

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

Skyline Market,

Appellant,

v.

Case Number: C0196973

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 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 Skyline Market.

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 (3) year disqualification against Skyline Market on March 3, 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 January 31, 2017, the Retailer Operations Division informed the Appellant of the Agency’s intention to impose a three (3) year disqualification against the Appellant from participating as an authorized retailer in the SNAP. The firm was disqualified for three (3) 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 January 18, 2017, that the Appellant was being disqualified from the WIC Program for three (3) 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 Skyline Market 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 Division staff on February 8, 2017, the Appellant replied to the charges outlined in the January 31, 2017 Charge Letter indicating that he was unaware that Skyline Market could be disqualified from the SNAP due to a WIC Program disqualification and that a three year SNAP disqualification of Skyline Market would pose a hardship on SNAP recipients as it is the only convenience store located in the neighborhood.

After considering the Appellant’s reply and the evidence in the case, the Retailer Operations Division informed the Appellant by letter dated March 3, 2017, that Skyline Market 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 (3) years. The Appellant was also informed that the determination to disqualify Skyline Market 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.

On March 10, 2017, the Appellant, through counsel, appealed the Retailer Operations Division’s decision to deny assessing a civil money penalty and requested review of this action. The 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.”

FNS granted the Appellant’s request for administrative review by letter dated March 20, 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

In the Appellant’s telephone reply to the Charge Letter and in the review request postmarked March 10, 2017, the Appellant, through counsel, stated the following summarized contentions, in relevant part:

- Skyline Market has been authorized to participate in the SNAP since early 2014 and this is the first time that the Appellant has been cited for any SNAP or other government assistance program violations;
- The Appellant was unaware that Skyline Market could be disqualified from the SNAP due to a WIC Program disqualification;
- To ensure that these types of SNAP violations do not occur in the future, the Appellant has implemented an effective compliance policy and program and has ensured that the store cashier responsible for the WIC Program violations is no longer working at Skyline Market;
- FNS’ determination that Skyline Market does not qualify for a hardship civil money penalty because there are other authorized retail stores in the area selling a variety of staple foods at comparable prices is an incorrect determination;
- The only authorized retail food store located within a half mile of Skyline Market is a halal grocery store that sells only foods specifically prepared and permissible under Islamic law. This store is not an equivalent substitution for non-Muslim SNAP customers. All of the other authorized retail food stores in the area serve prepared foods only; and
- Therefore, the Appellant is requesting that FNS impose a civil money penalty in lieu of a three (3) year SNAP disqualification as a SNAP disqualification of Skyline Market will impose a hardship on area SNAP customers as there are no other authorized retail food stores in the area that sell staple foods.

The preceding may represent only a brief summary of the 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

Regarding the Appellant’s contentions, 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. As cited, the disqualification of Skyline Market from the SNAP

for three (3) years is not subject to administrative review. The sole appealable issue in this case is whether the Retailer Operations Division properly considered the firm's eligibility for a hardship civil money penalty (CMP). Thus, the Appellant's contentions related to his concerns regarding how the WIC Program disqualification was imposed for Skyline Market are not relevant to this administrative review.

No Prior Violations

The Appellant contends that Skyline Market has been authorized to participate in the SNAP since early 2014 and this is the first time that he has been cited for any SNAP or other government assistance program violations. However, a record of participation in the SNAP or other government assistance programs 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. There is no provision in the Food and Nutrition Act, SNAP regulations, or agency policy that reverses or reduces a sanction based upon a lack of prior SNAP or other government assistance program violations by a firm and its owners, managers, and/or employees.

Unaware WIC Program Disqualification Imposes SNAP Disqualification

The Appellant contends that he was unaware that Skyline Market could be disqualified from the SNAP due to a WIC Program disqualification. However, in the July 8, 2016 letter that was sent from the Minnesota Department of Health and received by the Appellant, the Minnesota WIC State Agency advised the Appellant that Skyline Market 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 as is indicated in the below excerpts from the letter:

