

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

**2K Express No. 5, Inc,**

**Appellant,**

**v.**

**Office of Retailer Operations and  
Compliance,**

**Respondent.**

**Case Number: C0217253**

**FINAL AGENCY DECISION**

It is the decision of the U.S. Department of Agriculture (USDA) that the record supports that 2K Express No. 5, Inc., (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 September 14, 2017, through November 7, 2017. The investigative report dated 6/14/2019, documented that personnel at Appellant accepted SNAP benefits in exchange for ineligible merchandise on multiple separate occasions that warrant a six

month disqualification period. The items sold on multiple dates are best described as common nonfood items.

As a result of evidence compiled during the investigation, by letter dated September 24, 2019, Retailer Operations charged the owner with violating the terms and conditions of the SNAP regulations. Misuse of SNAP benefits was noted in Exhibits C, E, and F, 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 replies to the Charge letter on October 4, 7, 10 and 11, 2019. Retailer Operations informed the owner's representative by Determination letter dated December 11, 2019, 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.

The owner, via the accountant/representative, appealed the determination by letter dated December 19, 2019. The administrative review was granted by letter dated January 2, 2020.

## **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(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(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(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.”

### **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. The investigative report documents that SNAP violations were recorded during three store visits that warrant a six month disqualification. The SNAP violations of 7 CFR § 278.2(a) involved the sale of nonfood items for benefits including: bars of soap, a scrubber sponge, bathroom tissue, and a heavy duty sponge.

### **APPELLANT’S CONTENTIONS**

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

- There appears to be a mistake. It seems to me that the investigation, was for 5 U.S.C. § 552 (b)(6) & (b)(7)(C). I am enclosing correspondence for the same allegations that were made to 5 U.S.C. § 552 (b)(6) & (b)(7)(C) on the same dates and times that your investigation took place allegedly for 2K Express #5, Inc.
- Each alleged violation has the same amounts in each of your exhibits. I am attaching correspondence submitted previously where the USDA, FNS rescinded the case due to unverified transaction data. 5 U.S.C. § 552 (b)(6) & (b)(7)(C) has ceased operations and closed for business.

### **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. Upon review, the evidence supports that Appellant established a record of selling nonfood items as defined by Section 271.2 of the regulations, on multiple occasions. The Exhibits furnished with the Charge letter warrant a disqualification period of six months. The regulations

at 7 CFR § 278.6(e)(5) specify that FNS shall “disqualify the firm 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 nonfood items due to carelessness or poor supervision by the firm’s ownership or management.” Three violations are considered evidence of carelessness. Therefore, the violations in this case are not too limited to warrant a disqualification.

A review of the record shows that Appellant is/was located at the same address, directly adjacent to the meat and seafood store mentioned by the accountant. The meat and seafood store had a different FNS number, a different owner with a similar name as the owner of Appellant, and both store owners share(d) the same home address. The investigative report dated 6/28/18, was sent to the owner of the meat and seafood store on July 11, 2018, and noted violations in Exhibits D, F, and G. That investigation was conducted from April 21, 2017 through November 7, 2017. On August 6, 2018, Retailer Operations rescinded the Charge letter against the other store and owner, for unverified transaction data. When the previous accountant responded to the Charge letter in the rescinded case, he stated that perhaps the transactions did not occur at the retailer location.

The current Charge letter is for Appellant with a different FNS number than the meat and seafood store, as verified by FNS transaction records. This was the location whereby the identified violative transactions occurred. While there appears to have been some confusion by Retailer Operations in the issuance of documents in 2018 to the other store with a similar name, and similar owner’s name, at this shared street address, the record does support that Appellant conducted the violative transactions as described in the 2017 store visits and sanctioned by Retailer Operations in 2019. The violative transactions in the 2019 investigative report in this matter are the same as those described in Exhibits B through G in the 2018 Exhibits that were sent to the adjacent store and subsequently rescinded. The record is silent as to why it took Retailer Operations about a year after the rescission of the Charge letter to the other store, for it to reissue the investigative report to Appellant where the transactions occurred.

No evidence was submitted by the owner’s representative to support that the transactions did not occur at Appellant. The charges of violations are based on the findings of a formal USDA investigation. A review of the transaction documentation confirms that the transactions were conducted at Appellant at its FNS number. Thus, the preponderance of the evidence supports that Appellant sold nonfood items on multiple store visits in exchange for SNAP benefits, a program violation.

### **CIVIL MONEY PENALTY**

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

## **CONCLUSION**

The preponderance of the evidence in the record supports that the program violations charged did occur at Appellant. The record documents that Retailer Operations considered Appellant's eligibility for a hardship CMP according to the terms of Section 278.6(f)(1) of the regulations, and properly denied it. Therefore, the six 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 receipt of this decision.

A new application for participation in the SNAP may be submitted ten (10) 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. Please contact John Dotson at (608) 662-4422 Ext: 301 if you have operations questions.

## **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 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.

M. Viens  
ADMINISTRATIVE REVIEW OFFICER

January 27, 2020