

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

5 U.S.C. § 552 (b)(6) & (b)(7)(C)

**Former Owners,
Aas Market,**

Appellant,

**v.
Retailer Operations Division,**

Respondent.

Case Number: C0202454

FINAL AGENCY DECISION

It is the decision of the U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS), that there is sufficient evidence to support a finding that a Transfer of Ownership Civil Money Penalty (hereinafter, “TOCMP”) of \$22,000.00 was properly assessed by the Retailer Operations Division against the former owners of Aas Market (hereinafter, “Aas Market” and/or “Appellant”), for selling and/or transferring a retail food store that was permanently disqualified from participation in the Supplemental Nutrition Assistance Program¹ (SNAP) effective March 2, 2017.

ISSUE

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with Federal regulations at 7 U.S.C. § 2021, 7 CFR § 278.6(f)(2),(3) and (4) and 7 CFR § 278.6(g) in its administration of the SNAP when it assessed a TOCMP in the amount of \$22,000.00 against the former owners of Aas Market, in a letter dated September 29, 2017.

AUTHORITY

7 U.S.C. 2023 and its 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.

¹ Section 4001(b) of the Food, Conservation, and Energy Act of 2008 (P.L. 110-234; 122 Stat. 1092) amended the Food and Nutrition Act of 2008 by striking “food stamp program” and inserting “supplemental nutrition assistance program” effective October 1, 2008

CASE CHRONOLOGY

The materials in the administrative file indicate that in a letter dated February 2, 2017 the owners of record of Aas Market, located at 218 A St, Hayward, VA 94541-4927 were notified that they were being charged with trafficking, as defined in SNAP regulations at 7 CFR § 271.2. The charges were based on an investigation conducted by the USDA during which personnel of Appellant were identified as having exchanged SNAP benefits for cash on two (2) separate occasions. Subsequently, in a letter dated February 24, the owners of record of Appellant, were notified of the decision to permanently² disqualify Aas Market as an authorized retailer in the SNAP. The determination is documented to have been delivered to Appellant's owners of record on February 24, 2017 and to have been made effective March 2, 2017. From that time forward, Aas Market and its owners of record have been subject to the provisions of 7 CFR § 278.6(f)(2),(3), and (4) based on the information included on page 2, in the third paragraph of the February 7, 2017 letter and on page 2, in the second to the last paragraph of the February 24, 2017 letter. Each of those letters specifically stated that "In the event that you sell or transfer ownership of your store subsequent to your disqualification, you will be subject to and liable for a CMP as provided by SNAP regulations Sections 278.6(f)(2) (3), and (4). The amount of this sale or transfer CMP will be calculated based on SNAP regulations at 278.6(g)."

In a letter dated September 29, 2017 the Retailer Operations Division informed the former owners of Appellant that a Transfer of Ownership Civil Money Penalty (TOCMP) in the amount of \$22,000.00, calculated in accordance with 7 CFR § 278.6(f)(2) and (g), was being assessed for the sale or transfer of Aas Market during a period of disqualification.

In a letter dated October 10, 2017 counsel, on behalf of Aas Market and its former owners of record, requested an appeal of the Retailer Operations Division's determination to impose a TOCMP of \$22,000.00. The billing and payment of the TOCMP have been held in abeyance pending final determination of the present administrative review.

STANDARD OF REVIEW

In appeals of adverse actions, Appellant bears the burden of proving by a clear 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 AND REGULATIONS

² The permanent disqualification was imposed by Retailer Operations Division and since Aas Market was already afforded appeal rights regarding the previous action taken to permanently disqualify the store, the circumstances that led to the permanent disqualification are not subject to review in this proceeding.

The controlling statute in this matter is contained in the Food and Nutrition Act of 2008, as amended (the “Act”)³, 7 USC 2021 and 278 of Title 7 of the Code of Federal Regulations (CFR)⁴ at 7 CFR §278.6.

7 U.S.C. 2021(e)(1)Section 12 of the Food and Nutrition Act of 2008, as amended, states, in relevant part:

“In the event any retail food store or wholesale food concern that has been disqualified under subsection (a) is **sold or the ownership thereof is otherwise transferred to a purchaser or transferee**, the person or persons who sell or otherwise transfer ownership of the retail food store or wholesale food concern shall be subjected to a civil penalty in an amount established by the Secretary through regulations to reflect that portion of the disqualification aperiod that has not yet expired.” [Emphasis Added]

The regulations at 7 CFR § 278.6 (f)(2) authorize FNS to assess a TOCMP against the owner(s) of a disqualified retail food store that has been sold, or for which the ownership is otherwise transferred stating, in part,

“(2) In the event any retail food store or wholesale food concern which has been disqualified is sold or the ownership thereof is otherwise transferred to a purchaser or transferee, the person or other legal entity who sells or otherwise transfers ownership of the retail food store or wholesale food concern shall be subjected to and liable for a civil money penalty in an amount to reflect that portion of the disqualification period that has not expired, to be calculated using the method found at §278.6(g)...

(3) At any time after a civil money penalty imposed under paragraph (2) of this section has become final under the provisions of part 279, the Food and Consumer Service may request the Attorney General institute a civil action to collect the penalty from the person or persons subject to the penalty in a district court of the Unites States for any district in which such person or persons are found, reside, or transact business.

(4) A bona fide transferee of a retail food store shall not be required to pay a civil money penalty imposed on the firm prior to its transfer...”

The following steps, based on the regulations at 7 CFR § 278.6(g), are used to calculate the amount of this TOCMP:

Step 1: Determine the cumulative redemptions for the 12-month period immediately preceding the issuance of the Retailer Operations Division charge letter.

