

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

Tienda Mexicana La Posadita,

Appellant,

V.

Retailer Operations Division,

Respondent.

Case Number: C0225884

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 Supplemental Nutrition Assistance Program (SNAP) as a result of Women, Infants and Children (WIC) Program violations, was properly rendered by the Retailer Operations Division against Tienda Mexicana La Posadita (hereinafter 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 the Supplemental Nutrition Assistance Program (SNAP) when it denied assessing a civil money penalty in lieu of a three (3) year disqualification against Appellant on March 16, 2020.

AUTHORITY

7 U.S.C. § 2023 and the 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 in correspondence dated December 2, 2019, that Appellant was being disqualified from the WIC Program for three (3) years identified as the period starting February 8, 2020, and that Appellant exhausted all appeals. The correspondence was appended with a North Carolina WIC State Agency letter dated September 21, 2018, addressed to Appellant and that included information on violations committed against the terms and conditions contained in the Vendor Agreement. Those violations included ones

pursuant to 7 CFR § 278.6(e)(8)(i)(E) “A pattern of charging WIC customers more for food than non-WIC customers or charging WIC customers more than the current shelf price.”

In a letter dated January 29, 2020, the Retailer Operations Division informed ownership of the agency’s intention to disqualify Appellant from participation in the SNAP for a period of three (3) years as a reciprocal administrative action on the basis of the store’s disqualification from the WIC Program. Appellant’s counsel contacted Retailer Operations Division via telephone on February 11, 2020 and left a voicemail. Retailer Operations Division returned Counsel’s phone call on February 12, 2020, and left a message advising counsel that a signed release from the owner to correspond with him was required. Counsel was also notified that the 10-day window in which to respond to the charge letter elapsed on Monday February 10, 2020, however upon receipt of the signed release an extension would be considered.

Counsel responded to the message and advised that Appellant was ill and the individuals that received the original letter do not communicate in English. Counsel requested an extension in which to respond to the charge letter. In correspondence dated February 13, 2020, Retailer Operations Division granted Appellant an extension to February 21, 2020, in which to respond to the charge letter. In a February 20, 2020, telephone conversation, Appellant, through counsel, requested an addition extension and questioned the HCMP process. In correspondence dated February 20, 2020, Retailer Operations Division granted the extension to March 6, 2020.

In correspondence dated March 6, 2020, Appellant, through counsel, responded to the charge letter and generally stated that the owner was out of the country due to an unknown medical condition. Counsel stated that the owners’ appeal rights do not elapse until November 2020 under NC Rule 41. Counsel requested that FNS suspend its decision until such time or allow 90 days for the firm to re-file the petition for judicial review. Counsel indicated that a change in the nature of the business may be on the horizon given the owners health and requested 90 days to request an HCMP based on the uniqueness of the store.

Retailer Operations Division considered Appellant’s response to the charge letter and the facts of the case, and in correspondence dated March 16, 2020, notified Appellant that it was disqualified from the SNAP. 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.

We considered your eligibility for a hardship civil money penalty (CMP) according to the terms of Section 278.6(f)(1) of the SNAP regulations. We have determined that you are not eligible for a CMP because there are other authorized retail stores in the area selling a variety of staple foods at comparable prices”

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, would 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 correspondence dated March 26, 2020, ownership, through counsel, made the following summarized contentions in response to the Retailer Operations Division determination that Appellant was not eligible for a CMP in lieu of disqualification, in relevant part:

1. We respectfully disagree with your conclusion that there are other authorized retailers in the area selling a variety of staple foods at comparable prices.
2. Your conclusion that "All opportunities for appear of the WIC State agency action have been exhausted or expired" is unequivocally wrong. The case was dismissed under North Carolina Rule of Civil Procedure 41, without prejudice. When a case is so dismissed, under well settled state law, he has up to one year to resume the proceedings by simply paying the filing fee to the clerk of court.
3. When my client qualified for WIC, all communication was in Spanish, his only language. However, subsequent communications were in English, and he really didn't understand what was going on until after the second "sting," which happened in a very short time period.
4. My client's employees were taking the WIC forms and completing them later. This was never a problem because at my client's store every customer always got everything on the list.

