

**U.S. Department of Agriculture  
Food and Nutrition Service  
Administrative Review  
Alexandria, VA 22302**

**Los Altenos Market,**

**Appellant,**

**v.**

**Retailer Operations Division,**

**Respondent.**

**Case Number: C0205830**

**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 participation as an authorized retailer in the Supplemental Nutrition Assistance Program<sup>1</sup>, as a result of Special Supplemental Nutrition Program for Women, Infants, and Children (WIC) Program violations was properly imposed against Los Altenos Market (hereinafter “Los Altenos Market” and/or “Appellant”) and its owners of record, by the Retailer Operations Division of the FNS.

**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 Los Altenos Market in a letter dated February 21, 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.

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<sup>1</sup> Section 4001(b) of the Food, Conservation, and Energy Act of 2008 (P.L. 110-234; 122 Stat. 1092) amended the Food and Nutrition Act of 2008 by striking “food stamp program” and inserting “supplemental nutrition assistance program” effective October 1, 2008

## **CASE CHRONOLOGY**

FNS was advised by the California WIC State Agency that Appellant was being disqualified from participation as a WIC vendor for a period of three (3) years and that there had been no appeal of that disqualification.

WIC provided a copy of the letter delivered to Los Altos Market on November 7, 2017, wherein Appellant's ownership is advised of the three (3) year WIC disqualification effective from December 6, 2017 through December 5, 2020. WIC also provided a copy of the record affirming that food instruments contained overcharges for supplemental foods not received dated May 31, 2017 and September 22, 2017 which lead to the WIC disqualification.

Retailer Operations Division identified that, in addition to representing violations of the terms and conditions contained in the WIC vendor agreement, the same violations are identified as having violated SNAP regulations at 7 CFR §278.6(e)(8). Therefore, in a letter dated February 8, 2018 Appellant was advised by the Retailer Operations Division that it was being considered for either reciprocal disqualification from SNAP based on the WIC violations that also violated the SNAP regulations at 7 CFR §278.6(e)(8); or, the imposition of a civil money penalty in lieu of that disqualification.

The record indicates that Appellant replied, through counsel, and that that response was duly considered by the Retailer Operations Division.

Appellant was informed in a letter dated February 21, 2018, that it was not eligible for imposition of a hardship civil money penalty in lieu of disqualification and would be reciprocally disqualified from participation as a retail store in the SNAP for a period of three (3) years. The February 21, 2018 letter also informed Appellant that the determination to disqualify Los Altos Market from the SNAP on the basis of the WIC Program disqualification is not subject to administrative review; rather only appeal rights with regards to the firm's eligibility for a hardship civil money penalty are afforded. This is in accordance with the Food and Nutrition Act of 2008, as amended, and 7 CFR § 278.6(e)(8) of the SNAP regulations.

In a letter dated February 24, 2018, Appellant requested an appeal of the Retailer Operations Division's decision to deny the assessment of a hardship civil money penalty. The appeal was granted and implementation of the SNAP disqualification has been held in abeyance pending completion of this review in accordance with 7 CFR § 279.4(a).

## **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 AND REGULATIONS

The controlling statute in this matter is contained in the Food and Nutrition Act of 2008, as amended (the “Act”)<sup>2</sup>, 7 USC 2023 and 278 of Title 7 of the Code of Federal Regulations (CFR).<sup>3</sup>

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 specified 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 [SNAP] 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 [SNAP]”.

7 CFR § 278.6(e)(8)(i) states, in part, that such a disqualification shall be based on “any of the following specific program violations...(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.”

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 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. FNS may disqualify a store which meets the criteria for a civil money penalty if the store had previously been assigned a sanction.”

7 CFR Part § 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 Part § 278.1(b)(4)(D) states, in part, “The collateral bond or irrevocable letter of credit must have a face value of \$1000 or an amount equal to ten percent of the average monthly SNAP

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<sup>2</sup> Effective October 1, 2008, the Food Stamp Act of 1977 was superseded by the Food and Nutrition Act of 2008, as amended through P.L. 110-246 with subsequent amendment through P.L. 113-79, enacted February 7, 2014.

<sup>3</sup> Title 7 of the Code of Federal Regulations may be accessed in its entirety via the Internet at [https://www.ecfr.gov/cgi-bin/text-idx?tpl=/ecfrbrowse/Title07/7tab\\_02.tpl](https://www.ecfr.gov/cgi-bin/text-idx?tpl=/ecfrbrowse/Title07/7tab_02.tpl)

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 a letter dated February 24, 2018 Appellant requested a review of the decision explaining that there were two (2) owners at the registers which are old and do not scan resulting in mistakes being made. A request for reduction of the disqualification period is made.

In a second letter dated March 27, 2018 the same information and request are provided.

The preceding may represent only a summary of Appellants’ contentions as presented by counsel 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.

### **SUMMARY OF THE CHARGES**

The record shows that Appellant was informed in the FNS letter of charges dated February 8, 2018 as well as in the FNS letter of determination dated February 21, 2018 that the decision to disqualify Los Altenos Market 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 California 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 instant appeal is focused strictly on the firm’s eligibility for a hardship civil money penalty.

Appellant was duly notified that WIC Program disqualification may result in a reciprocal SNAP authorization disqualification in the notice from the California WIC State Agency that was delivered to Los Altenos Market on November 1, 2017, in the third paragraph on page three (3).

### **ANALYSIS AND FINDINGS**

#### **Mistakes:**

Although Appellant explains that the WIC violations resulted from an antiquated cash register system and request reduction of the disqualification period the SNAP regulations are specific in the requirement for reciprocal disqualifications for SNAP to be for the same period as the WIC disqualification. USDA has no discretion to reduce the disqualification period despite operational challenges that may be occurring at Appellant.

### **Civil Money Penalty:**

The Retailer Operations Division has rendered a finding pursuant to 7 CFR §278.6(f) that it would not be appropriate to impose a civil money penalty in lieu of a period of disqualification because of its determination that Los Altenos Market 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 civil money penalty 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. Further, the SNAP regulations do not define hardship as inconvenience, but define it rather specifically as a condition that results because "there is **no** [emphasis added] other authorized retail food store in the area selling as large a variety of staple food items at comparable prices."

The Retailer Operations Division has documented that Los Altenos Market is a medium grocery store, as defined in accordance with SNAP regulations and that there are SNAP authorized retailers within a one-mile radius of Los Altenos Market including a supermarket located at 0.24 miles from Los Altenos Market and a large grocery store located at 0.51 miles from Los Altenos Market. Retailer Operations Division documented that the stores identified were found to have a larger offering of staple foods in all categories when compared to Appellant.

On review the determination of the availability of alternative SNAP authorized retailers within a one-mile radius identified by Retailer Operations Division is further affirmed with review of the USDA-FNS SNAP Retailer Locator tool at <https://www.fns.usda.gov/snap/retailerlocator> identifying 10 alternative SNAP authorized retailers located within one (1) mile of Los Altenos Market.

Although the temporary disqualification of Appellant might cause inconvenience to some of the area SNAP customers; there is no **hardship** that will result as there are alternative comparable stores in the area selling as large a variety of staple foods at comparable, or lower, prices.

### **CONCLUSION**

Based on the discussion above, the decision to deny the imposition of a hardship civil money penalty in lieu of a three (3) year SNAP disqualification against Los Altenos Market is sustained.

In accordance with the Food and Nutrition Act of 2008, and the pursuant regulations, the 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 the 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 will 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**

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.

NANCY BACA-STEPAN  
Administrative Review Officer

June 26, 2018