

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

A T Polynesian Market,

Appellant,

v.

Case Number: C0202719

Retailer Operations Division,

Respondent.

FINAL AGENCY DECISION

The U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS) finds that there is sufficient evidence to support the determination by the Retailer Operations Division to levy a Transfer of Ownership Civil Money Penalty of \$22,000 against the former ownership of A T Polynesian Market (“Appellant”) for having sold a store during a period of disqualification from the Supplemental Nutrition Assistance Program (SNAP).

ISSUE

The purpose of this review is to determine whether the Retailer Operations Division took appropriate action, consistent with Title 7 of the Code of Federal Regulations (CFR) § 278.6(f)(2), when it levied a Transfer of Ownership Civil Money Penalty (TOCMP) against Appellant on September 21, 2017.

AUTHORITY

According to 7 U.S.C. § 2023 and its implementing regulations at 7 CFR § 279.1, “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

In a letter dated February 4, 2014, Appellant was notified that it was permanently disqualified as a SNAP-authorized retailer. A purchase agreement dated July 7, 2016 established Appellant sold A T Polynesian Market. In the Retailer Operations Division's letter dated September 21, 2017, Appellant was assessed a lump sum Transfer of Ownership Civil Money Penalty (TOCMP) of \$22,000 in accordance with 7 CFR § 278.6(f)(2) for the sale or transfer of ownership of A T Polynesian Market during a period of disqualification.

On September 28, 2017, Appellant appealed the Retailer Operations Division's assessment and requested an administrative review of this action. The appeal was granted and implementation of the sanction has been on hold pending completion of this review.

STANDARD OF REVIEW

In an appeal of an adverse action, Appellant bears the burden of proving by a preponderance of evidence that the administrative action should be reversed. That means Appellant has the burden of providing relevant 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 untrue.

CONTROLLING LAW

The controlling law in this matter is contained in the Food and Nutrition Act of 2008, as amended (7 U.S.C. § 2021), and implemented through regulation under Title 7 CFR Part 278. In particular, 7 CFR § 278.6(f)(2) establishes the authority upon which a civil money penalty may be imposed against a disqualified retail food store or wholesale food concern in the event that it has been sold or the ownership is otherwise transferred.

7 CFR § 278.6(f)(2) reads, in part:

In the event any retail food store . . . which has been disqualified is sold or the ownership thereof is otherwise transferred . . . the person or other legal entity who sells or otherwise transfers ownership . . . shall be subjected to and liable for a civil money penalty

APPELLANT'S CONTENTIONS

Appellant's responses regarding this matter are essentially as follows:

- Appellant was surprised by the TOCMP;
- Appellant still does not accept the permanent disqualification;

- Appellant sold the firm because of financial difficulties;
- Appellant cannot afford to pay the TOCMP. Appellant provided ~25 pages of financial documents; and,
- Appellant requests that the TOCMP be reduced and a payment plan instituted.

These explanations may represent only a brief summary of Appellant's contentions. However, in reaching a decision, full consideration has been given to all contentions presented, including any others that have not been specifically listed here.

ANALYSIS AND FINDINGS

Appellant stated that it still does not accept the permanent disqualification. This appears to be an attempt to demonstrate that the earlier permanent disqualification imposed on the firm may have been improper. In this regard, no findings or conclusions on the merits of the specific arguments presented will be made. Appellant was permanently disqualified from participation in SNAP based on trafficking violations in a previous determination letter. Those matters dealing with the firm's permanent disqualification are not subject to this particular administrative review process but are included in other review processes of which Appellant was made aware and which were pursued.

The matter of the permanent disqualification imposed cannot properly be re-addressed in this context. The issue in this review is solely whether the Retailer Operations Division took appropriate action, consistent with 7 CFR § 278.6(f)(2) of the SNAP regulations, when it assessed a \$22,000 Transfer of Ownership Civil Money Penalty against Appellant.

Appellant subject to TOCMP

Regarding the assessment of a \$22,000 civil money penalty, 7 CFR § 278.6(f)(2) is quite specific in its directive that:

In the event any retail food store . . . which has been disqualified is sold or the ownership thereof is otherwise transferred . . . the person or other legal entity who sells or otherwise transfers ownership . . . shall be subjected to and liable for a civil money penalty . . .

The civil money penalty is calculated strictly on the basis of the SNAP redemption volume of the store over the 12 months prior to the firm's notification of the violations that led to the store's disqualification.

Appellant Notified of TOCMP

Appellant contends it was surprised by the Transfer of Ownership Civil Money Penalty (TOCMP) assessment. The administrative record documents that in a letter dated January 13, 2014, the Retailer Operations Division informed Appellant that it was being considered for permanent disqualification from participation in SNAP, or the imposition of a civil money penalty in lieu of disqualification. This letter was received on January 14, 2014.

