

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

Tropicana Foods,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0209908

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 Tropicana Foods 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 July 8, 2019.

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 24, 2019, the Retailer Operations Division informed Appellant that as the result of a February 7, 2018, North Carolina WIC State Agency disqualification action 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). The WIC State Agency correspondence also cautioned Appellant that the WIC disqualification may result in a disqualification from SNAP for three years that was not subject to administrative review.

An earlier charge letter had been issued on June 21, 2018, but was rescinded when Appellant, through counsel, advised the Retailer Operations Division that an appeal had been filed with the North Carolina Supreme Court on June 19, 2018. On April 2, 2019, counsel voluntarily withdrew the appeal and the charge letter dated June 24, 2019, was subsequently issued.

Appellant responded to the charges by letters dated June 29, 2018, and July 1, 2019, in which Appellant claimed economic hardship to the firm and its employees as well as a hardship to SNAP recipients in the surrounding community. By letter dated July 8, 2019, 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 July 11, 2019, 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. 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 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 CFR § 278.6(e)(8) establishes, among other things, the kind of violations that warrant a reciprocal disqualification and 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)(C) states that reciprocal SNAP disqualifications shall not be subject to administrative or judicial review. FNS may, in lieu of a disqualification, subject a firm to a CMP if the agency determines that a disqualification would cause hardship to participating SNAP households. In interpretation of the regulations, agency policy provides, inter alia, that “even though the action to disqualify on the basis of the WIC disqualification is, by statute and regulation, un-appealable, the determination to deny a firm a hardship CMP in lieu of the reciprocal disqualification, or the amount of the hardship CMP, remains subject to appeal in the Supplemental Nutrition Assistance Program.”

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

The following 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:

- The business is a full-service supermarket, not simply a grocery store within a convenience store, and serves a large diverse neighborhood that relies on SNAP. The business serves approximately 620 SNAP and non-SNAP customers per day with most, if not all, coming from the immediate neighborhoods around the store;
- The neighborhoods are in a low socioeconomic area with subsidized housing and a median annual income of \$16,613-\$20,313. Census data shows as many as 2,000 people within walking distance of the store which is important as many residents do not have any form of reliable transportation. All other grocery stores are located more than 1.6 miles to as much as four miles away. Moreover, residents would have to cross some form of four or five lane highway no matter which way they travel putting them in a dangerous situation when hauling groceries home;
- The majority of residents are renters and many do not have regular transportation. The business regularly helps deliver groceries at no cost to these customers as an extra way to help them. Although there are other stores that are somewhat close, many customers would be unable to haul their groceries home and certainly most of these stores would not offer delivery; and,
- Consideration for a CMP is requested. The WIC disqualification clearly hurts the business financially and reduces its ability to provide for their regular customers. The loss of SNAP would be a further detriment to these customers and would cripple the business. The owners took a huge risk by locating here to serve underprivileged customers and it is likely they would cease operations without SNAP. Most of the 18 employees who rely on the business to provide income to pay their bills would have to be

laid off without SNAP. The owners would never want this to occur and hope that this is taken into consideration. Tropicana Foods is a family run operation and the family pours its heart and soul into many of its endeavors. All of these factors are reasons for USDA to consider a hardship for the store owners and, more importantly, a hardship for its loyal customers. The owners will abide by a reasonable CMP and continue to serve the community.

Appellant submitted a census tract map illustrating the median household income are the business, a census blockgroup population map, maps and photos showing the location of nearby stores and groceries, a signed statement by a customer, and a petition signed by local residents in support of these contentions.

ANALYSIS AND FINDINGS

By letter dated February 7, 2018, the North Carolina Department of Health and Human Services, the WIC State Agency, disqualified Appellant from participating in the WIC program for three years. The subject firm was disqualified from the North Carolina WIC Program for claiming reimbursement for the sale of WIC foods that were in excess of the Vendor's documented inventory, a violation that warrants a three year WIC disqualification period. The North Carolina Department of Health and Human Services 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 FNS SNAP retailer application and reauthorization application 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 completed the retailer application and again when it completed the retailer reauthorization application. The authorization application specifically states that, "Disqualification from the WIC Program may result in Supplemental Nutrition Assistance Program disqualification, and a 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 and clearly states that store owners or operators are legally responsible for their 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 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.

