

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

**Anam Banani, Former Owner,
Convenient,**

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0203637

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 \$55,000.00 was properly assessed by the Retailer Operations Division against the former owner of Convenient (hereinafter, “Convenient” 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 April 3, 2015.

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 \$55,000.00 against the former owner of Convenient, in a letter dated October 31, 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 §

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

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 January 13, 2015 the owner of record of Convenient, located at 580 W Jeffery St, Kankakee, IL 60901-4868 was notified that Appellant was being charged with trafficking, as defined in SNAP regulations at 7 CFR § 271.2. The charges were based on an analysis of SNAP benefit transactions conducted by the USDA wherein it was determined that identified transactions were suspicious and more likely than not the result of SNAP violations identified as trafficking. Subsequently, in a letter dated April 2, 2017, the owner of record of Appellant, was notified of the decision to permanently² disqualify Convenient as an authorized retailer in the SNAP. The determination is documented to have been delivered to Appellant's owner of record on April 3, 2015 and to have been made effective April 3, 2015. From that time forward, Convenient and its owner 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 January 13, 2015 letter and on page 2, in the second to the last paragraph of the April 2, 2015 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 October 31, 2017 the Retailer Operations Division informed the former owner of Appellant that a Transfer of Ownership Civil Money Penalty (TOCMP) in the amount of \$55,000.00, calculated in accordance with 7 CFR § 278.6(f)(2) and (g), was being assessed for the sale or transfer of Convenient during a period of disqualification.

In a letter postmarked November 13, 2017 Convenient, through its former owner of record, requested an appeal of the Retailer Operations Division's determination to impose a TOCMP of \$55,000.00. 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.

² The permanent disqualification was imposed by Retailer Operations Division and since Convenient 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.

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

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

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

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.

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 request for appeal postmarked November 13, 2017 appeal; and, in the supplemental materials provided Appellant, provides that he is seeking to reduce or eliminate the \$55,000.00 penalty because he cannot afford it because of the economic pressures suffered by him and his business following the implementation of the permanent disqualification dated April 3, 2015.

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 July 6, 2017 Appellant's owner of record signed a Stock Purchase Agreement to sell Appellant. Appellant's ownership has not denied that the sale of Appellant occurred.

CMP Calculation:

In a letter dated January 13, 2015 Appellant was charged with having conducted SNAP redemption transactions that supported a decision that suspicious transaction at Appellant were more likely than not the result of SNAP 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 April 2, 2015, which is documented to have been delivered to Appellant on April 3, 2015.

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 Convenient, this results in an assessment of \$55,000.00 (\$11,000.00 times 5) based on consideration of the charges leading to the imposition of the permanent disqualification that was effective April 3, 2015.

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**. Business profit or economic hardship is not an allowable consideration therefore the banking and tax materials provided for consideration are not a basis to mitigate or reverse the current penalty assessment. The TOCMP amount cannot be reduced.

As indicated in Table 1 below, the amount of the TOCMP has been recalculated to be \$55,000.00 which is the same as the original amount that was assessed against Convenient by the Retailer Operations Division in its October 31, 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 \$55,000.00 against Convenient 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 October 31, 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 31, 2018