

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

**1683 Jimmy Grocery Corp.,**

**Appellant,**

**v.**

**Case Number: C0244183**

**Office of Retailer Operations and  
Compliance,**

**Respondent.**

**FINAL AGENCY DECISION**

It is the decision of the U.S. Department of Agriculture (USDA), that the record supports that 1683 Jimmy Grocery Corp. (Appellant), committed violations of the Supplemental Nutrition Assistance Program (SNAP) regulations. There is sufficient evidence to sustain a six month disqualification of Appellant from the SNAP as imposed by the Office of Retailer Operations and Compliance (Retailer Operations).

**ISSUE**

The issue accepted for review is whether Retailer Operations took appropriate action in its administration of the SNAP, consistent with 7 CFR § 278.6(f)(1), 7 CFR § 278.6(a), and 7 CFR § 278.6(e), when it imposed a six month period of 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 the Food and Nutrition Service (FNS).

**CASE CHRONOLOGY**

The USDA conducted an investigation of the compliance of Appellant with federal SNAP law and regulations during the period of April 28, 2021 through May 3, 2021. The investigative report dated May 11, 2021, documented that personnel at Appellant accepted SNAP benefits in exchange for ineligible merchandise on multiple separate dates. The items sold are best described as common, ineligible, nonfood items.

As a result of evidence compiled during the investigation, by letter dated May 25, 2021, Retailer Operations charged Appellant with violating the terms and conditions of the SNAP regulations. Misuse of SNAP benefits was noted in Exhibits B, C, and E, that warrants a disqualification as a

SNAP retail food store for a period of six months. The letter also states that under certain conditions FNS may impose a civil money penalty (CMP) in lieu of a disqualification.

The record shows that counsel replied to the Charge letter. Retailer Operations informed Appellant by Determination letter dated July 12, 2021, that the violations cited in the Charge letter occurred at the firm, and that a six month period of disqualification was warranted. The letter also stated that eligibility for a hardship CMP was not applicable as there are other authorized retail food stores in the area selling as large a variety of staple foods at comparable prices.

Counsel requested review of the determination by letter dated July 21, 2021. The review was granted by letter dated August 16, 2021. .

### **STANDARD OF REVIEW**

In an appeal of an adverse action, the Appellant bears the burden of proving by a preponderance of the evidence, that the administrative action should be reversed. That means the 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 argument asserted is more likely to be true than not true.

### **CONTROLLING LAW AND REGULATIONS**

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). Sections 278.6(a) and (e)(5) establish the authority upon which a six month disqualification may be imposed against a retail food store.

7 CFR § 278.2(a) states: “Coupons may be accepted by an authorized retail food store only from eligible households or the households’ authorized representative, and only in exchange for eligible food.”

7 CFR § 278.6(a) states: “FNS may disqualify any authorized retail food store if the firm fails to comply with the Food and Nutrition Act of 2008, as amended, or this part. Such disqualification shall result from a finding of a violation on the basis of evidence that may include facts established through on-site investigations, inconsistent redemption data, evidence obtained through a transaction report under an electronic benefit transfer system.”

7 CFR § 278.6(e)(5) of the SNAP regulations states that a firm is to be disqualified for six months “if it is to be the first sanction for the firm and the evidence shows that personnel of the firm have committed violations such as but not limited to the sale of common nonfood items due to carelessness or poor supervision by the firm’s ownership or management.”

7 CFR § 278.6(f)(1) provides for civil money penalty assessments in lieu of disqualification in cases where disqualification would cause hardship to SNAP benefit households because of the unavailability of a comparable participating food store in the area to meet their shopping needs. It states: “FNS may impose a civil money penalty as a sanction in lieu of disqualification when the firm’s disqualification would cause hardship to SNAP benefit 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 § 278.6 regarding the disqualification of retail food stores and imposition of civil money penalties in lieu of disqualifications, states in part at (p) Freedom of Information Act (FOIA) requests and appeals: “A FOIA request or appeal for records shall not delay or prohibit FNS from making a determination regarding disqualification or penalty against a firm under paragraphs (c) and (d) of this section, or delay the effective date of a disqualification or penalty listed in paragraph (e) of this section.”

### **SUMMARY OF THE CHARGES**

A report of the investigation was provided to the Appellant as Exhibits with the Charge letter. The investigative report provides details on the results of each compliance visit by two investigators to Appellant. The investigative report documents that SNAP violations conducted by different store personnel were recorded during multiple store visits, that warrant a six month disqualification. The SNAP violations of 7 CFR § 278.2(a) involved the sale of ineligible, nonfood items for SNAP benefits including: sandwich bags, cutlery, aluminum foil, and plates.

