

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

**Marathon Prepaid & More,**

**Appellant,**

**v.**

**Case Number: C0200337**

**Retailer Operations Division,**

**Respondent.**

**FINAL AGENCY DECISION**

The U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS) finds that there is sufficient evidence to support the determination by the Retailer Operations Division to deny Marathon Prepaid & More a hardship Civil Money Penalty (CMP) in lieu of a three year disqualification from participating as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP) as a result of Women, Infants, and Children (WIC) Program violations.

**ISSUE**

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with Title 7 of the Code of Federal Regulations (CFR) § 278.6(e)(8) and § 278.6(f), in its administration of the SNAP, when it disqualified Appellant for a period of three years and denied assessing a hardship CMP in lieu of disqualification by letter dated December 6, 2017.

**AUTHORITY**

According to 7 U.S.C. § 2023 and its implementing regulations at 7 CFR § 279.1, “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 November 20, 2017, the Retailer Operations Division informed Appellant that as the result of a December 9, 2015, New York WIC State Agency disqualification action for three years for failure to pay the remaining balance of a civil money penalty (CMP) previously assessed due to violations of program rules and regulations, the Retailer Operations Division was considering a SNAP reciprocal disqualification in accordance with 7 CFR § 278.6(e)(8). The CMP was assessed by a New York WIC State Agency letter dated December 16, 2014, and advised that a failure to pay the CMP would result in a three year disqualification from the WIC Program. This correspondence also cautioned Appellant that the WIC disqualification may result in a disqualification from SNAP for three years that was not subject to administrative review.

Appellant responded to the charges by submitting via fax a WIC Vendor Management Company letter dated August 27, 2015, terminating Appellant's WIC vendor contract effective August 6, 2015, due to a series of WIC vendor contract violations. By letter dated December 6, 2017, the Retailer Operations Division informed Appellant that in accordance with Sections 278.6(e)(8)(iii) and 278.6(f)(1) it determined that Appellant's disqualification would not cause a 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 dated December 18, 2017, Appellant, through counsel, appealed the Retailer Operations Division's decision to deny the hardship 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. A Freedom of Information Act (FOIA) request was submitted on January 23, 2018, and the Agency responded to this request by correspondence received by counsel on April 10, 2018. Subsequent correspondence dated May 1, 2018, has been received from Appellant.

## **STANDARD OF REVIEW**

In an appeal of an adverse action, Appellant bears the burden of proving by a preponderance of evidence that the administrative action should be reversed. That means Appellant has the burden of providing relevant evidence that a reasonable mind, considering the record as a whole, would accept as sufficient to support a conclusion that the argument asserted is more likely to be true than untrue.

## **CONTROLLING LAW**

The controlling law in this matter is contained in the Food and Nutrition Act of 2008, as amended (7 U.S.C. § 2021), and implemented through regulation under Title 7 CFR Part 278. In particular, 7 CFR Part 278.6, establishes the authority upon which a reciprocal disqualification may be imposed against a firm disqualified from the WIC Program. Part 278.6(f)(1) provides for CMP assessments in lieu of disqualification in cases where disqualification would cause hardship to SNAP households because of the unavailability of a comparable participating food store in the area to meet their shopping needs.

7 CFR § 278.6(e)(8) establishes, among other things, the kind of violations that warrant a reciprocal disqualification and reads, inter alia, “FNS shall disqualify from the Supplemental Nutrition Assistance Program (SNAP) any firm which is disqualified from the WIC Program.” Stipulations are added to this regulation requiring that 1) the firm was provided individual and specific notice that it could be disqualified from the SNAP based on the WIC violations committed by the firm, 2) a signed and dated copy of such notice is provided to FNS by the WIC administering agency, and 3) a determination is made which ensures that such disqualification action will not cause a hardship for participating SNAP households.

7 CFR § 278.6(e)(8)(iii)(C) states that reciprocal SNAP disqualifications shall not be subject to administrative or judicial review. FNS may, in lieu of a disqualification, subject a firm to a CMP if the agency determines that a disqualification would cause hardship to participating SNAP households. In interpretation of the regulations, agency policy provides, inter alia, that “even though the action to disqualify on the basis of the WIC disqualification is, by statute and regulation, un-appealable, the determination to deny a firm a hardship CMP in lieu of the reciprocal disqualification, or the amount of the hardship CMP, remains subject to appeal in the Supplemental Nutrition Assistance Program.”

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 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.”

### **APPELLANT’S CONTENTIONS**

The following may represent a 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:

- The business was the primary grocery for most customers and carried a vastly superior selection of SNAP items not carried by other local stores

such as fresh produce and deli meats/cheeses. The other stores in the immediate vicinity carry a limited amount of staple foods. The Appellant's selection would not be easily substituted by the other stores in the immediate vicinity both for geographic/logistic reasons [and] for quality reasons (the selection of meats, fruits, vegetables, deli meats, cheeses, and the like cannot be found in such variety or significance as what the Appellant maintains). As such, suspending the Appellant for the term of three (3) years will be a significant hardship on the local SNAP participant families in the area. Appellant also cited two court cases in support of a hardship CMP;

- The business is in New York's 20<sup>th</sup> Congressional District and few SNAP participants own or have regular access to a vehicle limiting their options for traveling to other stores. The customers conform to traditional transaction patterns cited by USDA studies and a large portion redeems nearly all their benefits in the first two weeks of the month; and,
- Studies conducted by the Convenience Store News and other groups were cited and explanations for multiple transactions in short periods of time were also provided.

