

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

**You Fresh Mart Inc,**

**Appellant,**

**v.**

**Case Number: C0213008**

**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 impose a hardship Civil Money Penalty (CMP) in the amount of \$11,000.00 against You Fresh Mart Inc 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 7 CFR § 278.6(e)(8)(iii) and § 278.6(f)(1), when on November 20, 2018, it imposed a hardship CMP in the amount of \$11,000.00 against Appellant in lieu of a three year SNAP reciprocal disqualification.

**AUTHORITY**

According to 7 U.S.C. § 2023 and the 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 October 30, 2018, the Retailer Operations Division informed Appellant that as the result of an August 1, 2018, New York 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.

The record reflects that Appellant failed to respond to the charge letter. By letter dated November 20, 2018, the Retailer Operations Division informed Appellant that in accordance with Section 278.6(e)(8)(iii) of the SNAP regulations, the firm was disqualified from the SNAP for a period of three years as was imposed for its WIC program violations. The letter noted that the Retailer Operations Division considered Appellant's eligibility for a hardship CMP according to the terms of Sections 278.6(e)(8) and (f)(1) of the SNAP regulations, and determined that an assessment of a CMP in the amount of \$11,000.00 in lieu of a three year SNAP disqualification was an appropriate penalty for the violations committed. This determination was based on Appellant's disqualification causing hardship to SNAP households as there were no other authorized retail stores in the area selling a variety of staple foods at comparable prices. This notification also stated that this determination was final and not subject to administrative review, but that appeal rights were available regarding the calculation of the CMP amount.

By letter dated November 27, 2018, Appellant through counsel, appealed the Retailer Operations Division's assessment of an \$11,000.00 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 dated December 26, 2018, was received.

### **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) states, in part, "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)(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 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, unappealable, 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) 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 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."

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 or 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**

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 owner has strictly complied with all SNAP rules and regulations. While the hardship CMP was imposed for alleged WIC violations, the amount is unreasonably high and not affordable without endangering the firm; and,

- A review of the hardship CMP amount is requested and that the penalty is permitted to be paid in installments.

Appellant submitted an affidavit by the store owner in support of these contentions.

## **ANALYSIS AND FINDINGS**

By letter dated August 1, 2018, the New York Department of Health, the WIC State Agency, disqualified Appellant from participating in the WIC program for three years. The subject firm was disqualified from the New York WIC Program for a pattern of claiming reimbursement for the sale of Enfamil Infant Concentrated 13 ounce Formula which exceeds the store's documented inventory of that item for a specific period of time, a violation that warrants a three year WIC disqualification period. The firm also failed to have invoices and purchase slips for WIC food items equal to the type and volume of WIC foods sold. The New York Department of Health 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. Appellant did not appeal the WIC disqualification.

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 2013. 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, "Stores that are disqualified from WIC may be disqualified from SNAP for an equivalent period of time". The 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**

Appellant is appealing the calculation of the hardship CMP amount. SNAP regulations at 7 CFR § 278.6(g) state that the CMP amount is calculated using a formula which includes the SNAP redemption volume of the store during the 12 months prior to the firm being notified of the violations that led to the store's disqualification. Modifications to the CMP may occur only when there is an error in calculation or the amount exceeds the agency limit. The Retailer Operations Division correctly determined that the initial calculated amount of the CMP was \$17,532.00. The initial calculated CMP amount is greater than the agency limit of \$11,000 per violation. The October 30, 2018, FNS charge letter identified one pattern of WIC violations based on correspondence dated September 13, 2018, from the New York WIC State Agency therefore, the hardship CMP amount was correctly assessed at \$11,000.00 which is the agency limit per violation multiplied by the number violations (\$11,000.00 x one WIC violation).

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 SNAP retailer in the area selling as large a variety of staple food items at comparable prices. In this case, the Retailer Operations Division noted the Appellant firm was selling a substantial variety of staple food items that included international specialty foods not available at other nearby retailers and that the firm's disqualification would cause hardship to SNAP households.

## **CONCLUSION**

Based on the above discussion and the evidence under review, the determination by the Retailer Operations Division to assess a hardship CMP in the amount of \$11,000.00 in lieu of a three year SNAP disqualification is sustained.

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. Appellant will be advised on the submission of the collateral bond or irrevocable letter of credit by the Retailer Operations Division during the application process. 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

May 16, 2019