### **APPELLANT’S CONTENTIONS**

Consideration of all contentions and submissions as presented was made whether recapitulated here or not.

- The Retailer Operations Division did not take appropriate action consistent with 7 CFR Sec. 278.6(a)(d), (e)(5) and (e)(7) in its administration of the SNAP regulations, when it assessed a finding of 6 months disqualification, as there is insufficient evidence to support such a finding that the disqualification from participation as an authorized retailer in the program is appropriate.
- The finding is erroneous, an abuse of discretion, without merit, and arbitrary and capricious in that it has no basis in the actual facts of the case. Furthermore, the agency made a clear error of judgment, failed to consider important aspects of the problem, and failed to articulate a rational connection between the facts found and the choice made. The administrative action should therefor be reversed.
- As put forth in the initial response, the USDA investigator incorrectly identified the cashiers. The physical descriptions of the subjects of the investigation do not match any of the employees of the firm, as evidenced by affidavit of the owner, corroborated by the submission of photo IDs of the employees. Therefore, the investigator did not credible show that violations could have taken place at the firm. There were two different clerks identified between exhibits B, C and E. The clerk in Exhibits B and C was identified as Jimmy. None of the clerks were positively identified via photo ID or other identifiable means. Mr. Kaid is 61 years old with light grey hair and has never gone by Jimmy; this name is a select name for the corporation. There are none and have never been any employees named Jimmy. There are no cashiers that meet the description of any clerk in the description. The investigator’s report is therefore inaccurate and not credible and the owner denies the allegations in the Investigative Transaction Reports.

- The agency also improperly denied respondent firm the option to pay a CMP in lieu of disqualification. Our office submitted evidence that firm management met all the criteria listed in SNAP regulations Section 278.6(f).
- The USDA FNS made the following errors in its determination: The USDA determined that there are other authorized retail stores in the area selling as large a variety of staple food at comparable prices.
- The agency fails to take demographic and geographic considerations of the firm into account. Information about the cost of living and the population density of the neighborhood was submitted in our original reply.
- Ridgewood, the neighborhood in Brooklyn, New York in which the firm is located, is a less wealthy area that depends on the firm for affordable and healthy food. Despite the fact that the firm is located near several public housing developments, the agency determined that there are other authorized retail stores in the area selling as large a variety of staple foods at comparable prices. Most residents of the area do not drive cars. They therefore cannot travel long distances for groceries, as they must be carried by hand.
- Furthermore, many of the grocery stores in the general area are specialty or artisanal, high priced stores located.
- It is clear that the SNAP FNS did not consider the cost of living and demographics of the neighborhood, the needs presently and in the future of SNAP recipients, or the market realities faced by the firm and SNAP recipients. The evidence does not show that "personnel of the firm have committed violations such as but not limited to the sale of common nonfood items due to carelessness or poor supervision by the firm's ownership or management." Section 278.6(e)(5). Included in the original letter of violation were instances of visits where ineligible food items were rejected. No evidence has been submitted that firm management was careless or had poor supervision. Several transactions over a period of months, in a store with many SNAP transactions, does not amount to such.
- Therefore, the appropriate action by the agency would have been to issue a letter of warning to the firm, as per Section 278.6(e)(7), as the violations alleged were too limited to warrant a disqualification. The administrative action should be reversed.

## **ANALYSIS AND FINDINGS**

This review is to either validate or to invalidate the determination made by Retailer Operations, and it is limited to the facts at the basis of Retailer Operations' determination at the time it was made. The FOIA regulations cited herein were applied to this matter. Appellant was investigated by USDA for compliance with SNAP laws and regulations. The record supports that the USDA issued a warning letter September 28, 2017 to Appellant for the sale of an ineligible item in exchange for SNAP benefits. Thus, the firm has been previously advised of a violative transaction at the location.

The investigative record is accurate with regard to the dates of the violations, and the exchange of ineligible items. The first page of the Exhibits contains a certification by the investigator that: "The facts stated in this declaration are true to my knowledge. If I am called to testify as a witness in any proceeding, I am competent to testify to the matters stated herein. I declare under penalty of perjury the foregoing is true and correct." As to a clerk reported to have identified himself as Jimmy, when no Jimmy works at Appellant, it is possible that a clerk told the investigator(s) that his name was Jimmy when it was not.

