

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

**Mohamed Alashwal, Former Owner,
A & S Gourmet Deli Inc,**

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0201508

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 \$33,000.00 was properly assessed by the Retailer Operations Division against Mohamed Alashwal, the former owner of A & S Gourmet Deli Inc (hereinafter, "A & S Gourmet Deli Inc" 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 September 16, 2016.

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 \$33,000.00 against Mohamed Alashwal, former owner of A & S Gourmet Deli Inc, in a letter dated August 22, 2017.

AUTHORITY

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

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.

CASE CHRONOLOGY

The materials in the administrative file indicate that in a letter dated September 15, 2016, Mohamed Alashwal, as owner of A & S Gourmet Deli Inc, located at 457 S Broadway, Yonkers, NY 10705-2338 was notified of the decision to permanently² disqualify A & S Gourmet Deli Inc as an authorized retailer in the SNAP. The determination is documented to have been delivered to Appellant’s owner on September 16, 2016. From that time forward, A & S Gourmet Deli Inc and its owner of record Mohamed Alashwal, 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 second to the last paragraph of the September 15, 2016 letter, wherein it is 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 August 22, 2017 the Retailer Operations Division informed Mohamed Alashwal that a Transfer of Ownership Civil Money Penalty (TOCMP) in the amount of \$33,000.00, calculated in accordance with 7 CFR § 278.6(f)(2) and (g), was being assessed for the sale or transfer of A & S Gourmet Deli Inc during a period of disqualification.

In a letter dated August 30, 2017 counsel, on behalf of Mohamed Alashwal and A & S Gourmet Deli Inc, requested an appeal of the Retailer Operations Division’s determination to impose a TOCMP of \$33,000.00. 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.

² The permanent disqualification was imposed by Retailer Operations Division and since 24-7 On The Go #5411 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.

CONTROLLING LAW AND REGULATIONS

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 person 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 staore shall not be required to pay a civil money penalty imposed on the firm prior to its transfer...”

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

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.

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 August 30, 2017 appeal counsel, on behalf of Appellant, requests consideration of the financial difficulties experienced by Appellant following the permanent disqualification from SNAP authorization. It is explained that following said disqualification action Appellant attempted to continue operation by drastically minimizing its food inventory, replacing it with non-food items in an attempt to recover lost customers. The high poverty area and fierce competition with other deli/grocery stores in the area precluded Appellant's operational success resulting in an inability to continue to make the monthly lease payments or renew required licensures leading to the sale of Appellant for the nominal amount **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**, which is characterized as far less than the actual investment. Appellant, through counsel, contends that the sale does not represent wrong doing but rather is the result of an unfortunate business strategy. The CMP amount of \$33,000.00 is identified as being excessive and far in excess of the financial capacity of ownership.

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

Financial Hardship:

It is understood that a penalty of \$33,000.00 for the sale of a business **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** is likely to impose a financial hardship upon Appellant ownership; however, there is no provision in the SNAP regulations for waiver or reduction of an administrative penalty assessment on the basis of possible economic hardship to the firm resulting from imposition of penalties. To allow store ownership to be excused from assessed administrative penalties based on purported economic hardship would render virtually meaningless the enforcement provisions of the Food and Nutrition Act of 2008 and the enforcement efforts of the USDA.

Moreover, giving special consideration to economic hardship to the firm would forsake fairness and equity to those retailers who have been assessed CMPs for similar circumstances. Therefore, Appellant's contention that economic hardship will result from the assessment of a CMP does not provide any valid basis for dismissing the charges or for mitigating the penalty imposed.

CMP Calculation:

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 A & S Gourmet Deli Inc, this results in an assessment of \$33,000.00 (\$11,000.00 times 3) based on consideration of the charges leading to the imposition of the permanent disqualification that was effective September 16, 2016.

In a letter dated August 30, 2016 Appellant was charged with having conducted SNAP redemption transactions that met three (3) patterns suggestive of trafficking violations. The record indicates that following responses to the letter of charges the Retailer Operations Division notified Appellant of a decision to impose a permanent disqualification against Appellant in a letter dated September 15, 2016, which is documented to have been delivered to Appellant on September 16, 2016.

Evidence of Sale:

There is no denial of the sale/transfer of A & S Gourmet Deli Inc. Appellant, through counsel, has affirmed the sale occurred effective December 1, 2016 with the provision of a copy of the Agreement of Sale signed by Mohamed Alashwal as seller.

Copies of the bill of sale and promissory note relative to the sale are also included in the official agency record.

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 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. Therefore, this amount cannot be reduced.

5 U.S.C. § 552 (b)(7)(E)

As indicated in Table 1 below, the amount of the TOCMP has been recalculated to be \$33,000.00 which is the same as the original amount that was assessed against A & S Gourmet Deli Inc by the Retailer Operations Division in its August 22, 2017 letter.

CONCLUSION

Based on the discussion above, the decision to impose a TOCMP in the amount of \$33,000.00 against A & S Gourmet Deli Inc 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 August 22, 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

November 30, 2017