

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

Soto's Produce,

Appellant,

v.

Case Number: C0202950

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 Soto's Produce 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 October 16, 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 September 28, 2017, the Retailer Operations Division informed store ownership that as the result of a January 18, 2017, California WIC State Agency disqualification action for three years 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). This correspondence also stated that the disqualification from SNAP for three years was not subject to administrative review.

Appellant responded to the charges in a letter dated October 3, 2017. By letter dated October 16, 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 October 24, 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. Counsel submitted a Freedom of Information Act (FOIA) request on November 20, 2017, and the Agency responded to this request by correspondence sent via email on January 11, 2018. Counsel also requested an extension of time to respond via email on January 31, 2018, and was approved for an extension until February 12, 2018. Subsequent correspondence dated February 12, 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 USC § 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 specified 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(a) establishes the authority upon which FNS may disqualify any authorized retail food store from further participation in the SNAP if the firm fails to comply with the Food Stamp Act including disqualification of a firm from the WIC Program as specified in paragraph (e)(8). 7 CFR § 278.6(e)(8) establishes, among other things, the kind of violations that warrant a reciprocal disqualification.

7 CFR § 278.6(e)(8) 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) states, in part, that FNS shall disqualify any firm from the SNAP which is disqualified from the WIC Program “(A) Shall be for the same length of time as the WIC disqualification; (B) May begin at a later date than the WIC disqualification;” 7 CFR § 278.6(e)(8)(iii)(C) states, that such a disqualification: “Shall not be subject to administrative or judicial review under the Food Stamp Program [SNAP].”

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

In the response to the letter of charges, in the request for administrative review, and in the subsequent correspondence, Appellant has stated as its position in the matter the following:

- The sole basis for the WIC disqualification was an incompetent employee who overcharged WIC a few dollars on two separate occasions. Nevertheless, the owner accepts responsibility and subsequently the loss of WIC privileges, but is begging for consideration of a CMP in lieu of SNAP disqualification. Disqualification will result in closure due to the severe decline in SNAP revenues and the citizens of Compton will have one less market to shop at in an already “food desert” not to mention another blighted corner. Additionally, the owners recently spent nearly **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** on new construction and would never jeopardize their family’s only source of income or ruin their relationship with the City of Compton for mere pennies;
- The store has been in business since 1978 and serves a variety of foodstuffs nearly all of which qualify under SNAP. Nearly one-third of the business comes from the meat department which is larger than most stores and is the only food store to the surrounding

neighborhood carrying the variety of foodstuffs routinely used by SNAP participants. While there is a market approximately 1200 feet away it mainly stocks Hispanic foods. For most customers, the store is their primary grocery provider and is most conveniently located to their homes. Furthermore, the store carries a vastly superior selection of SNAP eligible items that the other local stores do not carry such as fresh meats, organic items, and cheeses to better meet the needs of participants;

- There are other stores in the immediate vicinity that accept EBT, but they differ in both quality and quantity of food. The nearby market does not carry the items or the broad selection of items that are on Appellant's shelves. Instead these other stores carry a limited amount of staple foods and lack a variety to satisfy the participant's needs and tastes. There are other stores within minutes driving, but they are less convenient and a hardship to reach;
- The business is in the 44th Congressional District with approximately 32,692 households receiving SNAP with approximately 23.9 percent aged 60 or older, 74.8 percent with children under 18, and 27.8 percent disabled. Few residents own or have regular access to a vehicle so they have to carry their groceries home;
- The customers conform to traditional SNAP shopping patterns making large and frequent purchases within one week of receiving their benefits and frequently within 5 U.S.C. § 552 (b)(6) & (b)(7)(C) hours expending half of their benefits within seven days of receipt. A large portion of households redeem nearly all of their benefits in the first two weeks. The store is located on a well-travelled route and the majority of business comes from SNAP participants;
- A three year suspension will be a significant hardship on local SNAP families in the area. Photos provided for the Appellant business when compared to the photos the Department maintains for other stores will show that the store maintains a much wider selection of eligible items than other local stores. Such selection is materially important and significant to the local SNAP population. Appellant's selection would not be easily substituted by 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;
- The SNAP store locator shows 27 stores within a one mile radius though the actual distance is typically greater as highways 710 and 105 bisect the area. Few of the local stores provide the same array of foods and furthermore, the store is the closest to a middle school and serves a number of local residents. Counsel provided a brief summary of 18 stores located within a radius of 0.7 miles that included a supermarket, a super store, two medium grocery stores, and a meat specialty store. Two other medium grocery stores located 0.91 and 0.96 miles away were not listed due to their distance. The listing below does not include those SNAP retailers whose store classification would automatically make them ineligible to be comparable stores for consideration of a hardship CMP.

