

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

Moreno Deli Grocery I Inc,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0227171

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 the Supplemental Nutrition Assistance Program (SNAP) as a result of WIC Program violations, was properly rendered by the Retailer Operations Division against Moreno Deli Grocery I Inc (hereinafter “Moreno Deli Grocery I Inc” or “Appellant”).

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 three year disqualification against Moreno Deli Grocery I Inc.

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 March 25, 2020, the Retailer Operations Division informed the Appellant of the agency’s intention to impose a three year disqualification against the Appellant firm from participating as an authorized retailer in the SNAP. The firm was disqualified for three years from the WIC Program for violations that included, pursuant to 7 CFR § 278.6(e)(8)(i)(E) of the SNAP regulations, “A pattern of charging WIC customers more for food than non-WIC customers or charging WIC customers more than current shelf price”.

FNS was advised by the New York State Department of Health, Bureau of Special Investigations (New York WIC State Agency) that the Appellant was being disqualified from the WIC Program for three years effective September 17, 2019 and that the Appellant's appeal rights had been exhausted. The New York WIC State Agency provided FNS with a copy of a letter dated August 12, 2019 that it had sent to the Appellant advising it that Moreno Deli Grocery I Inc could be disqualified from the SNAP based on the WIC Program violations that occurred at the firm. The letter also informed the Appellant of its appeal rights regarding the WIC Program disqualification. The New York WIC State Agency informed FNS that Moreno Deli Grocery I Inc had exhausted all of its appeal rights with regard to the three year WIC disqualification.

In a response to the Retailer Operations Division of March 28, 2020, the Appellant replied to the charges therein stating that the owner has always been a rule-abiding individual and has operated the business for 11 years and the situation with the WIC program has been his only issue. All store employees are very well acquainted with the rules and regulations of the WIC and SNAP programs. The Appellant is a very large store and has a vast selection of merchandise. It is the biggest grocery store in the area. The Appellant sells a lot of fresh meats which no other store in the area sells and the store's clientele is very dependent on the store to fulfill their home purchases. The store is located in an extensively large residential area with apartment buildings all around with many residents who receive some type of assistance. There is a senior citizen's development across from the store and many of the senior residents receive SNAP benefits. There are other businesses in the area but none of them offer the extensive selection of food products that the Appellant offers. There are also two supermarkets but they are located several blocks away making it difficult for seniors to make their purchases. These same seniors can complete their monthly purchases in the Appellant store and not have to worry about walking six blocks to a supermarket. Many of these individuals will be affected by the SNAP disqualification of the Appellant store. The Appellant requests reconsideration of the three year SNAP disqualification and requests a civil money penalty be imposed in lieu of SNAP disqualification.

After considering the Appellant's response and the evidence in the case, the Retailer Operations Division informed the Appellant, by letter dated May 11, 2020, that Moreno Deli Grocery I Inc 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 three years. The Appellant was also informed that the determination to disqualify Moreno Deli Grocery I Inc 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.

In a letter postmarked May 18, 2020, the Appellant 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 June 3, 2020 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)(E) 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 charging WIC customers more for food than non-WIC customers or charging WIC customers more than the current shelf price ...”

7 CFR § 278.6(e)(8)(ii)(A) and (B) state “FNS shall not disqualify a firm from SNAP 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 SNAP 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”.

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 response to the Charge Letter and in the administrative review request, the Appellant stated the following summarized contentions, in relevant part:

- The owner has always been a rule-abiding individual and has operated the business for 11 years and the situation with the WIC program has been his only issue. All store employees are very well acquainted with the rules and regulations of the WIC and SNAP programs.
- The Appellant is a very large store and has a vast selection of merchandise. It is the biggest grocery store in the area. The Appellant sells a lot of fresh meats which no other store in the area sells and the store’s clientele is very dependent on the store to fulfill their home purchases. The store is located in an extensively large residential area with apartment buildings all around with many residents who receive some type of assistance. There is a senior citizen’s development across from the store and many of the senior residents receive SNAP benefits. There are also many day care facilities in the area.
- There are other businesses in the area but none of them offer the extensive selection of food products that the Appellant offers. There are also two supermarkets but they are located several blocks away making it difficult for seniors to make their purchases. These same seniors can complete their monthly purchases in the Appellant store and not have to worry about walking six blocks to a supermarket. Many of these individuals will be affected by the SNAP disqualification of the Appellant store.
- The Appellant will not survive a three year SNAP disqualification in addition to the WIC disqualification. The owner may be forced to close the business as SNAP redemptions represent the majority of the Appellant’s revenue.
- The Appellant requests reconsideration of the three year SNAP disqualification and requests a hardship civil money penalty be imposed in lieu of SNAP disqualification.

ANALYSIS AND FINDINGS

WIC Program Violations

In accordance with 7 CFR § 278.6(e)(8)(ii)(A) and (B), the Appellant was provided with specific notice that Moreno Deli Grocery I Inc 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 August 12, 2019. A copy of that notice was provided to FNS by the New York State Department of Health, Bureau of Special Investigations (New York WIC State Agency) and FNS was notified that the Appellant's appeal rights had been exhausted.

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 Moreno Deli Grocery I Inc from the SNAP on the basis of the WIC disqualification would not be subject to administrative or judicial review. The Appellant contends that 7 CFR § 278.6 provides that . . . “Disqualification shall be for a period of 6 months to 5 years for the firm's first sanction”. However, 7 CFR § 278.6(e)(8) states 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 charging WIC customers more for food than non-WIC customers or charging WIC customers more than current shelf price. Pursuant to the state's administrative regulations, such a violation warrants a three year WIC disqualification. The record also shows that the Appellant's appeal rights have been exhausted.

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 three year disqualification from the SNAP.

First Time Violator

The owner contends that he has always been a rule-abiding individual and has operated the business for 11 years and the situation with the WIC program has been his only issue. All store employees are very well acquainted with the rules and regulations of the WIC and SNAP programs. However, 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 those charges.

Financial Hardship

The Appellant contends that the store will not survive a three year SNAP disqualification in addition to the WIC disqualification. The owner may be forced to close the business as SNAP redemptions represent the majority of the Appellant's revenue. 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 the store is a very large store and has a vast selection of merchandise. It is the biggest grocery store in the area. The Appellant sells a lot of fresh meats which no other store in the area sells and the store's clientele is very dependent on the store to fulfill their home purchases. The store is located in an extensively large residential area with apartment buildings all around with many residents who receive some type of assistance. There is a senior citizen's development across from the store and many of the senior residents receive SNAP benefits. There are also many day care facilities in the area. The Appellant requests a hardship civil money penalty be imposed in lieu of SNAP disqualification.

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.] **5 U.S.C. § 552 (b)(7)(E).**

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 Moreno Deli Grocery I Inc'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 Moreno Deli Grocery I Inc a hardship civil money penalty in lieu of a three (3) 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 16, 2020