

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

**Former Store Owner,
Central Express Deli & Grocery Corp.,**

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0201920

FINAL AGENCY DECISION

It is the decision of the U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS), that there sufficient evidence to support a finding that a transfer of ownership Civil Money Penalty (CMP) in the amount of \$33,000.00 was properly levied by the Retailer Operations Division (Retailer Operations) against the former owner of Central Express Deli & Grocery Corp. (Appellant) for selling and/or transferring a retail food store that was permanently disqualified from participation in the Supplemental Nutrition Assistance Program (SNAP).

ISSUE

The issue accepted for review is whether Retailer Operations took appropriate action, consistent with 7 CFR § 278.6(f)(2), (3), and (4) and 7 CFR § 278.6(f)(2) and (g), in its administration of the SNAP when it assessed a CMP in the amount of \$33,000.00 against Appellant.

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.”

CASE CHRONOLOGY

The record supports that Appellant was notified by letter dated July 7, 2015, addressed to its accountant, of its permanent disqualification by the USDA from participation in the SNAP as an authorized retail food store. The Determination letter states that in the event the owner sold or transferred the store subsequent to the permanent disqualification, Appellant would be subject to and liable for a CMP pursuant to the SNAP regulations at Sections 278.6(f)(2), (3), and (4).

Retailer Operations informed the former store owner by letter dated August 22, 2017, that a CMP 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 his firm during a period of disqualification. By letter dated August 28, 2017, the former store owner appealed Retailer Operations' assessment of the CMP and requested administrative review. The appeal was granted by letter dated September 7, 2017.

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 evidence which 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). Section 278.6(f)(2) establishes the authority upon which a civil money penalty may be imposed against a SNAP 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 to a purchaser or transferee, the person or other legal entity who sells or otherwise transfers ownership of the retail food store... 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)."

7 CFR § 278.6(f)(3) reads, in part, "...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 United States..."

7 CFR § 278.6(f)(4) reads, in part, "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 a transfer of ownership CMP:

Step 1: Determine the cumulative redemptions for the 12-month period immediately preceding the issuance of Retailer Operations' 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);

Step 3: Multiply the AMR (as determined in *Step 2*) by .10. (Round this amount to the nearest dollar);

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.)

7 CFR § 278.6(g) and § 3.91(b) (3)(i) establish an \$11,000.00 per violation limit as the maximum amount for a transfer of ownership CMP. The Act, at Section 12, on the subject of transfer of ownership, supports the responsibility of ownership of the firm to the penalty as follows: Section 12 (5) Hearing – 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 who sells or otherwise transfers 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 period that has not yet expired. If the retailer food store has been disqualified permanently, the civil penalty shall be double the penalty for a ten year disqualification period, as calculated under regulations issued by the Secretary.

APPELLANT'S CONTENTIONS

The former store owner contends:

- The deli went out of business and we surrendered the store 5 U.S.C. § 552 (b)(6) & (b)(7)(C) to pay outstanding liabilities.
- Therefore, it is not sale.[sic]
- To pay this huge penalty is not reasonable.
- We already lost the business and we are in no shape to even pay 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

ANALYSIS AND FINDINGS

This review is to determine whether Retailer Operations' decision to assess a transfer of ownership CMP against the former owner of a previously permanently disqualified firm was the appropriate course of action. The SNAP regulations at 7 CFR § 278.6(f) authorize FNS to assess a CMP against the owner, or other legal entity, who sells or otherwise transfers ownership of a disqualified retail food store in an amount to reflect that portion of the disqualification period that has not expired. In reaching a decision, full attention and

consideration has been given to all contentions presented, including any not specifically recapitulated or specifically referenced herein.

A review of the amount of the CMP reveals that it was properly computed. Retailer Operations, using the methodology described in 7 CFR § 278.6(g), correctly determined that the initial calculated amount of the transfer of ownership CMP was above the agency limit which is \$11,000 per violation. The May 27, 2015 Charge letter identified three (3) patterns of trafficking based on SNAP benefit transaction redemption data. Therefore, the CMP was correctly assessed at \$33,000.00, which is the agency limit per violation multiplied by the number of trafficking patterns in the case.

The record contains an executed “Contract of Sale” and “Bill of Sale” dated February 29, 2016. These documents establish that Appellant was sold by the former store owner to a buyer. There is clear documentation in the record that the Appellant was in fact sold during its period of permanent disqualification. The evidence under review supports that a retail food business at the same address as Appellant is now owned and operated by another owner. Thus, the record supports that there was a legitimate business sale or transfer by the former store owner to a new store owner subject to a CMP under the SNAP regulations. Based on the Bill of Sale, as well as the entirety of the record that supports a sale of this permanently disqualified business to another individual, Retailer Operations took appropriate action, consistent with 7 CFR § 278.6(f)(2), (3),

and (4) and 7 CFR § 278.6(f)(2) and (g), in its administration of the SNAP when it assessed a transfer of ownership CMP in the amount of \$33,000.00 against the former store owner.

The former store owner contends that payment of the CMP will have a negative financial impact on him. It is recognized that some degree of economic hardship is a likely consequence whenever a transfer of ownership CMP is assessed. 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 former store owner resulting from imposition of such penalty based on the sale or transfer of a permanently disqualified store. To allow the former store owner to be excused from an assessed administrative penalty 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. Furthermore, giving special consideration to economic hardship to the former store owner would forsake fairness and equity, to those retailers who have been assessed transfer of ownership civil money penalties in the past. Therefore, the contention does not provide any valid basis for dismissing the CMP for \$33,000.00.

CONCLUSION

This review finds that the evidence provided by Retailer Operations as to a bona fide sale of a permanently disqualified retail food store is sufficient by a preponderance to support

its determination to assess a transfer of ownership CMP against the former store owner in the amount of \$33,000.00. The determination is hereby sustained.

RIGHTS AND REMEDIES

Your attention is called to Section 14 of the Food and Nutrition Act of 2008 and to 7 CFR Section 279.7 of the regulations with respect to applicable rights to a judicial review of this determination. Please note that 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 Appellant's former 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

October 13, 2017