

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

Veer A and D Foodmart LLC,

Appellant,

v.

Case Number: C0206896

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 Veer A and D Foodmart LLC 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 April 4, 2018.

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 March 5, 2018, the Retailer Operations Division informed Appellant that as the result of a January 26, 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 SA 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.

Appellant failed to respond to the charges. By letter dated April 4, 2018, 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 postmarked April 5, 2018, 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 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:

- Request reconsideration of the hardship CMP as there are no other stores in the area. The owners will pay the CMP in order to continue serving their customers;
- The business has been serving this community for over 20 years with food and supplies needed in the community. The store is in a rural area and a lot of customers walk to the store. Although there are other retailers that accept SNAP, they are not within walking distance of some customers. The business also sells items in smaller packages at affordable cost;
- There is an 5 U.S.C. § 552 (b)(6) & (b)(7)(C) 1.2 miles up the road that sells fruits at higher prices and would be a hardship for customers; and,
- The business is on two county lines and customers would have to travel

5-10 miles to reach a store accepting SNAP.

Appellant submitted no evidence or documentation in support of these contentions.

ANALYSIS AND FINDINGS

By letter dated January 26, 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 WIC items that exceeded the store'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 in 2015. The authorization application specifically states 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.

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 households in the surrounding neighborhood who rely on the store and that a lot of these households have to walk to the store. In regards to this contention, FNS records show there are three SNAP authorized retailers located within a one-mile radius of Appellant that includes one supermarket, one combination grocery store, and one convenience store. The supermarket is located 0.93 miles away while the combination grocery store is located directly across the street from the Appellant business. The records also show three super stores located 2.92, 2.95, and 3.0 miles away. The nearby stores appear readily accessible to SNAP recipients and offer a variety of staple foods comparable to, or better than, those offered by Appellant. Transaction records show that virtually all of the households shopping at the Appellant business are also shopping at these stores as well as at larger stores located several miles away, thus, transportation does not appear to be an issue. 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.

CONCLUSION

Based on the discussion above, the determination by the Retailer Operations Division to deny the imposition of a hardship civil money penalty 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

June 25, 2018