It is important to clarify for the record that 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.

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.

It is Appellant's contention that disqualification would create an undue hardship to SNAP recipients in the surrounding neighborhoods since the area is economically depressed with a low median annual income and many residents whom do not have any form of reliable transportation to travel to the nearest grocery store which is more than 1.6 miles away with other stores as far away as four miles. There are as many as 2,000 residents within walking distance of the firm who would have to cross some form of four or five lane highway no matter which way they walk to other stores putting them in a dangerous situation when hauling groceries home. The Appellant firm serves approximately 620 SNAP and non-SNAP customers per day with most, if not all, coming from the immediate neighborhoods around the store. The firm also regularly helps deliver groceries at no cost to these customers as an extra way to help them. Appellant submitted a census tract map illustrating the median household income around the business, a census blockgroup population map, maps and photos showing the location of nearby stores and groceries, a signed statement by a customer, and a petition signed by local residents in support of these contentions.

In regards to these contentions, it is not unusual for SNAP retail stores to be located in economically depressed areas with low household income levels and possible transportation challenges. FNS records show that the Appellant firm is located in an area designated as rural and that there are there are 11 comparable or larger stores located within 2.91 miles of Appellant's location that includes four super stores and six supermarkets with the closest store, a supermarket, being located 0.99 miles away. The Retailer Operations Division conducted a review of the area stores and noted that online mapping shows there are sidewalks the entire distance from the Appellant firm to this nearby supermarket and that there are no four or five lane highways to be crossed. While confirming this route as part of the review process, this Review Officer also noted bus transit symbols. While being a small city in a rural area, Wilson has an extensive transit system consisting of five fixed bus routes, a para-transit service for handicapped individuals, and dial-a-ride service. The Appellant firm is located on or within a block of two different scheduled bus routes per the Wilson Transit bus route guide located on their web site.

FNS conducted a store visit at the Appellant firm on February 5, 2018. Store visit report forms include the completion of a series of questions that are answered in conjunction with the store employee authorizing the store visit which in this case was one of the owners. This owner answered "no" to the question asking if the firm offered delivery thereby casting doubt on

Appellant's claim that the firm offers delivery. Appellant also claims the firm has approximately 620 SNAP and non-SNAP customers per day which would equate to 18,600 transactions at the Appellant firm for the month of June 2019. FNS SNAP transaction data shows there were 1,834 SNAP transactions at the Appellant firm during this same month meaning that slightly less than 10 percent of all transactions at the Appellant firm are attributable to SNAP recipients.

The Retailer Operations Division also conducted an analysis of the shopping patterns for a random sampling of names on the petition and the customer statement using the North Carolina SNAP database and FNS transaction data. The customer statement was from a handicapped individual who purportedly used a wheelchair and had no transportation. The SNAP database shows that this individual's reported home of record is not near the Appellant firm and that the household only shopped there three times in a six month period while shopping 39 times at five different super stores and supermarkets. The analysis of names from the petition found households who were not SNAP recipients; households that were SNAP recipients, but did not shop at the Appellant firm at all during the six month period; and households that were SNAP recipients who shopped at the Appellant firm, but also shopped at super stores and/or supermarkets.

The many supermarkets and super stores, located nearby as well as at a distance from Appellant's location, offer a greater quantity and variety of SNAP eligible foods items for comparable or better prices than customers can find at the Appellant firm. These stores appear to be accessible to SNAP recipients and many of these stores also offer store brand products at lower prices, offer weekly specials, and have many shopping carts and checkouts with built-in scanners and conveyor belts to facilitate processing purchases quickly. Appellant does not carry any unique items or foods that cannot be found at other 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.

It is also 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 the firm 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 deny the imposition of a hardship CMP in lieu of a three year SNAP disqualification 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. Questions regarding the application process can be answered by the FNS Retailer Service Center at 877-823-4369.

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

October 28, 2019