

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

**Portland Food Mart,**

**Appellant,**

**v.**

**Case Number: C0200983**

**Retailer Operations Division,**

**Respondent.**

**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 Portland Food Mart.

**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 Portland Food Mart on August 22, 2017.

**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 July 25, 2017, the Retailer Operations Division informed the Appellant of the Agency’s intention to impose a three year disqualification against the Appellant 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)(E) of the

SNAP regulations, “A pattern of charging WIC customers more for food than non-WIC customers or charging WIC customers more than the current shelf price.”

FNS was advised by the Minnesota WIC State Agency, via e:mail correspondence dated June 28, 2017, that the Appellant was being disqualified from the WIC Program for three years effective August 8, 2016 and that all of the Appellant’s appeal rights had been exhausted. The WIC State Agency also provided FNS with a copy of a letter dated July 8, 2016 that they had sent to the Appellant advising him that Portland Food Mart could be disqualified from the SNAP based on the WIC Program violations that occurred at the firm. The letter also informed the Appellant of his appeal rights regarding the WIC Program disqualification.

In a telephone conversation with Retailer Operations staff on July 27, 2017 and in a letter to the Retailer Operations Division postmarked August 2, 2017, the Appellant replied to the charges outlined in the July 25, 2017 Charge Letter indicating that the WIC Program violations were unintentional mistakes conducted by a new store employee while the Appellant was out of town. The Appellant apologizes for the inadvertent mistakes made with regard to the WIC Program.

After considering the Appellant’s replies and the evidence in the case, the Retailer Operations Division informed the Appellant by letter dated August 22, 2017, that Portland Food Mart 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 Portland Food Mart 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. The August 22, 2017 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.”

In a letter postmarked August 29, 2017, 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 September 11, 2017 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)(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 Appellant's replies to the Charge Letter and in the review request postmarked August 29, 2017, the Appellant stated the following summarized contentions, in relevant part:

- The WIC Program violations were unintentional mistakes conducted by a new store employee while the Appellant was out of town. The Appellant apologizes for the inadvertent mistakes made with regard to the WIC Program and requests that FNS allow Portland Food Mart to continue to participate as an authorized retailer in the SNAP.
- This is the first time that the Appellant has been cited for any SNAP violations.
- A SNAP disqualification will impose a financial hardship on Portland Food Mart.
- A SNAP disqualification will impose a hardship on SNAP customers as Portland Food Mart is the only store that carries specialty/ethnic foods.

## **ANALYSIS AND FINDINGS**

In accordance with 7 CFR § 278.6(e)(8)(ii)(A) and (B), the Appellant was provided with specific notice that Portland Food Mart could be disqualified from the SNAP based on the WIC violations committed by the firm. This notice was given to the firm by the Minnesota WIC Compliance Coordinator in a letter dated July 8, 2016. A copy of that notice was provided to FNS by the Minnesota Department of Health on June 28, 2017.

Additionally, in accordance with 7 CFR § 278.6(e)(8), the Appellant was informed by both the Minnesota WIC State Agency and the FNS Retailer Operations Division that the decision to reciprocally disqualify Portland Food Mart from the SNAP on the basis of the WIC disqualification would not be subject to administrative or judicial review. Further, the regulations state 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 Minnesota. 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 the 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 and the WIC Program disqualification was upheld.

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.

### **WIC Program Violations Unintentional**

The Appellant contends that the WIC Program violations were unintentional mistakes conducted by a new store employee while the Appellant was out of town. The Appellant apologizes for the inadvertent mistakes made with regard to the WIC Program and requests that FNS allow Portland Food Mart to continue to participate as an authorized retailer in the SNAP. This administrative review has no authority to render an opinion regarding WIC violations that were uncovered by the state of Minnesota. 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 and the WIC Program disqualification was appropriately upheld.

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 was not eligible for a hardship civil money penalty in lieu of a three year disqualification from the SNAP.

### **First Time Program Violator**

The Appellant contends that this is the first time that he has been cited for any SNAP violations. 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.

### **Imposed Financial Hardship**

The Appellant contends that a SNAP disqualification will impose a financial hardship on Portland Food Mart. 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 a SNAP disqualification will impose a hardship on SNAP customers as Portland Food Mart is the only store that carries specialty/ethnic foods. 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.]

It is the determination of this review that a disqualification of Portland Food Mart, a convenience store, would not cause hardship to SNAP households because there are other comparable or larger SNAP authorized stores located in the area of the Appellant firm. Agency mapping systems document that there are currently 11 similar or larger SNAP authorized retail stores located within a one mile radius of Portland Food Mart including 2 super stores, 1 supermarket, 1 large grocery store, 1 small grocery store, 3 combination grocery stores, and 3 convenience stores. These stores offer a variety and quality of staple foods comparable to, or better than, those offered by Portland Food Mart. While Portland Food Mart may carry a few specialty/ethnic food items, the subject firm does not carry any unique items or specialty/ethnic foods that cannot be found at some of these other area SNAP authorized retail stores.

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 Portland Food Mart'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 Portland Food Mart a hardship civil money penalty in lieu of a three 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

April 27, 2018