other convenience stores, three small groceries, two supermarkets, and two super stores. Although it may cause inconvenience for some SNAP recipients if Appellant is disqualified, such possible inconvenience does not rise to the level of hardship as required for assessment of a civil money penalty. The record documents that the Retailer Operations Division properly considered Appellant's eligibility for a hardship CMP according to the terms of Section 278.6(f)(1) of the SNAP regulations, and appropriately denied such.

CONCLUSION

The decision to deny the imposition of a hardship civil money penalty in lieu of a three year SNAP disqualification against Keefe & 3rd Supermarket 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 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.

RIGHTS AND REMEDIES

Applicable rights to a judicial review of this decision are set forth in 7 USC § 2023 and 7 CFR § 279.7. 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 the Appellant's owners 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, 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.

MARY KATE KARAGIORGOS
Administrative Review Officer

July 13, 2020