

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

**Former Store Owner,
JB Express Mart,**

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0201582

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 \$22,000.00 was properly levied by the Retailer Operations Division (Retailer Operations) against the former owner of JB Express Mart (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 \$22,000.00 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 the USDA notified Appellant and its attorney at the time, by letter dated September 16, 2014, of its permanent disqualification by 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). Appellant sought judicial review of this determination. The record supports that on July 12, 2016, the court upheld in favor of the United States, that the two documented trafficking occurrences at Appellant warranted a permanent disqualification.

Retailer Operations informed the former store owner by letter dated September 28, 2017 that a transfer of ownership CMP 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 his firm during a period of disqualification. By letter dated October 5, 2017, the former store owner, via counsel, appealed Retailer Operations' assessment of the CMP and requested administrative review of this action. The appeal was granted by letter dated October 16, 2017. Counsel provided a copy of his October 5, 2017 letter by letter dated November 2, 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) 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."

Based on the regulations at 7 CFR § 278.6(g), the following steps 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 amount. Step 3: Multiply the AMR (as determined in Step 2) by .10. Round this amount to the nearest dollar amount. 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

- Mr. Singh did not sell the store. In early 2017 the lease expired and the building owner did not review Mr. Singh's lease. He was forced to close the business.
- Mr. Singh agreed to sell what remained of his inventory and other assets such as food products, beverages, and dry goods.
- Please find the Contract for Transfer of Assets and Inventory and a copy of a related Bill of Sale. Both confirm Mr. Singh did not sell his business, but sold just his remaining business inventory and assets.
- The TOCMP may only be imposed in the event any retail food store which has been disqualified is sold or the ownership thereof if otherwise transferred.
- The ownership was not sold or otherwise transferred. The USDA does not have the authority to issue a TOCMP against Mr. Singh.
- Mr. Singh is willing to settle this dispute by paying a lump sum **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**.

Counsel provided a one page Offer of Compromise, a one page Power of Attorney, a two page Contract for Transfer of Assets and Inventory, and a two page Bill of Sale.

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 herein.

The review seeks to determine if a sale/transfer is bona fide, and that conditions of the sales contract or transfer were fully satisfied. The record shows that Retailer Operations assembled documents related to the transfer/sale of the business that included the signatures of both the buyer and seller. The record contains an executed Contract for Transfer of Assets and Inventory and Bill of Sale both dated April 21, 2017. The signatures of both the buyer and seller are not difficult to read and are not questionable.

A two page signed and notarized Contract for Transfer of Assets and Inventory, documents that Mr. Singh sold/transferred assets and inventory of the firm for 5 U.S.C. § 552 (b)(6) & (b)(7)(C). The record supports that the business inventory, all products for sale and all goods for sale, all miscellaneous business inventory, as noted in sections III. 1 A through H and 2 on the Bill of Sale was sold/transferred to a buyer. The record also has a lease document that confirms that the property, the physical store itself, at the same address as Appellant, was leased in an agreement dated and notarized by the new store owner and the lessor on April 1, 2017.

The Contract for Transfer of Assets and Inventory and the Bill of Sale establish that Appellant was sold by the former store owner to a buyer. There is documentation in the record that Appellant was 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. Once it is determined that a legitimate sale has taken place, if the former owner is currently disqualified, a transfer of ownership CMP is assessed. A review of the amount of the CMP reveals that it was properly computed using the methodology described in 7 CFR § 278.6(g).

CONCLUSION

This review finds that the evidence supports that there was a legitimate business sale or transfer subject to a CMP under the SNAP regulations. The agency's imposition of a civil money penalty adheres to relevant guidelines for such a penalty. Based on entirety of the record supporting a sale of this permanently disqualified business, 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 \$22,000.00 against Appellant. The transfer of ownership CMP is 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

November 29, 2017