

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

**Starlight Mini Mart,**

**Appellant,**

**v.**

**Case Number: C0213765**

**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 Starlight Mini Mart (“Appellant”) a hardship civil money penalty in lieu of a three-year disqualification from participating as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP) as a result of WIC program violations.

**ISSUE**

The purpose of this review is to determine whether the Retailer Operations Division took appropriate action, consistent with Title 7 of the Code of Federal Regulations (CFR) § 278.6(e)(8) and 7 CFR §278.6(f), when it denied a civil money penalty in lieu of a three-year disqualification against Appellant on November 27, 2018.

**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 November 8, 2018, the Retailer Operations Division informed Appellant of the agency’s intention to impose a three-year disqualification against Appellant from participating as an authorized retailer in 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)(A) of the SNAP regulations, "a pattern of claiming reimbursement for the sale of an amount of a specific food item which exceeds the store's documented inventory of that food item for a specified period of time."

Although afforded the opportunity to do so, Appellant did not reply to the Retailer Operations Division's charges.

After considering the evidence, the Retailer Operations Division informed Appellant by letter dated November 27, 2018, that the store was not eligible for imposition of a civil money penalty in lieu of disqualification and would be disqualified from participation as a retail store in SNAP for a period of three years. Appellant was also informed that the determination to disqualify Appellant from 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 December 7, 2019, Appellant, through counsel, appealed the Retailer Operations Division's decision to deny assessing a civil money penalty and requested an administrative review of this action. The appeal was granted and implementation of the sanction has been on hold pending completion of this review.

## **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 statute in this matter is contained in the Food and Nutrition Act of 2008, as amended (7 U.S.C. § 2021), and promulgated through regulation under Title 7 CFR Part 278. In particular, 7 CFR § 278.6(a) 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 civil money penalty 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 CFR § 278.6(e)(8) reads, in part, "FNS shall disqualify from the Supplemental Nutrition Assistance Program (SNAP) any firm which is disqualified from the WIC Program." 7 CFR § 278.6(e)(8)(iii)(A) states 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 that such reciprocal SNAP disqualifications shall not be subject to administrative or judicial review.

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'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**

Appellant's responses regarding this matter are essentially as follows:

- The disqualification would pose a hardship to SNAP participants who have relied on the firm. The firm has been SNAP authorized for nine years. Many participants walk to the store and would be forced to shop at less convenient stores.
- The three-year disqualification would pose a severe hardship to the firm and force the firm to close.
- The three-year disqualification is unduly harsh. Appellant has never been previously accused of a SNAP or WIC violation.
- The WIC violations were primarily due to poor recordkeeping, not fraud or cheating.

These explanations may represent only a brief summary of Appellant's contentions. However, in reaching a decision, full consideration has been given to all contentions presented, including any others that have not been specifically listed here.

### **ANALYSIS AND FINDINGS**

With regards to Appellant's contention that a three-year reciprocal disqualification from SNAP due to the three-year disqualification from WIC due to WIC violations seems like a harsh penalty, no findings or conclusions are herein rendered. Those matters dealing with the WIC Program disqualification are not subject to this particular administrative review process. The matter of the WIC Program disqualification cannot properly be re-addressed in the present context except to conclude on a fact-finding basis that Appellant has been disqualified from participation in the WIC Program based on violations which include those specified within 7 CFR § 278.6(e)(8) for a period of three years. The only issue in this review is whether the Retailer Operations Division properly denied Appellant the option of a civil money penalty (CMP) in lieu of a three-year SNAP disqualification.

The action to disqualify Appellant from SNAP is a required reciprocal action on the basis of the firm being disqualified from the WIC Program. Such action to reciprocally disqualify is directed by 7 CFR § 278.6(e)(8) of the SNAP regulations and provides no agency discretion in the matter.

#### **No Undue Hardship to Appellant**

Appellant maintains that disqualification would pose an extreme hardship to the firm. Economic hardship is a likely consequence whenever a store is disqualified from SNAP participation.

However, there is no provision in the SNAP regulations for reducing an administrative penalty on the basis of possible economic hardship to the firm resulting from such a penalty. To excuse Appellant from an assessed administrative penalty based on purported economic hardship would render the enforcement provisions of the Food and Nutrition Act of 2008 and the enforcement efforts of the USDA virtually meaningless.

Moreover, giving special consideration to the firm for economic hardship would forsake fairness and equity to competing stores and other participating retailers who are complying fully with program regulations, and also to those retailers who have been disqualified from the program in the past for similar violations. Therefore, Appellant's contention that it will incur economic hardship due to an administrative penalty does not provide any valid basis for dismissing the charges or for mitigating the imposed penalty.

### **CIVIL MONEY PENALTY**

Appellant contends that it is eligible for a hardship civil money penalty (CMP). The imposition of a CMP in lieu of disqualification is appropriate only if: 1) a store sells a substantial variety of staple food items, and; 2) 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.

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 Appellant is not the only authorized retail food store in the area "selling as large a variety of staple food items at comparable prices."

Appellant contends the disqualification would pose a hardship to SNAP participants who rely on the firm. Many participants walk to the store and would be forced to shop at less convenient stores.

It is to be noted that the SNAP regulations defines hardship specifically 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." That is what "hardship" means with regards to consideration of a firm's eligibility for a CMP. The subject store is classified in the FNS SNAP retailer database as a convenience store. That database also shows there are 35 SNAP retailers located within a one-mile radius of Appellant's store including four medium grocery stores. Therefore, by definition, there is no hardship that will result as there is no lack of comparable stores in the area.

All of these stores are easily accessible to customers and offer a variety and quality 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 other stores. Therefore, the earlier determination that Appellant's disqualification would not create a hardship to customers, as differentiated from potential inconvenience, is sustained, and a CMP in lieu of disqualification is not appropriate in this case.

With regards to the store being preferred by SNAP participants, some degree of inconvenience to SNAP customers is inherent with the disqualification from SNAP of any participating food store, as the normal shopping pattern of such SNAP customers may be temporarily altered during the period of disqualification. However, the earlier determination that the disqualification of Appellant would not create a hardship to customers, as differentiated from potential inconvenience, is valid. Therefore, a CMP in lieu of disqualification is not appropriate in this case.

## **CONCLUSION**

Based on the discussion above, the determination by the Retailer Operations Division to deny Starlight Mini Mart a hardship civil money penalty in lieu of a three-year disqualification from 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, 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**

Applicable rights to a judicial review of this decision are set forth in 7 U.S.C. § 2023 and 7 CFR § 279.7. If Appellant desires a judicial review, 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.

RICH PROULX  
Administrative Review Officer

February 11, 2019