

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

**5 U.S.C. § 552 (b)(6) & (b)(7)(C), former
owners of Fair Deal Liquors,**

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0214029

FINAL AGENCY DECISION

It is the decision of the U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS), that a Transfer of Ownership Civil Money Penalty (TOCMP) in the amount of \$22,000.00 was properly imposed by the Retailer Operations Division (hereinafter Retailer Operations) against **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**, former owners of Fair Deal Liquors (hereinafter Appellant) for selling and/or transferring ownership of a store that was permanently disqualified from participation as a retail food store 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 SNAP, when it assessed a TOCMP 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 case record supports that USDA notified the owners on February 19, 2014, that Appellant was permanently disqualified from participation as an authorized retail food store due to violations detailed in the Charge letter dated August 22, 2013. The Determination letter states that in the event the owners sold or transferred the store after its disqualification, Appellant would be subject to and liable for a TOCMP as provided by SNAP regulations §278.6(f)(2), (3), and (4).

Retailer Operations informed the former store owners by letter dated November 28, 2018, that a TOCMP in the amount of \$22,000, calculated in accordance with 7 CFR § 278.6(f)(2) and (g), was being assessed against them for the sale or transfer of the firm during a period of disqualification. By letter dated December 14, 2018, Appellant requested an administrative review of the assessment of the TOCMP. FNS granted Appellant's request for administrative review by letter dated December 19, 2018, and the assessment of the TOCMP was held in abeyance pending completion of this review.

STANDARD OF REVIEW

In an appeal of adverse action, such as the imposition of a CMP, the Appellant bears the burden of proving by a preponderance of the evidence, that the administrative actions should be reversed. This 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 matter asserted is more likely to be true than not true.

CONTROLLING STATUTE AND REGULATIONS

7 U.S.C. § 2023 and its implementing regulations at 7 CFR § 279.1 provide that a food retailer 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.

The controlling statute in this matter is contained in the Food and Nutrition Act of 2008, as amended, 7 USC § 2021 and 7 CFR § 278. § 278.6(f)(2) establishes the authority upon which a CMP 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) states: "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) states: "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) states: "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 regulations at 7 CFR § 278.6(g) describes how to calculate the amount of a TOCMP:
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); and 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 TOCMP. 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 money 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 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

All contentions have been considered prior to rendering a decision.

- I understand and do not refute that my business was cited for a violation in 2014. I completed an internal investigation and took corrective action by terminating this employee. I have attached a signed, notarized affidavit from this former employee that he acted on his own accord and took full responsibility.
- I requested a CMP be assessed knowing the detrimental impact a disqualification would have on my business, but the disqualification was sustained.
- I feel I have already paid this CMP over time by the loss of revenue, because of the disqualification.
- I attempted to stay in business, but four years later, I had no choice but to sell my business and am now retired.
- I have been in the retail business for over 36 years and have owned and operated multiple locations and never had any other violations.
- I am asking your kind reconsideration to reduce the amount assessed and/or waive this penalty if possible. This is a huge burden upon me and my family.

ANALYSIS AND FINDINGS

This review is to determine whether Retailer Operations' decision to assess a TOCMP against the former owners of a previously permanently disqualified firm was in accordance with applicable regulations. The permanent disqualification of Appellant in 2014 as a SNAP retail food store is not under review. Appellant was already afforded the opportunity to appeal that determination.

The SNAP regulations at 7 CFR § 278.6(f) authorize FNS to assess a CMP against the owners, or other legal entity, who sell or otherwise transfer ownership of a disqualified retail food store in an amount to reflect that portion of the disqualification period that has not expired. Using the methodology described in 7 CFR § 278.6(g), Retailer Operations determined that the initial

calculated amount of the TOCMP was above the agency limit. Therefore, the TOCMP was assessed at \$22,000.00, which is the agency limit per violation.

The record contains an executed “Tenant Lease”, dated April 23, 2018, conditioned upon Tenant’s purchase as Buyer of the Appellant’s store and an executed “Buyer’s Final Settlement Statement”, dated October 24, 2018, sold by the former store owners to Buyers during its period of permanent disqualification. Appellant is therefore subject to a CMP under the SNAP regulations cited herein. 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 SNAP when it assessed a CMP against Appellant. A review of the amount of the CMP confirms that it was properly computed.

CONCLUSION

This review finds that by a preponderance of the evidence, a bona fide sale of a permanently disqualified retail food store occurred. The evidence is sufficient to support Retailer Operations’ determination to assess a TOCMP against Appellant. The amount was also properly computed.

RIGHTS AND REMEDIES

Section 14 of the Food and Nutrition Act of 2008 (7 U.S.C. § 2023) and 7 CFR § 279.7 of the SNAP regulations addresses your right to a judicial review of this determination. 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 owners reside or are 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 30 days of receipt of this Decision.

Under the Freedom of Information Act, FNS is 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.

KIM DAMERON
ADMINISTRATIVE REVIEW OFFICER

January 28, 2020