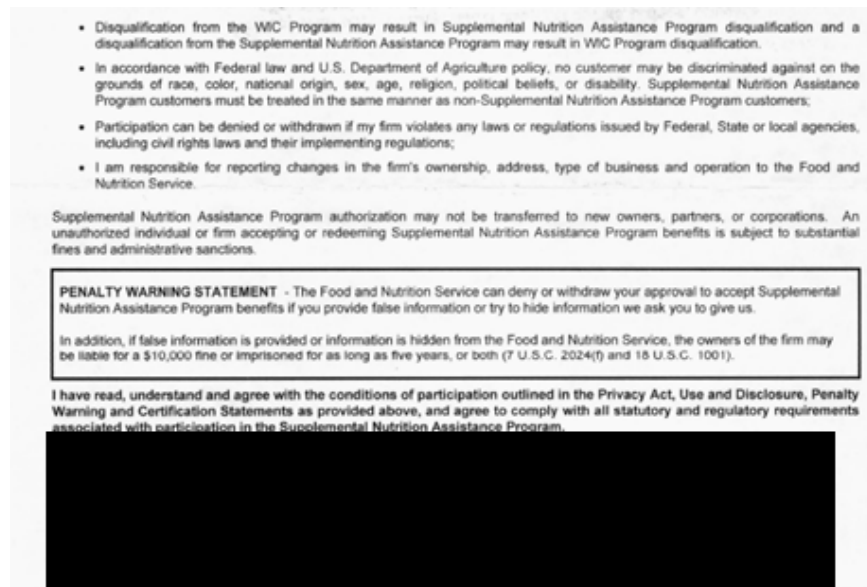
You have the right to appeal this decision. Please let me know if you would like me to send you a copy of our evidence before you decide whether to appeal. I have enclosed additional information concerning your right to appeal this decision. If you choose to appeal this decision, we must receive your written appeal no later than **August 8, 2016**. If you want to appeal, you must mail, deliver or fax your written appeal as follows:

Mailing address:	Delivery address:	Fax:
Mary Rogness	Mary Rogness	Mary Rogness
WIC Program	WIC Program	(651) 215-8951
P.O. Box 64882	85 East Seventh Place, Suite 220	
St. Paul, MN 55164-0882	St. Paul, MN 55101	

This disqualification from the WIC Program may result in your store's disqualification as a Supplemental Nutrition Assistance Program/EBT retailer. Such disqualification may not be subject to administrative or judicial review under the SNAP.

The Retailer Operations Division also advised the Appellant in his February 8, 2017 telephone response to the January 31, 2017 Charge Letter that the WIC Program disqualification of Skyline Market may result in the store's disqualification from the SNAP. The Appellant was reminded that the SNAP retailer training materials that FNS had provided him also advised of this potential for a SNAP disqualification. As is indicated in the below copy of the Certification

and Signature page of the SNAP Retailer Application that was signed by the Appellant on March 26, 2014, the Appellant was advised that a WIC Program disqualification may result in Skyline Market's disqualification from the SNAP:



As such, the Appellant's contention that he was unaware that Skyline Market could be disqualified from the SNAP due to a WIC Program disqualification is unfounded.

Corrective Actions Implemented

The Appellant contends that in order to ensure that these types of SNAP violations do not occur in the future, he has implemented an effective compliance policy and program and has ensured that the store cashier responsible for the WIC Program violations is no longer working at Skyline Market. It is important to clarify for the record that the purpose of this review is to either validate or to invalidate the earlier decision of the Retailer Operations Division. This review is limited to what circumstances were at the basis of the Retailer Operations Division action at the time such action was made. It is not the authority of this review to consider what subsequent remedial actions may have been taken so that the store may begin to comply with program requirements. 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 after-the-fact corrective action implemented subsequent to investigative findings of program violations. Therefore, the Appellant's contention that he has taken corrective actions, though they would have been valuable towards preventing future program violations, does not provide any valid basis for dismissing the charges or for mitigating the penalty imposed.

CIVIL MONEY PENALTY

The Appellant contends that FNS' determination that Skyline Market does not qualify for a hardship civil money penalty because there are other authorized retail stores in the area selling a variety of staple foods at comparable prices is an incorrect determination. The only authorized retail food store located within a half mile of Skyline Market is a halal grocery store that sells only foods specifically prepared and permissible under Islamic law. This store is not an equivalent substitution for non-Muslim SNAP customers. All of the other authorized retail food stores in the area serve prepared foods only. Therefore, the Appellant is requesting that FNS impose a civil money penalty in lieu of a three (3) year SNAP disqualification as a SNAP disqualification of Skyline Market will impose a hardship on area SNAP customers as there are no other authorized retail food stores in the area that sell staple foods.

In this case, however, the 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 Skyline Market is not the only authorized retail food store in the area "selling as large a variety of staple food items at comparable prices". That is what "hardship" means with regards to consideration of a firm's eligibility for a CMP. Skyline Market is classified in the FNS SNAP retailer database as a convenience store. Agency mapping systems document that there are 57 SNAP retailers located within a 1.0 mile radius of the subject store to include 12 convenience stores, 8 combination grocery/other stores, 10 small grocery stores, 17 medium grocery stores, 7 large grocery stores, and 3 supermarkets. These stores offer a variety and quality of staple foods comparable to, or better than, those offered by Skyline Market. Skyline Market does not carry any unique items or foods that cannot be found at these other area SNAP authorized retail stores. Therefore, the earlier determination that Skyline Market'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 Skyline Market 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, 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.

LORIE L. CONNEEN
Administrative Review Officer

January 9, 2018