

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

**Royal R Deli Corp,**

**Appellant,**

**v.**

**Case Number: C0199823**

**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 Women, Infants and Children (WIC) Program violations, was properly rendered by the Retailer Operations Division against Royal R Deli Corp. (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 November 30, 2017.

**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 New York WIC State Agency, in correspondence dated May 1, 2017, that Appellant was being disqualified from the WIC Program for three (3) years identified as the period starting April 21, 2017, and that all appeals have been exhausted. The correspondence was appended with the New York State Department of Health letter dated March 22, 2017, 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)(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 May 23, 2017, 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 April 19, 2017, Appellant, through representation, replied to the charge letter and requested additional time in which to submit documentation in support of its position. In correspondence dated June 15, 2017, Appellant, through counsel, submitted a Freedom of Information Act (FOIA) request for documents pertaining to the charge. In correspondence dated July 13, 2017, Retailer Operations Division responded to the FOIA request and provided the requested documentation. The record reflects that counsel received the requested documentation on July 18, 2017.

In correspondence dated November 9, 2017, Appellant, through counsel, replied to the charge letter and generally stated that FNS shall not disqualify a firm from the Food Stamp Program on the basis of a WIC disqualification where the firm was not provided individual and specific notice that it could be disqualified from the Food Stamp Program based on WIC violations committed by the firm. In this case the owner and firm were requesting to be removed and terminated from the WIC program prior to any alleged violations, but were unreasonably denied such termination. Appellant, through counsel, stated that the owner never signed or dated a copy of any individual or specific notice advising him that the firm could be disqualified from the Food Stamp Program based on the WIC violations allegedly committed by the firm. It is also submitted that a civil money penalty should be offered pursuant to Section 278.6 where a 3-year disqualification under the WIC program as provided to FNS by the WIC administering agency and would cause a hardship for participating Food Stamp households. The decision of the USDA to disqualify this vendor will not only cause a hardship to the community but will also deprive this vendor of his business and cause him to sustain irreparable injury and damage and cause his workers who also live in the community to lose their jobs.

### **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 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**

In a letter dated December 11, 2017, 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. FNS shall not disqualify a firm from the Food Stamp Program on the basis of a WIC disqualification where the firm was not provided individual and specific notice that it could be disqualified from the Food Stamp Program based on WIC violations committed by the firm. In this case the owner and firm were requesting to be removed and terminated from the WIC program prior to any alleged violations, but were unreasonably denied such termination.
2. The owner never received a signed or dated a copy of any individual or specific notice advising him that the firm could be disqualified from the Food Stamp Program based on the WIC violations allegedly committed by the firm. It was only upon receipt of the

Letter of Charges that this owner realized the mistake he made by agreeing to participate in the WIC Program and the ramifications of termination or disqualification from that program.

3. This business is a retail food convenience store and during the time set forth in the letter of charges, was open to the public seven days per week, 20 hours a day. This should be a consideration in the imposition of a civil money penalty as the disqualification of this store would create a hardship to the community who can shop in their community when other stores are closed. Additionally this store is also a purveyor of Halal food to the religious and ethnic community in the area of its location.
4. It is submitted that this vendor has not been afforded the opportunity to fully answer and challenge the charges lodged against it and has been deprived of due process.

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 May 23, 2017, as well as in the FNS letter of determination dated November 30, 2017, 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 New York State Department of Health 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 notice from the New York State Department of Health dated March 22, 2017. In the first paragraph of the letter, the retailer was informed that pursuant to 7 CFR 278.6(e)(8) a WIC disqualification may result in a Supplemental Nutrition Assistance Program (SNAP) reciprocal disqualification without the opportunity to a separate administrative or judicial review under the SNAP. Additionally, the owner signed form FNS 252, the application to become an authorized retailer, and by signing the SNAP application agreed to the following statement: "Disqualification from the WIC Program may result in Supplemental Nutrition Assistance Program disqualification and a disqualification from the Supplemental Nutrition Assistance Program may result in WIC Program disqualification;"

## **CIVIL MONEY PENALTY**

Appellant, through counsel, contends that Appellant should be considered for the imposition of civil money penalty as the disqualification of the store would create a hardship of the community and that the store is also a purveyor of Halal food to the religious and ethnic community in the area of its location. 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 small grocery store, as defined in accordance with SNAP regulations, and is located in an area where 12 alternative SNAP authorized firms are located within a one (1) mile radius. The alternative SNAP authorized firms include medium grocery stores, a large grocery store, a supermarket, a superstore and other alternative small grocery 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. Additionally, Appellant contends that it offers Halal foods however; the store visit photographs do not support this assertion. The record reflects that a nearby retailer was contacted and found to offer Halal foods to the community. 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 Royal R Deli Corp. 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

March 28, 2018