Appellant was subsequently informed by letter dated February 4, 2010 that the firm was denied a trafficking civil money penalty and was being permanently disqualified from participation as a retail store in SNAP. This letter was received on February 5, 2014. The letter ordered the firm to cease accepting SNAP benefits, and from that time forward Appellant was subject to the provisions of 7 CFR § 278.6(f). The pertinent part of both letters stated as follows:

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

Notice of the imposition of a TOCMP for the sale or transfer of a store is also contained in the regulations at 7 CFR § 278.6(f)(2). Therefore, being unaware of the assessment of the TOCMP if the store was sold does not provide a valid basis for mitigating or dismissing the TOCMP assessed by the Retailer Operations Division.

No Undue Hardship to Appellant

The former owners contend they sold firm because of financial difficulties and they cannot afford to pay the penalty. While the former owners' financial situation may be worthy of sympathy, the transfer of ownership civil money penalty cannot be reduced based on Appellant's personal circumstances.

Economic hardship is a likely consequence whenever a store is permanently disqualified from SNAP participation and is assessed a transfer of ownership civil money penalty in the amount levied in this case. However, there is no provision in the SNAP regulations for reducing an administrative penalty on the basis of possible economic hardship to the firm resulting from imposition of such penalty. To excuse Appellant from an assessed administrative penalty based on purported economic hardship to the firm would render the enforcement provisions of the Food and Nutrition Act of 2008 and the enforcement efforts of the USDA virtually meaningless.

Moreover, giving special consideration to the firm for economic hardship would forsake fairness and equity, not only to competing stores and other participating retailers who are complying fully with program regulations, and

also to those retailers who have been disqualified from the program in the past for similar violations and also assessed civil money penalties. Therefore, Appellant's contention that it will incur economic hardship based on the assessment of an administrative penalty does not provide any valid basis for dismissing the charges or for mitigating the imposed penalty.

Basis of Amount of TOCMP

The former owners request that the TOCMP be reduced and a payment plan instituted. The calculation of the amount of a CMP is based on regulations that delineate the exact formula to be used when calculating a CMP. These regulations at 7 CFR § 278.6(g) state, in relevant part:

FNS shall determine the amount of the civil money penalty as follows:

- (1) Determine the firm's average monthly redemptions of coupons for the 12-month period ending with the month immediately preceding that month during which the firm was charged with violations.*
- (2) Multiply the average monthly redemption figure by 10 percent.*
- (3) Multiply the product arrived at in paragraph (g)(2) by the number of months for which the firm would have been disqualified under paragraph (e) of this section. The civil money penalty may not exceed an amount specified in §3.91(b)(3)(i) of this title for each violation.*

As stated above, the formula for the calculating the CMP is specific per 7 CFR § 278.6(g) and does not allow for any reductions. However, the regulations do provide the option of an installment plan for paying the CMP over the period of disqualification. The regulations at 7 CFR § 278.6(h), state the following:

A firm has 15 days from the date the FNS regional office notifies the firm in writing in which to pay the civil money penalty or to notify the regional office in writing of its intent to pay in installments as specified by the regional office The civil money penalty must be paid in full by the end of the period for which the firm would have been disqualified.
(Emphasis added.)

Appellant can contact Financial Management at 703-305-2830 to discuss payment of this penalty in installment payments or online in one lump sum.

5 U.S.C. § 552 (b)(7)(E)

Modifications to the civil money penalty may occur only when there is an error in the calculation or the civil money penalty exceeds the agency limit. In this case, the calculated civil money penalty for transferring ownership of Appellant did exceed the agency limit, which is \$11,000 per violation. Each of the two violations reported, involving patterns of SNAP transactions indicative of the exchange of SNAP benefits for cash (trafficking), is considered a single violation. Therefore, the transfer of ownership civil money penalty warranted in this matter has been assessed at \$22,000, the agency limit.

Summary

Based on a review of the evidence, A T Polynesian Market was, indeed, sold following its disqualification from SNAP on February 4, 2014. Therefore, 7 CFR § 278.6(f)(2) of the SNAP regulations is applicable in this case as it pertains to a civil money penalty for the sale or transfer of a disqualified firm.

CONCLUSION

Based on the discussion above, the determination by the Retailer Operations Division to levy a Transfer of Ownership Civil Money Penalty of \$22,000 against Appellant for selling A T Polynesian Market during a period of disqualification from SNAP is sustained.

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 Appellant desires a judicial review, 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.

RICH PROULX
Administrative Review Officer

November 20, 2017