Appellant submitted copies of: the FNS Profile of SNAP Households for New York Congressional District 20, the FMI US Grocery Shopping Trends report for 2016, the FMI US Grocery Shopping Trends report for 2017, the USDA November 2016 report "Foods Typically Purchased by SNAP Households", and an article titled "Know Your Core, Protect Your Core" published by Convenience Store News in support of these contentions.

## **ANALYSIS AND FINDINGS**

By letter dated December 9, 2015, the New York Department of Health, the WIC State Agency, terminated Appellant's WIC Vendor Agreement for Non-Compliance for a period of three years. The subject firm was disqualified from the New York WIC Program for being unable to provide sufficient invoices to substantiate its WIC formula sales, a violation that warrants a three year WIC disqualification period. The New York Department of Health letter properly gave notice of Appellant's right to file a formal appeal, and clearly states that the disqualification from WIC may result in disqualification as a retailer in the SNAP. It also states that such reciprocal disqualification is not subject to administrative or judicial review under the SNAP Program.

The FNS SNAP retailer application and reauthorization application contain a certification page whereby applicants must confirm their understanding of and agreement with SNAP retailer requirements in order to complete the application process. Store ownership did certify its understanding and agreement when it completed the retailer application in 2011. The authorization application specifically states that, "Disqualification from the WIC Program may result in

Supplemental Nutrition Assistance Program disqualification and disqualification from the Supplemental Nutrition Assistance Program may result in WIC Program disqualification”. The “SNAP Training Guide for Retailers” is also provided to all retailers upon their authorization/reauthorization and clearly states that store owners or operators are legally responsible for the own actions as well as the actions of everyone working in their store and that violations may include being disqualified from SNAP. This training guide specifically states that, “Stores that are disqualified from WIC may be disqualified from SNAP for an equivalent period of time”. The SNAP retailer applications and all training materials clearly state that regardless of whom the ownership of a store may utilize to handle store business or their degree of involvement in store operations, the ownership is accountable for the proper training of staff and the monitoring and handling of benefit transactions. The ownership remains liable for all violative transactions handled by store personnel, whether paid or unpaid, new, full-time or part- time.

It is important to clarify for the record that this review is limited to what circumstances were at the basis of the Retailer Operations Division’s action at the time such action was made. The record is clear that Appellant was disqualified from the WIC Program for a period of three years. As cited herein, the disqualification from SNAP for three years as the result of WIC Program violations 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.

Accordingly, the materials submitted by Appellant (the FNS Profile of SNAP Households for New York Congressional District 20, the FMI US Grocery Shopping Trends report for 2016, the FMI US Grocery Shopping Trends report for 2017, the USDA November 2016 report “Foods Typically Purchased by SNAP Households”, and an article titled “Know Your Core, Protect Your Core” published by Convenience Store News) provide no relevant information pertinent to the matter under review.

### **CIVIL MONEY PENALTY**

A hardship CMP as an optional penalty in lieu of a three year disqualification was considered in this case. Such a finding 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.

During a telephone conversation with the store owner on November 22, 2017, in follow-up to the owner’s response to the charge letter, the owner told Retailer Operations Division staff that he had already closed Marathon Prepaid & More and opened a new retail store a few doors away.

He added that he had also filed an application for SNAP authorization of his new business. The fact that Marathon Prepaid & More was withdrawn from the SNAP effective September 6, 2016, for non-redemption of SNAP benefits supports the owner's statement that he had closed the business. This information was contained in the FOIA response of April 10, 2018, and also would be available to counsel by the store owner.

Even if the store owner had not closed his business, FNS records show there are 69 SNAP authorized retailers located within a one-mile radius of Appellant that includes two supermarkets and six medium grocery stores. The closest supermarket is located 0.68 miles away while four of the medium grocery stores are located within 176 yards of Appellant's former location with the closest store being one block away. The former business was also located on a street with scheduled fixed route bus service that would facilitate shopping at more distant stores.

Based on the above discussion, the three year SNAP retailer disqualification of Marathon Prepaid & More would have no impact on SNAP recipients as it was voluntarily closed by the owner and withdrawn as a SNAP retailer nearly two years ago for not redeeming SNAP benefits.

## **CONCLUSION**

Based on the discussion above, the determination by the Retailer Operations Division to deny the imposition of a hardship civil money penalty in lieu of a three year SNAP disqualification 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 (30) 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. In accordance with 7 CFR §278.1(b)(4), at the time of any such new application for participation in the SNAP, the firm would be required, as a store previously sanctioned for program violations, to submit a collateral bond or irrevocable letter of credit as a condition for again being authorized to participate in the program. Questions regarding the application process can be answered by the FNS Retailer Service Center at 877-823-4369.

## **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.

ROBERT T. DEEGAN  
Administrative Review Officer

June 22, 2018