

**U.S. Department of Agriculture
Food and Nutrition Service
Administrative Review Branch
Alexandria, VA 22302**

Bargain Food Center,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0195407

FINAL AGENCY DECISION

The USDA, Food and Nutrition Service (FNS) finds that the decision of the Retailer Operations Division to impose a three year disqualification from the Supplemental Nutrition Assistance Program (SNAP) as a result of Women, Infants, and Children (WIC) program violations, was properly rendered against Bargain Food Center (Bargain Food Center or Appellant). There is also sufficient evidence to support a finding that the denial of a hardship Civil Money Penalty (CMP) is appropriate and in accordance with Section 278.6(f)(1) of the SNAP regulations.

ISSUE

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with 7 CFR § 278.6(e)(8)(iii) in its administration of the SNAP when it disqualified Appellant for a period of three years and denied assessing a hardship civil money penalty in lieu of disqualification by letter dated December 16, 2016.

AUTHORITY

7 USC § 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

In a letter dated November 22, 2016, the Retailer Operations Division informed Appellant that as the result of the July 5, 2016, Connecticut WIC program disqualification for three

years, due to violations of WIC program rules and regulations, the Retailer Operations Division was considering a SNAP reciprocal disqualification in accordance with 7 CFR § 278.6(e)(8). The Retailer Operations Division reviewed all documents provided by the Connecticut Department of Health, and determined the State Agency's actions met the regulatory requirements, and that the firm received proper notification of the potential that it could be reciprocally disqualified from SNAP in response to the WIC disqualification. Appellant replied to the charge letter by letter dated December 6, 2016, and stated that the disqualification would be a hardship for its customers.

On December 16, 2016, the Retailer Operations Division informed Appellant that in accordance with Section 278.6(e)(8)(iii) of the SNAP regulations, Appellant's disqualification would not cause 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 postmarked December 28, 2106, Appellant appealed the Retailer Operations Division's decision to deny the 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.

STANDARD OF REVIEW

In appeals of adverse actions, the Appellant bears the burden of proving by a clear preponderance of the evidence, that the administrative actions should be reversed. That means the 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. § 2021 and 278 of Title 7 of the Code of Federal Regulations (CFR). 7 CFR § 278.6(a) establishes the authority upon which a reciprocal SNAP disqualification may be imposed against a firm disqualified from the WIC program.

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 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 . . . 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 store in the area selling as large a variety of staple food items at comparable prices.”

APPELLANT’S CONTENTIONS

In the administrative review request received December 30, 2016, and subsequent correspondence date January 25, 2017, Appellant provided the following summarized contentions, in relevant part:

- The disqualification will cause severe hardship on the SNAP recipients.
- The cold temperatures and snow often make it difficult for clients to walk short distances.
- Appellant has had no other issues in 13 years of service.
- During the WIC investigation, Appellant was not provided with an opportunity to correct the errors.
- The law was against Appellant causing it to lose the WIC Program.
- Appellant requests a reasonable CMP.

In support of its contention, Appellant provided the following documents:

- December 6, 2016, reply to the Retailer Operations Division;
- State of Connecticut Department of Public Health Price Stock Survey dated November 16, 2015;
- State of Connecticut Department of Public Health Memorandum of Decision;
- 2013/2014 WIC Vendor Agreement;
- 25 pages of signatures on a petition stating: “. . . We the community ask that you reconsider the decision as it will cause hardship to myself or a member of my family.”;
- 15 client affidavits that were all typed and included customer name, telephone number, and some included last four digits of the customer’s EBT card number; and
- Six color photographs of the exterior view of store and surrounding area.

The preceding may represent only a brief summary of the Appellant’s contentions presented in this matter. However, in reaching a decision, full attention was given to all contentions presented, including any not specifically recapitulated or specifically referenced.

ANALYSIS AND FINDINGS

Regarding Appellant's contention, it is important to clarify for the record that this review is limited to what circumstances were at the basis of the Retailer Operation Division's action at the time such action was made. As cited, the disqualification from SNAP for three years 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. Thus, Appellant's contentions related to its concerns regarding how the WIC disqualification was imposed are not relevant.

The Retailer Operations Division reviewed whether or not Appellant was eligible for a hardship CMP in lieu of the three year disqualification. For a determination of hardship, as opposed to inconvenience, there must be an absence of any other authorized retail food store comparable to the disqualified store, in the area of consideration. The Retailer Operations Division determined that there of 11 authorized stores located within one-mile radius of Appellant including five small groceries, three medium groceries, one large grocery store, and two supermarkets.

Appellant states that it is hard to walk in the cold and snow in Connecticut. According to *CT transit* website, there are several different bus routes that customers can use to travel to some of these other authorized firms. There is one route to a supermarket that only requires about a one minute walk. Thus, the disqualification of Bargain Food Center would not cause a hardship for SNAP households due to numerous comparable stores within a one-mile radius. That it may cause inconvenience for some SNAP recipients if Appellant is disqualified, such possible inconvenience does not rise to the level of hardship as required for assessment of a civil money penalty. No evidence was advanced that the firm offers any unique food items that are not otherwise available by nearby authorized retailers. The record documents that the Retailer Operations Division properly considered Appellant's eligibility for a hardship CMP according to the terms of Section 278.6(f)(1) of the SNAP regulations, and appropriately denied such.

No Previous Violations

Appellant explains that this had not had any other violations. A record of participation in the SNAP with no previously documented instance of violations does not constitute valid grounds for dismissal of the current charges of violations or for mitigating the impact of the violations upon which they are based. There is no provision in the Act, regulations, or agency policy that reverses or reduces a sanction based upon a lack of prior violations by a firm and its owners, managers and/or employees.

CONCLUSION

The decision to deny the imposition of a hardship civil money penalty in lieu of a three year SNAP disqualification against Bargain Food Center 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 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

