

**U.S. Department of Agriculture
Food and Nutrition Service
Administrative Review Branch
Alexandria, VA 22302**

The Bodega on Ross Street,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0196014

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 as a result of WIC program violations, was properly rendered by the Retailer Operations Division (hereinafter, "Retailer Operations Division") against The Bodega on Ross Street (hereinafter, "The Bodega on Ross Street" / "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 Supplemental Nutrition Assistance Program (SNAP) when it denied assessing a civil money penalty in lieu of a three (3) year disqualification against The Bodega on Ross Street in a letter dated January 13, 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

FNS was advised by the North Carolina WIC State Agency that Appellant was being disqualified from participation as a WIC vendor via copy of the letter dated August 29, 2016 wherein Appellant was advised that it was being disqualified from the WIC Program for three (3) years effective no later than 4:00 P.M. on September 30, 2016.

The materials specified that the sanction was being imposed because an audit conducted between March 30, 2016 and June 9, 2016 had revealed that Appellant claimed reimbursement for the sale of WIC supplemental food which exceeded its documented inventory during the audit period.

Retailer Operations Division has identified that, in addition to representing violations of the terms and conditions contained in the WIC vendor agreement, the same violations are identified as having violated SNAP regulations at 7 CFR §278.6(e)(8)(i)(A) “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;”

In a letter dated December 15, 2016 Appellant was advised by the Retailer Operations Division that it was being reciprocally disqualified from SNAP based on the WIC violations; that it had been duly informed by the North Carolina WIC State Agency that “...this disqualification from WIC may result in disqualification as a retailer in the Food Assistance program, known nationally as the Supplemental Nutrition Assistance Program (SNAP). Such disqualification is not subject to administrative or judicial review under the Food Assistance Program (SNAP)¹”; and that all opportunities for appeal of the WIC State agency action had been exhausted or expired.

The record indicates that Appellant provided a response and materials for consideration of its request for the imposition of a hardship civil money penalty (CMP) in lieu of disqualification, dated January 6, 2017. Following consideration of Appellant’s response the Retailer Operations Division informed Appellant in a letter dated January 13, 2017, that it 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. Appellant was also informed that the determination to disqualify The Bodega on Ross Street from the SNAP on the basis of the WIC Program disqualification is not subject to administrative review; rather only appeal rights with regards to the firm’s eligibility for a hardship civil money penalty are afforded. This is in accordance with the Food and Nutrition Act of 2008, as amended, and 7 CFR § 278.6(e)(8) of the SNAP regulations.

Via letter dated January 20, 2017, Appellant, through its owner of record, appealed the Retailer Operations Division’ decision to deny the assessment of a hardship civil money penalty and requested an administrative review of this decision. The appeal was granted and implementation of the SNAP disqualification has been held in abeyance pending completion of this review.

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, might accept as sufficient to support a conclusion that the matter asserted is more likely to be true than not true.

¹ August 29, 2016 letter 2nd to last paragraph.

CONTROLLING LAW

The controlling statute in this matter is contained in the Food and Nutrition Act of 2008, as amended (the “Act”)², 7 USC 2023 and 278 of Title 7 of the Code of Federal Regulations (CFR).³

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 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(e)(8) states, in part,

“FNS shall disqualify from the Food Stamp Program [SNAP] 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 [SNAP]”

7 CFR § 278.6(e)(8)(i) states, in part, that such a disqualification shall be based on

“any of the following specific program violations...(E) 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;”

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 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 Part § 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

² Effective October 1, 2008, the Food Stamp Act of 1977 was superseded by the Food and Nutrition Act of 2008, as amended through P.L. 110-246 with subsequent amendment enacted through P.L. 113-79 effective February 7, 2014.

³ Title 7 of the Code of Federal Regulations may be accessed in its entirety via the Internet at https://www.ecfr.gov/cgi-bin/text-idx?tpl=/ecfrbrowse/Title07/7tab_02.tpl

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 Part § 278.1(b)(4)(D) states, in part,

“The collateral bond or irrevocable letter of credit must have a face value of \$1000 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 January 20, 2017 Appellant provided a request for appeal of the disqualification from the SNAP because:

- He had purchased infant formula from non-approved retailers as a cost saving measure, therefore was unable to provide invoices for those purchases during a WIC audit resulting in a three (3) year WIC disqualification.
- The language in the August 17, 2016 letter from the North Carolina WIC State Agency stating “disqualification from the WIC Program **may** jeopardize your participation as a vendor in the Supplemental Nutrition Assistance Program (SNAP)” [Emphasis added], was not clear therefore he did not know he would be disqualified from SNAP as well.
- He has been conducting an honest business for five (5) years, treating people with the utmost respect, and disqualification would lead to a tremendous loss to the customers as well as to the business.

The preceding may represent only a summary of Appellants’ contentions as presented by counsel 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.

