

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

Lexus Food Mart,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0206582

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 Lexus Food Mart 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 October 30, 2018.

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, via email correspondence dated September 7, 2018, that Appellant was being disqualified from the WIC Program for three (3) years identified as the period starting 15 days after receipt of the March 21, 2018 termination letter, and that Appellant’s appeal was denied. The correspondence was appended with a Wisconsin WIC State Agency termination letter dated March 21, 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 a specific food items that exceeds the store’s documented inventory of the food items for a specific period”; 7 CFR § 278.6(e)(8)(i)(B) “Exchanging WIC instrument for cash, credit or consideration other than eligible food; or exchange of firearms, ammunition/explosives/controlled substances for WIC food instruments”, and 7 CFR § 278.6(e)(8)(i)(F) “A pattern of charging for food items not received by the WIC customer or for foods provided in excess of those listed on the food instrument.”

In a letter dated September 12, 2018, 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 September 19, 2018, Appellant, through counsel, requested an additional 30 days in which to respond to the charge letter. In a facsimile dated October 24, 2018, Appellant, through counsel, responded to the charge letter and generally stated that during the last 25 years there have been no incidences in which my client has violated the terms of the FNS/SNAP program rules. My client does not have any alcohol at the business and is operating as a true grocery store providing wholesome food to the community in a respectful manner that is conducive to the goals of the program. Appellant, through counsel, stated that there was no allegation against my client that of trafficking in any form or fashion as it relates to either the SNAP program or the WIC Program. In the event that the business loses the ability to accept SNAP benefits, the business will have to go out of business which in turn will affect my client’s ability to feed their family.

In correspondence dated October 30, 2018, Retailer Operations Division 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.”

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 or 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 November 7, 2018, Appellant, 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. During the last 25 years there have been no incidences in which my client has violated the terms of the FNS/SNAP program rules.
2. My client does not have any alcohol at the business and is operating as a true grocery store providing wholesome food to the community in a respectful manner that is conducive to the goals of the program.

3. There was no allegation against my client that of trafficking in any form or fashion as it relates to either the SNAP program or the WIC Program.
4. In the event that the business loses the ability to accept SNAP benefits, the business will have to go out of business which in turn will affect my client's ability to feed their family.

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 September 12, 2018, as well as in the FNS letter of determination dated October 30, 2018, 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 termination letter from the Wisconsin WIC State Agency dated March 21, 2018. Page 18, paragraph D, of the WIC disqualification notice dated March 21, 2018 states "Disqualification from WIC may 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 review under SNAP. See, 7 C.F.R. § 246.18(b)(1)."

CIVIL MONEY PENALTY

Appellant, through counsel, contends that in the event that the business loses the ability to accept SNAP benefits, the business will have to go out of business which in turn will affect my client's ability to feed their family. 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." 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 41 alternative SNAP authorized firms are located within a one (1) mile radius. The alternative SNAP authorized firms include two (2) medium grocery stores, one (1) direct farmers market, six (6) small grocery stores, two (2) supermarkets and 28 alternative convenience stores; and that the alternative SNAP authorized firms are identified as selling as large a variety or staple food items at prices comparable to those of Appellant. 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 Lexus Food Mart 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

June 4, 2019