

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

**Diaeddin M.A. Sweiki, Former Owner of
Dido Market,**

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0199442

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 that a Transfer of Ownership Civil Money Penalty (TOCMP) in the amount of **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** was properly imposed by the Retailer Operations Division against Diaeddin M.A. Sweiki, former owner of Dido Market (hereinafter “Appellant”), for selling or transferring ownership of a store which was permanently disqualified from the Supplemental Nutrition Assistance Program (SNAP).

ISSUE

The issue accepted for review is whether or not the Retailer Operations Division took appropriate action, consistent with 7 CFR § 278.6(f)(2) and 7 CFR § 278.6(g) in its administration of SNAP when it assessed a TOCMP in the amount of **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** against the 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 case record indicates that on June 30, 2015, FNS’s Retailer Operations Division charged Dido Market with two violations of trafficking in SNAP benefits. The record shows that the Appellant replied to these charges on July 8, 2015. After considering the Appellant’s reply to the

charges and further reviewing the evidence in the case, the Retailer Operations Division concluded that trafficking violations did occur. As a result, the Appellant firm was permanently disqualified from SNAP effective February 2, 2016. This decision was sustained in administrative review in a Final Agency Decision dated April 25, 2016.

The agency's determination letter, dated January 28, 2016, stated that in the event that the firm's owners sold or transferred ownership of the store after its disqualification, they would be subject to and liable for a TOCMP as provided by SNAP regulations at 7 CFR § 278.6(f)(2), (3) and (4). The letter also noted that the amount of the TOCMP would be calculated based on regulations at 7 CFR § 278.6(g).

Documentation in the case record shows that on January 11, 2017, a SNAP application was submitted to FNS for a new store at the same location where Dido Market had previously operated. According to the application, this new store, 5 U.S.C. § 552 (b)(6) & (b)(7)(C), began its operations effective July 21, 2016.

Upon discovering that a new application had been submitted at a location where SNAP violations had previously occurred, the Retailer Operations Division requested additional documentation from the new store owner to verify that the disqualified owner was not affiliated with the new store in any way and to ascertain whether or not the transfer of ownership from the Appellant to 5 U.S.C. § 552 (b)(6) & (b)(7)(C) was bona fide. In response to this request, 5 U.S.C. § 552 (b)(6) & (b)(7)(C) submitted a number of documents, including an asset purchase agreement, shareholder and by-law information, a certificate of incorporation, a statement signed by the Appellant that a payment had been made for the sale of the store, and a lease agreement – all verifying that a bona fide change of ownership had occurred.

In a letter dated May 2, 2017, the Retailer Operations Division informed the Appellant that since the store was sold during its disqualification period, a TOCMP in the amount of 5 U.S.C. § 552 (b)(6) & (b)(7)(C) was being assessed against the former owner of Dido Market in accordance with SNAP regulations at 7 CFR § 278.6(f)(2), (3) and (4), and § 278.6(g).

In a letter postmarked May 5, 2017, the Appellant, through counsel, appealed the Retailer Operations Division's assessment of the TOCMP by requesting an administrative review. The request was granted and implementation of the TOCMP has been held in abeyance pending completion of this review.

5 U.S.C. § 552 (b)(6) & (b)(7)(C)

STANDARD OF REVIEW

In an appeal of adverse action, such as the imposition of a civil money penalty, an appellant bears the burden of proving by a preponderance of the evidence that the administrative action should be reversed. This means that 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.

CONTROLLING LAW

The controlling law in this matter is found in the Food & Nutrition Act of 2008, as amended (7 U.S.C. § 2021), and promulgated through regulation under Title 7 CFR Part 278. In particular, 7 CFR § 278.6(f)(2) and (g) establish the authority upon which a TOCMP may be imposed against a retail food store or wholesale food concern.