³ Effective October 1, 2008, the Food Stamp Act of 1977 was superseded by the Food and Nutrition Act of 2008, as amended through P.L. 110-246. The Food and Nutrition Act of 2008 was amended by P.L. 113-79, enacted February 7, 2014.

⁴ Title 7 of the Code of Federal Regulations may be accessed in its entirety via the Internet at https://www.ecfr.gov/cgi-bin/text-idx?tpl=/ecfrbrowse/Title07/7tab_02.tpl

Step 2: Determine the firm's average monthly redemptions (AMR) by dividing the amount derived in Step 1 by 12. Round this amount to the nearest dollar (50 cents or less is rounded down; 51 cents or more is rounded up).

Step 3: Multiply the AMR (as determined in Step 2) by .10. Round this amount to the nearest dollar (50 cents or less is rounded down; 51 cents or more is rounded up).

Step 4: Multiply the amount derived in Step 3 by 240. The number 240 is used for permanent disqualifications in accordance with the Act and the regulations and represents doubling a 10 year penalty. The result is the amount of the TOCMP.

APPELLANT'S CONTENTIONS

In the October 10, 2017 appeal; and, in the supplemental materials provided counsel, on behalf of Appellant, provides that:

- Although the final sale of Appellant was consummated in 2017, it was initiated in December 2016, prior to receipt of any notification that it was under investigation and/or subject to SNAP disqualification action.
- Because Appellant was sold in April 2017 it was not participating as a SNAP authorized retailer due to the permanent disqualification imposed effective March 2, 2017.
- The December 5, 2016 Business Purchase Agreement And Joint Escrow Instructions specified that if either party cancelled the contract after December 31, 2016 the cancelling party would be subject to a 5 U.S.C. § 552 (b)(6) & (b)(7)(C) assessment.

The preceding represents only a brief summary of the contentions presented in this matter. Please be assured, however, that, in reaching a decision, full attention and consideration have been given to all contentions, including any not specifically recapitulated or specifically referenced herein.

ANALYSIS AND FINDINGS

Evidence of Sale:

The record evidences that on December 5, 2016, prior to the February 7, 2017 letter of charges, Appellant's owners of record entered into a Business Purchase Agreement And Joint Escrow Instructions contract to sell Appellant, subject to specified terms and conditions including approval by the landlords and alcoholic beverage licensing arrangements.

The Bill of Sale, indicates that the sale of Appellant was initiated on December 7, 2016⁵ under the signature of the joint owners; and, completed on the April 19, 2017 date of escrow, which is after the imposition of the SNAP permanent disqualification effective March 2, 2017.

It is accurate that there is no evidence that Appellant was advised of the transfer of ownership penalties in the SNAP regulations prior to the initiation of the sales contract on December 5, 2016. It is also accurate that Appellant was not participating as a SNAP authorized retailer on April 19, 2017, having been permanently disqualified effective March 2, 2017.

However, notwithstanding the initiation of the sale of Appellant prior to the SNAP charges being levied; and, being completed after permanent disqualification on March 2, 2017; the SNAP regulations at 7 CFR § 278.6(f)(2) specify that “In the event **any retail food store** or wholesale food concern **which has been disqualified is sold ... the person or other legal entity who sells or otherwise transfers ownership of the retail food store** or wholesale food concern **shall be subjected to and liable for a civil money penalty** in an amount to reflect that portion of the disqualification period that has not expired, to be calculated using the method found at §278.6(g)...”

Whether or not Appellant knew about the potential penalty on the date the sales contract was initiated, December 5, 2016, does not bear on the decision to complete the transaction in final escrow on April 19, 2017, after having been duly notified of the potential penalty for sale or transfer of ownership. The stipulation regarding a fee for cancellation, whether or not required by the State of California, does not mitigate the Federal SNAP regulations.

CMP Calculation:

In a letter dated February 2, 2017 Appellant was charged with having conducted SNAP redemption transactions that met two (2) trafficking violations. The record indicates that the Retailer Operations Division notified Appellant of a decision to impose a permanent disqualification against Appellant in a letter dated February 24, 2017, which is documented to have been delivered to Appellant on March 2, 2017.

FNS, through Agency and Departmental regulations at 7 CFR § 278.6(g) and § 3.91(b)(3)(i), established an \$11,000.00 per violation limit as the maximum amount for the TOCMP. For Aas Market, this results in an assessment of \$22,000.00 (\$11,000.00 times 2) based on consideration of the charges leading to the imposition of the permanent disqualification that was effective March 2, 2017.

CIVIL MONEY PENALTY

As a matter of course in this review, the amount of the TOCMP was recalculated in accordance with the applicable FNS regulations to ensure that the amount assessed by the Retailer

⁵ The Bill of Sale identifies the date of the execution of as December 7, 2016; the Business Purchase Agreement And Joint Escrow Instructions bears a December 5, 2016 date.

Operations Division is the appropriate amount. The calculation of the penalty is based on a formula prescribed within SNAP regulations at 7 CFR § 278.6(g).

The formula for computing the TOCMP does not provide for discretion and is directly related to the **amount of SNAP violations, redemptions, and the length of time in the disqualification period**. Declared profit is not a consideration. The TOCMP amount cannot be reduced.

As indicated in Table 1 below, the amount of the TOCMP has been recalculated to be \$22,000.00 which is the same as the original amount that was assessed against Aas Market by the Retailer Operations Division in its September 29, 2017 letter.

5 U.S.C. § 552 (b)(7)(E)

CONCLUSION

Based on the discussion above, the decision to impose a TOCMP in the amount of \$22,000.00 against Aas Market is sustained. The decision will become effective on the 30th day following Appellant's receipt of same.

The instructions regarding arrangements for payment are included in the Retailer Operations Division's letter dated September 29, 2017.

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.

NANCY BACA-STEPAN
Administrative Review Officer

January 29, 2018