

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

Pikes Peak Market,)
)
 Appellant,)
)
 v.)
)
 Retailer Operations Division,)
)
 Respondent.)
 _____)

Case Number: C0192291

FINAL AGENCY DECISION

The U.S. Department of Agriculture, 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 Pikes Peak Market (hereinafter 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(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 CMP in lieu of disqualification by letter dated August 26, 2016.

AUTHORITY

7 U.S.C. § 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

By letter dated August 11, 2016, the Retailer Operations Division informed store ownership that as the result of a March 7, 2015, New York WIC State Agency disqualification action for three years, 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). This correspondence also stated that the disqualification from SNAP for three years was not subject to administrative review.

Appellant failed to respond to the charge letter and did not request a hardship CMP. By letter dated August 26, 2016, 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 September 9, 2016, Appellant, through counsel, 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. No subsequent correspondence has been received from Appellant.

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 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 USC § 2021 and § 278 of Title 7 of the Code of Federal Regulations (CFR).

7 USC § 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 specified period of time from further participation in the Supplemental Nutrition Assistance Program; (B) assessed a civil penalty of up to \$100,000 for each violation; or (C) both."

7 CFR § 278.6 establishes the authority upon which FNS may disqualify any authorized retail food store from further participation in the SNAP if the firm fails to comply with the Food Stamp Act including disqualification of a firm from the WIC Program as specified in paragraph (e)(8).

7 CFR § 278.6(e)(8) establishes, among other things, the kind of violations that warrant a reciprocal disqualification.

7 CFR § 278.6(e)(8) 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) states, in part, that FNS shall disqualify any firm from the SNAP which is disqualified from the WIC Program “(A) Shall be for the same length of time as the WIC disqualification; (B) May begin at a later date than the WIC disqualification;”

7 CFR § 278.6(e)(8)(iii)(C) states, that such a disqualification: “Shall not be subject to administrative or judicial review under the Food Stamp Program [SNAP].”

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 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.”

APPELLANT’S CONTENTIONS

In the request for administrative review, Appellant has stated as its position in the matter the following:

- Store ownership apparently did not exercise his appeal from the State Agency action; however, there is a serious inequity relative to the issues raised in the WIC determination;
- The Pikes Peak Market was the subject of a burglary and the company lost its invoices in order to satisfy the New York State Department of Health’s request. However, counsel has been advised that what had been presented to WIC was appropriate; and,
- Appellant feels that under the circumstances that disqualifying Pikes Peak Market from SNAP is unfair under all the circumstances and respectfully requests a review of the circumstances leading to his disqualification under both State and Federal authorities.

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

The preceding 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.

ANALYSIS AND FINDINGS

By letter dated March 7, 2016, the New York Department of Health, the WIC State Agency, terminated Appellant's WIC Vendor Agreement for Non-Compliance for a period of three years effective April 8, 2016. The subject firm was disqualified from the New York WIC Program for claiming reimbursement for the sale of an amount of a specific food item that exceeded the store's documented inventory of that food item for a specific period of time. 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 failed to exercise his right to appeal the WIC action.

With regards to Appellant's contentions listed above, it is important to clarify for the record that the purpose of 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 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. A record of participation in 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 those charges.

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. Records show there are 42 SNAP retailers located within a one mile radius of the Appellant business including a supermarket located 0.75 miles away and three stores (two convenience stores and a small grocery store) located within 0.25 miles or 440 yards. The many nearby stores appear readily accessible to SNAP recipients and they offer a variety of staple foods comparable to, or better than, those offered by Appellant. The area also has adequate public transportation available for SNAP recipients to use as Fillmore Avenue is on a NFTA-Metro bus line. Appellant does not carry any unique items or foods that cannot be found at these or other nearby 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 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. 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 charges of trafficking SNAP benefits were levied by the Retailer Operations Division therefore Appellant may not be considered for a trafficking CMP.

CONCLUSION

Based on the discussion above, the decision to deny the imposition of a hardship CMP in lieu of a three year SNAP disqualification against Pikes Peak Market 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.

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, it may be necessary to release this document and related correspondence and records upon request. If such a request is received, FNS will seek to protect, to the extent provided by law, personal information that if released could constitute an unwarranted invasion of privacy.

/s/

October 13, 2016

ROBERT T. DEEGAN
ADMINISTRATIVE REVIEW OFFICER

DATE