SUMMARY OF CHARGES

The record shows that Appellant was informed in the FNS letter of charges dated December 15, 2016 as well as in the FNS letter of determination dated January 13, 2017 that the determination to disqualify The Bodega on Ross Street 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 North Carolina WIC State Agency 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 instant appeal is focused strictly on the firm’s eligibility for a hardship civil money penalty.

Appellant was duly notified that WIC Program disqualification may result in a reciprocal SNAP authorization disqualification in the notice from the North Carolina WIC State Agency dated August 17, 2016, in the second to the last sentence of the last paragraph on page two. In a second letter dated August 29, 2016, Appellant was more succinctly advised of the potential reciprocal SNAP disqualification in the second to the last paragraph on page two.

Therefore, Appellant's indication that the language in the August 17, 2016 letter from the North Carolina WIC State Agency was unclear, despite its being more directly addressed in the August 29, 2016 letter, cannot be considered a basis for mitigating or reversing the current decision. Similarly, Appellant's contention that formula was purchased from non-authorized vendors as a cost saving measure cannot be considered.

ANALYSIS AND FINDINGS

The Retailer Operations Division has rendered a finding pursuant to 7 CFR §278.6(f) that it would not be appropriate to impose a civil money penalty in lieu of a period of disqualification because of its determination that The Bodega on Ross Street 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 civil money penalty 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 define it rather specifically as a condition that results because "there is no [emphasis added] other authorized retail food store in the area selling as large a variety of staple food items at comparable prices."

The contentions that Appellant has been conducting an honest business for five (5) years, treating people with the utmost respect, are not factors that are recognized hardships subject to consideration of the imposition of an alternative civil money penalty instead of a period of disqualification.

In this case, the Retailer Operations Division has noted that The Bodega on Ross Street is a convenience store, as defined in accordance with SNAP regulations, of about 1,500 square feet with sections dedicated to ineligible SNAP items such as alcohol, tobacco products, lottery tickets, health and beauty products, paper goods; an ATM; and an independently run hot food establishment. The materials documents that a review of the December 21, 2016 contracted store visit survey does not reveal any expensive staple foods, accessory items, bulk, specialty items, or extensive produce available for sale. Also no carts or baskets are identified as available to transport merchandise for purchase to the checkout area.

Appellant is located in an area where Retailer Operations Division identified nine (9) alternative SNAP authorized firms within a one (1) mile radius including one (1) small grocery store; two (2) combination grocery stores such as dollar stores; and, six (6) alternative convenience stores. The contracted store visit materials for The Bodega on Ross Street were compared to the contracted store visit materials for two (2) nearby convenience stores finding the alternative stores more fully stocked with staple foods in larger quantities. Appellant has provided no evidence of the availability of SNAP eligible items which are not readily available at the alternative SNAP authorized firms.

Retailer Operations Division documented having conducted an analysis of the shopping behavior of two (2) of the three (3) households represented with statements in the reply to the letter of charges finding that the larger portion of their SNAP benefits were redeemed by the households at larger, likely better stocked firms.

On review the determination of the availability of alternative SNAP authorized retailers within a one-mile radius identified by Retailer Operations Division is further affirmed with review of the USDA-FNS SNAP Retailer Locator tool at <http://www.fns.usda.gov/snap/retailerlocator> identifying at least 10 alternative SNAP authorized retailers located within one (1) mile of The Bodega on Ross Street. By definition, there is no hardship that will result as there is no lack of comparable stores in the area.

Economic Impact:

To Appellant's contention that disqualification would lead to a tremendous loss to the customers as well as to the business; an economic impact is expected to result from the disqualification, whether permanent or temporary, of any currently authorized SNAP retailer. This impact is likely to be evident to not only Appellant's operation but to that of competitor firms. Similarly, the shopping patterns of frequent customers, particularly neighborhood households, may be subject to impact; and, the income of families dependent on Appellant revenue will likely be impacted. Notwithstanding the recognized economic impact consideration must be given to the interests of the program and fairness and equity, not only to competing stores but also to those other participating retailers who are complying fully with program regulations. In addition, fairness must be afforded to those other retailers who have been disqualified from the program in the past for similar violations.

Therefore, Appellant's contentions do not provide a basis for mitigating or reversing the current penalty as assessed by the Retailer Operations Division.

CONCLUSION

Based on the discussion above, the decision to deny the imposition of a hardship civil money penalty in lieu of a three (3) year SNAP disqualification against The Bodega on Ross Street is sustained.

In accordance with the Food and Nutrition Act of 2008, and the pursuant regulations, the 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 (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 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 provisions of the Freedom of Information Act (FOIA), FNS is releasing this information in a redacted format as appropriate. FNS will protect, to the extent provided by law, personal information that if released could constitute an unwarranted invasion of privacy.

NANCY BACA-STEPAN
Administrative Review Officer

April 18, 2017