7 U.S.C. § 2021(e)(1) states:

In the event any retail food store or wholesale food concern that has been disqualified under subsection (a) of this section 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 period that has not yet expired. If the retail food store or wholesale food concern 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. The disqualification period imposed under subsection (b) shall continue in effect as to the person or persons who sell or otherwise transfer ownership of the retail food store or wholesale food concern notwithstanding the imposition of a civil penalty under this subsection.

7 CFR § 278.6(f)(2) reads, in part,

In the event any retail food store or wholesale food concern 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 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). If the retail food store...has been permanently disqualified, the civil money penalty shall be double the penalty for a ten year disqualification period...

7 CFR § 278.6(g) outlines the steps for calculating the TOCMP amount, in relevant part:

- (1) Determine the firm's average monthly redemptions ... 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 The civil money penalty may not exceed an amount specified in § 3.91(b)(3)(i) for each violation.*

5 U.S.C. § 552 (b)(6) & (b)(7)(C)

It is also important to note that in Step 3 of § 278.6(g), above, 240 is the number of months used to calculate the civil money penalty for permanent disqualifications. This is in accordance with 7 U.S.C. § 2021(e)(1) and SNAP regulations at 7 CFR § 278.6(f)(2).

APPELLANT'S CONTENTIONS

The Appellant, through counsel, made the following summarized contentions in its request for administrative review, in relevant part:

- Appellant believes the penalty is unwarranted and unduly burdensome after having fully resolved the underlying charges and violations.
- If the TOCMP will not be waived, then the penalty should be reduced for reasons of equity, as the transfer of ownership was made for consideration of only 5 U.S.C. § 552 (b)(6) & (b)(7)(C), which is substantially less than the assessed penalty.
- Appellant proposes that the TOCMP be in the amount of 5 U.S.C. § 552 (b)(6) & (b)(7)(C), which is half the value of the transfer of ownership, to be paid in a lump sum payment.
- If the penalty can be reduced from the original 5 U.S.C. § 552 (b)(6) & (b)(7)(C), but is more than 5 U.S.C. § 552 (b)(6) & (b)(7)(C), then the Appellant requests a payment plan be established to allow the owner to make reasonable installment payments to resolve the balance owed.

In support of its contentions, the Appellant provided a copy of an Asset Purchase Agreement, dated July 15, 2016, showing the sale of property and assets, 5 U.S.C. § 552 (b)(6) & (b)(7)(C)

The preceding may represent only a brief summary of the Appellant's contentions presented in this matter. However, in reaching a decision, full attention was given to all contentions presented, including any not specifically summarized or explicitly referenced herein.

ANALYSIS AND FINDINGS

The primary issue for review in this case is whether or not it was lawful for the Retailer Operations Division to impose a 5 U.S.C. § 552 (b)(6) & (b)(7)(C) transfer of ownership civil money penalty against the Appellant firm. To this regard, statute at 7 U.S.C. § 2021 and SNAP regulations at 7 CFR § 278.6(f)(2) are clear that a TOCMP shall be assessed if a store which has been disqualified is subsequently sold or the ownership of the firm is transferred prior to the end of the disqualification period. This review has no authority to dismiss or modify the penalty for any reason except in those cases where a monetary penalty was assessed in a manner not in accordance with regulation or when there was an error in calculating the TOCMP amount.

As best as can be determined, there is no dispute that a sale of the business occurred. Evidence provided by both the Appellant and the owner of 5 U.S.C. § 552 (b)(6) & (b)(7)(C) clearly shows that a transfer of ownership occurred and that the transaction took place after Dido Market was permanently disqualified from SNAP participation.

All documentation of new ownership in this case appears to be legitimate and proof of a bona fide sale. Therefore, it is the determination of this review that the assessment of a TOCMP against Dido Market, under the ownership of Diaeddin M.A. Sweiki, is wholly appropriate and was imposed in accordance with established statute and regulation.

