

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

Redacted per 5 U.S.C. § 552 (b)(6) &
(b)(7)(C),

**Former Owners
Diamond Convenience Store,**

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0207458

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 Diamond Convenience Store (hereinafter, “Diamond Convenience Store” 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 8, 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 owner of Diamond Convenience Store, in a letter dated March 28, 2018.

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 January 26, 2017 the owners of record of Diamond Convenience Store, doing business at 5 U.S.C. § 552 (b)(6) & (b)(7)(C), San Antonio, TX 78211-3512 were notified that Appellant was being charged with trafficking, as defined in SNAP regulations at 7 CFR § 271.2. The charges were based on an undercover investigation as recounted in a USDA-FNS Report of Positive Investigation (Investigative Report) number HO00419 dated January 5, 2017. The Investigative Report documents the results of an undercover investigation conducted between October 6, 2016 and November 14, 2016 that included 10 visits to Appellant during which seven (7) of those visits resulted in violations of the SNAP regulations. Most egregiously the Investigative Report recounts the exchange of SNAP benefits for cash in Exhibits H and J. Subsequently, in a letter dated March 7, 2017, the owners of record of Appellant, were notified of the decision to permanently² disqualify Diamond Convenience Store as an authorized retailer in the SNAP. The determination is documented to have been delivered to Appellant's owner of record on March 8, 2017 and to have been made effective March 8, 2017.

From that time forward, Diamond Convenience Store 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, of the January 26, 2017 letter; and, on page 2, in the second to the last paragraph of the March 7, 2017 letter. Each of those letters specifically states 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 March 28, 2018, 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 Diamond Convenience Store during a period of disqualification.

In a letter dated March 30, 2018, Diamond Convenience Store, through counsel, 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, an appellant bears the burden of proving by a preponderance of the evidence, that the administrative actions should be reversed. That means an 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 March 7, 2017 permanent disqualification was imposed by Retailer Operations Division and, Diamond Convenience Store was afforded appeal rights regarding that sanction and the circumstances that led to that sanction at that time. Therefore, that permanent disqualification is 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 a period 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 United 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:

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 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 dated March 30, 2018 appeal counsel contends that:

- The penalty being applied is unconstitutional as Americans have a fundamental right to be able to buy and sell personal property.
- The letters informing Appellant of the restrictions on its sale did not define the period of restriction.
- Diamond Convenience Store was lost because a store clerk made a mistake leaving ownership no choice but to sell as Appellant was no longer profitable, having lost its ability to redeem government benefits.
- Appellant and its former owners need to stop being penalized.

The preceding represents only a brief summary of Appellant's contentions in this matter. However, in reaching a decision, full attention and consideration has been given to all contentions presented, including any not specifically recapitulated or specifically referenced herein.

ANALYSIS AND FINDINGS

Evidence of Sale:

The administrative record includes copies of:

- A "Bill of Sale" signed by redacted per 5 U.S.C. § 552 (b)(6) & (b)(7)(C) (seller) and the buyer dated February 4, 2018 detailing the sale by 5 U.S.C. § 552 (b)(6) & (b)(7)(C) of Diamond Convenience Store doing business at 5 U.S.C. § 552 (b)(6) & (b)(7)(C), San Antonio, Bexar County, Texas.
- Articles of incorporation from Texas listing the new owner doing business at 5 U.S.C. § 552 (b)(6) & (b)(7)(C), San Antonio, TX as a sole officer dated February 5, 2018.

- A property lease, signed by the new owner dated February 2, 2018, leasing the property at 5 U.S.C. § 552 (b)(6) & (b)(7)(C), San Antonio, TX 78211-3512.
- A letter from an area financial institution listing ‘Joint Owners’ of a business account signed by the Assistant Branch Manager dated February 27, 2018.
- A FNS-Form 252 signed by new owners applying for SNAP retailer authorization at 35 U.S.C. § 552 (b)(6) & (b)(7)(C), San Antonio, TX 78211-3512 dated February 10, 2018.
- An affidavit signed by the new owners stating the previous owners have no connection to new owners dated February 27, 2018.

Unconstitutional – Americans have a fundamental right to be able to buy and sell personal property; and, no time limit established for the imposition of a civil penalty:

FNS, in its administration of SNAP, imposes penalties for SNAP violations against the “firm,” whose operational definition has been the SNAP authorized retail food store together with the specific individuals who are responsible for the management, day-to-day operations, and policy decisions of that store. The SNAP retailer application of record dated September 25, 2015 lists redacted per 5 U.S.C. § 552 (b)(6) & (b)(7)(C), as corporate officers/owners of 5 U.S.C. § 552 (b)(6) & (b)(7)(C) d/b/a Diamond Convenience Store at 5 U.S.C. § 552 (b)(6) & (b)(7)(C), San Antonio TX. The record indicates that Diamond Convenience Store participated as a SNAP authorized retailer from October 20, 2015 through March 7, 2017. The Bill of Sale dated February 4, 2018 conveys Diamond Convenience Store to a buyer.

The plain language in subparagraph (e)(1) of Section 12 of the Food and Nutrition Act of 2008, as amended [7 U.S.C. 2021(e)(1)] , is clear that:

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...

The language taken from the Act above makes no accommodation to establish a time limit for the imposition of said TOCMP; nor, does it defer recognition of the constitutional rights of Americans to sell personal property. Accordingly, this contention is not a valid basis for a waiver or the reduction of the TOCMP under review.

Diamond Convenience Store Lost due to Clerk’s Mistake:

Appellant has explained that Diamond Convenience Store was lost because a store clerk made a mistake which left ownership no choice but to sell as Appellant was no longer profitable, having lost its ability to redeem government benefits. It is recognized that some degree of economic impact is likely to result from the imposition of penalties against SNAP authorized retail food stores. However, the economic impact is not a consideration for mitigation or reversal of the penalty as described in the Act and the pursuant SNAP regulations.

Appellant and its former owners need to stop being penalized:

Although Counsel, on behalf of Appellant, has indicated that the former owners of Diamond Convenience Store need to stop being penalized it is again noted that neither the Act or the pursuant SNAP regulations limit the penalties assessed in the instant case which include the permanent disqualification based on SNAP trafficking violations; and, the TOCMP imposed upon the sale of Diamond Convenience Store as a permanently disqualified SNAP retailer that is sold or transferred.

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 Diamond Convenience Store this results in an assessment of \$22,000.00 (\$11,000.00 times 2) based on consideration of the trafficking charges leading to the imposition of the permanent disqualification that was effective March 8, 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 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 number of identified SNAP trafficking violations and the length of time in the disqualification period. The TOCMP amount cannot be reduced.

5 U.S.C. § 552 (b)(6) & (b)(7)(C)

As indicated in Table 1 above, 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 Diamond Convenience Store by the Retailer Operations Division in its March 28, 2018 letter.

CONCLUSION

Based on the discussion above, the decision to impose a TOCMP in the amount of \$22,000.00 against Diamond Convenience Store 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 March 28, 2018.

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

August 7, 2018