- The nearby supermarket listed at 0.27 miles is actually closer to 0.3 miles, stocks almost entirely Hispanic foods, and focuses on meats and peppers;
- The nearest medium grocery store is actually located 0.6 miles away in an old gas station building that is decaying. It focuses on dairy products and does not carry an assortment of groceries or fresh meats. It doesn't have the space to maintain the same level of groceries and cannot be a replacement;
- The next medium grocery store is co-located with another business and they actually located 0.6 miles away. The markets offer meats and produce with a focus on Hispanic foods so would not be a replacement for some participants with different tastes. They are also well north of Appellant's location and not suitable for the heavily populated neighborhoods immediately south of Appellant's location;
- The nearest super store is actually 0.8 miles away and is too far removed to serve many SNAP households, particularly those walking;
- A purely mathematical calculation doesn't account for elderly/disabled customers who don't have easy access to transportation and the many families with no consistent vehicle. There are no immediately available stores in the area selling the store's large variety of food items. The nearby stores offer accessory foods in large numbers, but lack the fresh foods and the assortment of quality foods. As such, there's no ability to compare prices to the stores that are geographically closer. Should participants be forced to shop elsewhere, it would add 30 minutes to their round trip travel time and a mile or two further to walk, presumably with children or the elderly. Neither circumstance is realistic or ideal;
- The owners previously submitted letters from the mayor and local councilmembers showing the store has been a cornerstone for the poor community for decades and that its absence will result in reduced quality of food access and likely have a detrimental effect on the local population. Furthermore, Appellant's 40 years in business without any charge letters or other violations make it the type of store the Department should encourage to continue operations;
- While the WIC issues deserve appropriate redress, the disqualification of the store is little more than a self-inflicted wound for SNAP over a non-SNAP violation. The best option is to monetarily penalize the store under the hardship provision and permit it to continue to do the good work it does for SNAP; and,
- Each employee has been trained on SNAP regulations.

Appellant submitted copies of three letters dated 5/2/2017 from the Mayor of Compton and from two City Councilmembers to the administrative hearing judge requesting the business not be disqualified from WIC, a blank EBT Training Procedures and Guidelines form as well as many color photographs of stock at the Appellant business in support of these contentions.

The preceding 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.

ANALYSIS AND FINDINGS

By letter dated January 18, 2017, the California Department of Public 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 California WIC Program for a pattern of vendor overcharging violations that warrant a three year WIC disqualification period. The California Department of Public 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 California Department of Public Health letter to FNS dated September 27, 2017, states that Appellant appealed the three year WIC disqualification but lost its appeal. Copies of the administrative decision documents as well as the warning letter dated August 19, 2016, were included in the materials sent by the California Department of Public Health. The administrative Final Decision notes that the California Department of Public Health conducted a "participant access determination" to determine whether program participants would still have adequate access to nutritional foods in the event the WIC vendor was disqualified and found that they would.

An examination of the warning letter dated August 19, 2016, shows it specifically states that subsequent violations may result in a mandatory three year WIC disqualification and that a disqualification from WIC may result in a disqualification as a retailer in the SNAP Program and that such disqualification shall not be subject to administrative or judicial review under the SNAP. Despite these warnings, the Appellant business apparently failed to take sufficient effective measures to ensure no further WIC program violations occurred as a follow-up investigation conducted by the WIC State Agency again found overcharging violations.