In subsequent correspondence dated April 24, 2020, Appellant, through counsel, contends that the suspension of SNAP privileges has erroneously been implemented prematurely and that it stands on its prior assertions. An additional development has occurred in that Mr. Guzman's health has substantially improved and he has been released from the hospital to return home and is now available to more fully participate in the process. Counsel provided a copy of the State of North Carolina County of Chatham Petition for Judicial Review against the NC Department of Health and Human Services, Division of Public Health.

The preceding may represent only a brief 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

The record shows that Appellant was informed in the FNS letter of charges dated January 29, 2020, as well as in the FNS letter of determination dated March 16, 2020, that the determination to disqualify Appellant 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 immediate appeal is focused strictly on the firm's eligibility for a hardship civil money penalty.

It is important to clarify that Appellant was duly notified that the WIC Program disqualification may result in a reciprocal SNAP authorization disqualification in the notice from the North Carolina WIC State Agency dated September 21, 2018 and received via certified mail on September 24, 2018. Page 2 of the NC Department of Health and Human Services Notice of Intent to Disqualify from WIC Program states “Title 7 CFR 246.18(b)(1) requires us to inform you that this disqualification from WIC may result in disqualification as a retailer in the Supplemental Nutrition Assistance Program ("SNAP"). Such disqualification is not subject to administrative or judicial review under SNAP.”

Moreover, counsel contends that the opportunities for appeal of the State Agency’s decision to disqualify Tienda Mexicana La Posadita from WIC have not been exhausted under North Carolina Rule 41; which according to counsel gives Appellant until November 2020, to exercise its appeal rights. The record reflects that on February 14, 2020, the Retailer Operations Division received written confirmation from the North Carolina Department of Health and Human Services that Tienda Mexicana La Posadita appealed the 3-year disqualification, but subsequently withdrew the appeal in November of 2019, by way of Rule 41(Voluntary Dismissal). Therefore, Appellant has exhausted all of its appeal rights and FNS is free to move forward with reciprocal actions. It is also important to note that the administrative review process cannot be held in abeyance pending the outcome of a judicial review sought against the North Carolina WIC State Agency.

CIVIL MONEY PENALTY

With regard to Appellant’s contentions, 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.”

It is noted that a store analysis was conducted on Appellant to ascertain its depth and breadth of stock compared to the surrounding SNAP authorized retailers. The analysis does not show that Appellant had a superior variety, quantity, and quality of food inventories or that Appellant offered any specialty or ethnic foods not found at the other nearby SNAP authorized retailers. There also was nothing to indicate that Appellant had lower food prices or that a disqualification would cause hardship to SNAP households.

The imposition of a CMP 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 specifically defines it 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.”

In this case, the Retailer Operations Division has noted Appellant as a medium grocery store, as defined in accordance with SNAP regulations, and is located in an area where six similarly or

larger authorized firms were located within a one mile radius of Appellant's store. The alternative SNAP authorized firms include one (1) small grocery store, two (2) medium grocery stores, two (2) combination grocery stores and one (1) supermarket and all of the alternative SNAP authorized firms are identified as selling as large a variety or staple food items at prices comparable or better than those of Appellants'. Therefore, by definition, there is no hardship that will result as there is no lack of comparable stores in the area.

CONCLUSION

Based on the discussion herein, the decision to deny the imposition of a hardship CMP in lieu of a three (3) year SNAP disqualification against Tienda Mexicana La Posadita is sustained. In accordance with the Food and Nutrition Act of 2008, as amended, and the SNAP regulations, the period of disqualification shall become affective 30 days after receipt of this letter. A new application for participation may be submitted by the firm 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 once more 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, as amended, (7 U.S.C. § 2023) and to Title 7, Code of Federal Regulations, Part 279.7 (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 (FOIA), 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.

Monique Brooks
ADMINISTRATIVE REVIEW OFFICER

August 13, 2020