

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

**Superior Products Minimarket, Inc,**

**Appellant,**

**v.**

**Case Number: C0200355**

**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 Superior Products Minimarket, Inc. 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 September 5, 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 June 7, 2017, the Retailer Operations Division informed store ownership that as the result of a March 7, 2016, New York 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 requested an extension of time to respond via telephone on June 13, 2017, and was approved for an extension until June 26, 2017. Appellant responded to the charges in a letter dated June 24, 2017, and sent via fax on June 26, 2017. By letter dated September 5, 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 September 14, 2017, Appellant 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. No subsequent correspondence 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 statute 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 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 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 and in the request for administrative review, Appellant has stated as its position in the matter the following:

- The owner closed her WIC account because she was away for a period of time and wanted to stay in good standing with the WIC Program. The owner has been advised that a letter was sent after she had closed the WIC

account, but she never received this letter. The owner was not aware that if she terminated her contract with the WIC Program that it would affect participation in SNAP. The owner humbly requests the opportunity to reapply for the WIC Program and to obtain a Civil Penalty in lieu of permanent disqualification from the SNAP Program;

- If the business is terminated from SNAP, the owner would be unable to continue forward and would be forced to close the business as she will not be able to make ends meet; and,
- If an appeal is granted, the owner will have the opportunity to go to her local WIC office and request a conference to see if there is a way to back-track their actions and re-open their original investigation.

Appellant submitted a letter dated November 17, 2015, from the Montefiore/New Rochelle WIC Vendor Management Agency 809 stating that a voluntary termination request was received with the last day to accept and deposit WIC checks being December 2, 2015, and that Appellant may not reapply to be a WIC vendor until after November 16, 2016. No other evidence or documentation was submitted 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 March 7, 2016, the New York Department of 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 New York WIC Program for a pattern of vendor overcharging violations that warrant a three year WIC disqualification period. The New York Department of 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 New York Department of Health letter to FNS dated May 5, 2016, states that Appellant failed to exercise its right to appeal the WIC action. Although Appellant voluntarily withdrew from the WIC Program in November 2015, the violations for which the three year WIC disqualification were imposed occurred during the April 2015-September 2015 period during which Appellant was a WIC vendor.

The FNS SNAP retailer application form contains 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 applied for authorization as a

SNAP retailer in 2011 and again when it completed the reauthorization application in 2013. Both the original application and reauthorization application specifically state 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. Additionally, the official record shows that a previous WIC investigation at the Appellant business in fiscal year 2012-2013 found violations of State Agency WIC regulations that resulted in a warning letter being issued to store ownership.

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.

### **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 22 SNAP retailers located within a 0.25 mile radius of the Appellant business including a super store located 0.07 miles from Appellant’s location and three supermarkets located 0.08-0.2 miles away. The many 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

December 21, 2017