The FNS SNAP retailer application and reauthorization forms 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 most recently completed the reauthorization application in 2013. The reauthorization 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.

With regards to Appellant's contentions listed above, it is important to clarify for the record that the purpose of 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. The documentation submitted by Appellant does not provide a valid basis for a dismissal or reduction of the current reciprocal disqualification period.

Appellant's training of store employees in SNAP regulations, its many years in business, its lack of SNAP violations, congressional district SNAP demographics, and customer shopping patterns are not relevant 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.

Records show there are 27 SNAP retailers located within a 1.00 mile radius of the Appellant business that includes one super store, one supermarket, and four medium grocery stores located 0.28-0.96 miles from Appellant's location. The Retailer Operations Division evaluated those stores classified as medium grocery stores and larger in order to determine if they sold as large a variety of staple food items at comparable prices using existing FNS data as well as other sources. Their evaluation also included a store visit to the Appellant business conducted by a FNS contract employee on February 17, 2018, and an evaluation of Appellant's claim of the area being a "food desert". This evaluation resulted in three of the four medium grocery stores being determined as unsuitable either due to their stock of staple foods or their geographic location in relation to Appellant's location. However, three SNAP retailers were determined to be comparable stores including the nearby supermarket located 1200 feet away, the medium grocery store co-located with the meat specialty store at the farmers market located 0.52 miles away, and the super store located 0.57 miles away. The Retailer Operations Division also utilized the Food Access Research Atlas website maintained by the USDA Economic Research Service that is used to map community access to affordable, healthy food. A check of Appellant's location using this website determined that the business is not located in a "food desert". A further check by this Review Officer of the US Census Bureau's American Fact Finder shows that the population demographics for zip code 90221 are 75.3 percent Hispanic. A comparison of the photographs

submitted by Appellant to those taken during the February 17, 2018, FNS store visit both support that the Appellant business offers a good selection of fresh meats, fresh produce, and staple foods. Both sets of photographs show that the Appellant business has signage in English/Spanish and also stocks a large number of Hispanic brand foods commonly found in areas with Hispanic populations. Lastly, the Appellant business is located on East Rosecrans Avenue that has fixed route bus service that would facilitate shopping at other stores.

Based on the above discussion, the three nearby stores appear readily accessible to SNAP recipients and they offer a variety of staple foods comparable to, or better than, those offered by Appellant. Appellant does not carry any unique items or foods that cannot be found at these or other nearby stores. It is recognized that some degree of inconvenience to SNAP benefit users is inherent in the disqualification from SNAP of any participating food store as the normal shopping pattern of such SNAP benefit holders may be altered. Inconvenience; however, does not rise to the level of hardship required by the regulations.

The record documents that the Retailer Operations Division properly considered Appellant's eligibility for a hardship CMP according to the terms of Section 278.6(f)(1) of the SNAP regulations, and appropriately denied such. Therefore, the earlier determination that the disqualification of Appellant would not create a hardship to customers, as differentiated from potential inconvenience, is sustained, and a hardship CMP in lieu of disqualification is not appropriate in this case. No charges of trafficking SNAP benefits were levied by the Retailer Operations Division therefore Appellant may not be considered for a trafficking CMP.

It is recognized that some degree of economic hardship is a likely consequence whenever a store is disqualified from participation in SNAP. However, there is no provision in the SNAP regulations for waiver or reduction of an administrative penalty assessment on the basis of possible economic hardship to the firm or to ownership resulting from imposition of such penalty. To allow ownership to be excused from an assessed administrative penalty based on purported economic hardship to the firm would render virtually meaningless the enforcement provisions of the Food and Nutrition Act of 2008, as amended, and the enforcement efforts of the USDA. Furthermore, 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, ownership's contention that he and his family may incur economic 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.

CONCLUSION

Based on the discussion above, the determination by the Retailer Operations Division to impose a three year disqualification against the Appellant business from participating as an authorized retailer in SNAP 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.

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

March 9, 2018