Hardship to Appellant

The Appellant, through counsel, contends that the amount of the civil money penalty is unwarranted and unduly burdensome. The Appellant requests that the TOCMP be waived because the underlying charges and violations have been fully resolved. The Appellant states that if the TOCMP will not be waived, then the penalty should be reduced for “reasons of equity,” since the sale of the business was only 5 U.S.C. § 552 (b)(6) & (b)(7)(C), which is less than the TOCMP amount. The Appellant proposes that the TOCMP be reduced to 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Finally, the Appellant argues that if the TOCMP has to be more than 5 U.S.C. § 552 (b)(6) & (b)(7)(C), then it should be allowed to establish an installment plan to pay the debt over a period of time.

With regard to these contentions, it is recognized that some degree of economic hardship is a likely consequence whenever a store is disqualified from participation in SNAP or when a civil money penalty is imposed. However, there is no provision in statute or in SNAP regulations for waiver or reduction of an administrative penalty on the basis of possible economic hardship to either the ownership personally or to the firm itself resulting from the imposition of such a penalty.

To allow store ownership to be excused from administrative penalties based on a purported economic hardship to the Appellant or firm would render virtually meaningless the 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 Appellant would forsake fairness and equity, not only to competing stores and other participating retailers who are complying fully with Program regulations, but also to those retailers who have incurred monetary penalties in the past for similar violations. Therefore, the Appellant’s insinuation that it has incurred or may incur economic hardship based on the assessment of an administrative penalty does not provide a valid basis for dismissing the charges or for mitigating the penalty imposed.

As noted earlier, this review has no authority to dismiss or modify the penalty amount for any reason except in those cases where a monetary penalty was assessed in a manner not in accordance with regulation or when there was an error in calculation. Such circumstances do not exist in this case. It should also be noted that the amount for which the firm was sold is irrelevant when determining a TOCMP amount. Accordingly, a reduction of the TOCMP amount cannot be granted in this case. However, in accordance with 7 CFR § 278.6(h), a TOCMP may be paid in installments. To arrange an installment plan, the Appellant must contact FNS’s Financial Management Accounting Division at (703) 605-0483 within 30 days of receipt of this decision.

TOCMP Calculation

As noted earlier, regulations at 7 CFR § 278.6(g) outline the steps for calculating the TOCMP amount. The TOCMP is derived from the firm's SNAP redemption volume during the 12 months immediately prior to being charged with the violations that led to the store's disqualification. Modifications to a TOCMP may occur only when there is an error in calculation or when the TOCMP exceeds the statutory limit. This review has no authority to modify a TOCMP amount for any other reason. The calculation of the TOCMP in this case is as follows:

5 U.S.C. § 552 (b)(6) & (b)(7)(C).

5 U.S.C. § 552 (b)(6) & (b)(7)(C)

Based on regulations cited at 7 CFR § 278.6(g), it is the determination of this review that a TOCMP in the amount of 5 U.S.C. § 552 (b)(6) & (b)(7)(C) was properly assessed in this matter.

CONCLUSION

The permanent disqualification of Dido Market took effect on February 2, 2016. A review of the evidence in this case clearly indicates that the store was sold to a buyer on July 15, 2016. Therefore, 7 CFR § 278.6(f)(2) of the SNAP regulations is applicable, and the assessment of a TOCMP is required. A review of the calculation indicates that the amount of the TOCMP as assessed by the Retailer Operations Division is proper as noted in the analysis above. Thus, the decision by the Retailer Operations Division to impose a 5 U.S.C. § 552 (b)(6) & (b)(7)(C) civil money penalty against Diaeddin M.A. Sweiki, former owner of Dido Market, is sustained.

RIGHTS AND REMEDIES

Applicable rights to a judicial review of this decision are set forth in Section 14 of the Food and Nutrition Act of 2008 (7 U.S.C. § 2023) and in Section 279.7 of the SNAP regulations. 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 owner resides or is engaged in business, or in any court of record of the State having competent jurisdiction. If a complaint is filed, it must be filed within 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.

JON YORGASON
Administrative Review Officer

November 27, 2017