

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

**United Market,**

**Appellant,**

**v.**

**Retailer Operations Division,**

**Respondent.**

**Case Number: C0224362**

**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 (CMP), in lieu of a three-year disqualification from the Supplemental Nutrition Assistance Program (SNAP) as a result of the Women, Infants, and Children (WIC) Program violations, was properly imposed by FNS' Retailer Operations Division (Retailer Operations) against United Market (hereinafter Appellant).

**ISSUE**

The issue accepted for review is whether Retailer Operations took appropriate action, consistent with Title 7 of the Code of Federal Regulations (CFR) Part 278.6(f)(1), in its administration of SNAP, when it denied assessing a CMP in lieu of a three-year disqualification against Appellant.

**AUTHORITY**

7 U.S.C. § 2023, and the implementing regulations at 7 CFR § 279.1, provide that a food retailer 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**

On December 5, 2019, the California Department of Public Health (CDPH) WIC Division notified FNS' Retailer Operations that Appellant had been disqualified from participating in the CA WIC program for a period of three years, effective May 3, 2019, and that Appellant's appeal was denied. The correspondence was appended with the CDPH WIC Division's letter dated

April 4, 2019, addressed to Appellant and included information on violations committed against the terms and conditions contained in the Vendor Agreement.

Consequently, in a letter dated January 14, 2020, Retailer Operations informed Appellant that it was being considered for disqualification from SNAP for three years, as a result of violations of SNAP regulations at § 278.6(e)(8). The letter stated that Appellant was also being considered for the imposition of a CMP in lieu of disqualification.

This January 14, 2020 letter offered Appellant an opportunity to present any information, explanation, or evidence indicating that (1) Appellant has not been disqualified from the WIC Program; (2) Appellant was not informed of the possibility of SNAP disqualification in response to the WIC disqualification action; and (3) all opportunities for appeal of the WIC State agency action have not been exhausted or expired.

By email on January 28, 2020, Appellant, through counsel, requested an extension to respond to the January 14, 2020 letter and provided a letter of representation. On January 29, 2020, Retailer Operations called Appellant's counsel and explained WIC reciprocal disqualification and approved an extension of February 18, 2020, to respond to the January 14, 2020 letter. An extension of time to request a CMP in lieu of a permanent disqualification and to provide the documentation to support such a request cannot be extended. As of February 18, 2020, the case record shows Appellant did not submit a response.

By letter dated February 25, 2020, Retailer Operations informed Appellant that it was not eligible for imposition of a hardship CMP 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, Appellant only has appeal rights with regards to its eligibility for a CMP. This is in accord with the Food and Nutrition Act of 2008, as amended, and 7 CFR § 278.6(e)(8) of SNAP regulations.

By letter dated February 27 2020, Appellant appealed Retailer Operations' decision to deny assessing a CMP and requested an administrative review of this action. FNS granted Appellant's request for administrative review by letter dated March 6, 2020, and implementation of the sanction has been held in abeyance pending completion of this review.

## **STANDARD OF REVIEW**

In appeals of adverse actions, Appellant bears the burden of proving by a preponderance of the evidence, that the administrative actions should be reversed. That means Appellant has the burden of providing relevant, credible evidence that 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 law in this matter is contained in the Food and Nutrition Act of 2008, as amended, 7 U.S.C. § 2023 and 7 CFR § 278.

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 CMP 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 CMP 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 CMP 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 10% of the average monthly SNAP redemption volume of the applicant firm for the immediate 12 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**

Appellant, through counsel, made the following contention in its request for administrative review in relevant part:

- It is the Appellant’s position that there are not compatible stores in the proper radius.

## **ANALYSIS AND FINDINGS**

The record shows that Appellant was informed in the FNS Charge Letter dated January 14, 2020, as well as in the FNS Determination Letter dated February 25, 2020, that the determination to disqualify Appellant from 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 CDPH WIC Division and the basis for that decision is not a consideration in the instant case per SNAP regulations at §278.6(e)(8)(iii)(C); rather the immediate appeal is focused strictly on Appellant's eligibility for a hardship CMP.

It is important to clarify that Appellant was (1) disqualified from the WIC Program; (2) was informed of the possibility of SNAP disqualification in response to the WIC disqualification action; and (3) all opportunities for appeal of the WIC State agency action have been exhausted or expired. The CDPH WIC Division informed Appellant in its Disqualification Notice dated April 4, 2019 that WIC disqualification may result in disqualification as a retailer in SNAP in accordance with 7 CFR 278.6(e) and shall not be subject to administrative or judicial review under SNAP.

### **HARDSHIP CMP**

Appellant, through counsel, contends there are not compatible stores in the proper radius, they are in the process of getting supporting documentation, and that information will be filed at a later date. The case record shows that no supporting documentation was forwarded.

Retailer Operations has noted Appellant as a small grocery store, as defined in accordance with SNAP regulations, and is located in an urban area where eight alternative SNAP authorized firms are located within a one-mile radius. The alternative SNAP authorized firms include one large grocery store, one supermarket, three super stores, and three additional small grocery stores and that the alternative SNAP authorized firms are identified as selling as large a variety or staple food items at prices comparable to those of Appellant. 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-year SNAP disqualification against Appellant is sustained.

In accordance with the Food and Nutrition Act of 2008, as amended, and 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 Appellant 10 days prior to the expiration of this 3-year period. In accordance with 7 CFR § 278.1(b)(4), at the time of any such new application for program participation, Appellant 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 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 Appellant's owner resides or is 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 30 days of receipt of this Decision. Please note that the judicial filing timeframe is mandated in the Act, and this office cannot grant an extension.

Under the Freedom of Information Act, FNS is 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.

Kim Dameron  
Administrative Review Officer

December 9, 2020