Counsel advanced three different driver's licenses, the owner's and two for two stated employees. Retailer Operations states that the personnel descriptions in the Exhibits are provided to help store owners identify personnel responsible for the transactions during the onsite visits. With regard to the matter of the descriptions of personnel in the Exhibits, these are subjective in nature and may involve features that are relative with respect to the point of view of the investigator(s). For example, a short investigator may view taller clerks as being much taller than they are, and a young investigator may deem older clerks are much older than they are. In this case, the parties differ as to the descriptions of the clerks encountered during the violative visits, such that it is difficult for the review officer to determine the descriptions of the personnel who conducted the violative transactions. Nevertheless, the preponderance of the evidence supports that the ineligible items listed in the Exhibits, were in fact purchased at Appellant by the investigators.

The record includes photos of the items purchased by the investigators, copies of the EBT total receipts with the store name and address, and donation sheets of the items donated by the investigators to non-profits signed by non-profit representatives. All of the EBT transactions were verified in the USDA system database. The documentation under review supports that the violative transactions were conducted at Appellant on three different dates, whereby ineligible items were sold in exchange for SNAP benefits. As noted, the USDA had previously issued a warning letter to Appellant for the sale of an ineligible item in exchange for SNAP benefits.

Retailers are informed that it is their responsibility to ensure that store personnel are properly trained regarding the SNAP rules. When the owner signed the FNS application to become a SNAP authorized retailer, this included a certification and confirmation that the retailer would "accept responsibility on behalf of the firm for violations of the SNAP regulations, including those committed by any of the firm's employees, paid or unpaid, new, full-time or part-time." The violations listed on this certification document include selling ineligible non-food items. Regardless of whom the owner of a store may utilize to handle store business, the firm's owner is accountable for the proper training of personnel, and the effective monitoring and handling of SNAP benefit transactions. To allow the store owner to disclaim accountability for violative acts of his employees would render virtually meaningless the enforcement provisions of the Food and Nutrition Act of 2008 and the enforcement efforts of the USDA.

Section 278.6(e)(5) of the SNAP regulations states that FNS shall disqualify a store for six months if it is to be the first sanction for the firm, and the evidence shows that personnel of the firm have committed violations such as the sale of common nonfood items in exchange for SNAP benefits due to carelessness or poor supervision by the firm's ownership or management. The language "due to carelessness or poor supervision," in the context of the statute and regulations, has been consistently applied by the Agency to a specified number of clearly violative sales of ineligible items in which the evidence does not demonstrate firm practice and/or owner/management involvement. Entrusting an unsupervised, inexperienced and/or untrained clerk(s) to handle SNAP benefits is reasonably viewed as careless, and/or the exercise of poor supervision.

The evidence more supports that Appellant's personnel established a record of selling nonfood items in exchange for SNAP benefits on multiple occasions. Three violations are considered evidence of carelessness. Therefore, the violations in this case are not too limited to warrant a disqualification period of six months.

## **CIVIL MONEY PENALTY**

Retailer Operations rendered a finding that it was not appropriate to impose a CMP in lieu of a six month period of disqualification from SNAP. The record documents that there are hundreds of other authorized stores within a nearby radius of Appellant, that stock a variety of comparable staple foods at comparable prices. Therefore, Retailer Operations concluded that the evidence did not support that it would cause hardship for SNAP recipients if Appellant is disqualified.

## **CONCLUSION**

The preponderance of the evidence in the record supports that the program violation charged did occur at Appellant. The record documents that Retailer Operations properly evaluated Appellant's eligibility for a hardship CMP according to the terms of Section 278.6(f)(1) of the regulations, and properly denied a CMP. Therefore, the six (6) month disqualification of Appellant from participation as an authorized retail food store in the SNAP is sustained. This penalty shall become effective thirty (30) days after delivery of this decision.

A new application for participation in the SNAP may be submitted ten days prior to the expiration of the six month period of disqualification. Please contact the Retailer Center at 877-823-4369 with general questions regarding the SNAP application process.

## **RIGHTS AND REMEDIES**

Attention is called to Section 14 of the Food and Nutrition Act of 2008 (7 U.S.C. § 2023), and to the regulations at 7 CFR § 279.7 with respect to the owner's right to judicial review of this decision. 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 the 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 thirty (30) days of delivery 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.

M. Viens  
ADMINISTRATIVE REVIEW OFFICER

November 9, 2021