

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

**Former Store Owners,
R & V Food Store,**

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0206659

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 that a transfer of ownership Civil Money Penalty (CMP) in the amount of \$11,000.00 was properly levied by the Retailer Operations Division (Retailer Operations) against the former owners of R & V Food Store (Appellant) for selling and/or transferring 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 the SNAP when it assessed a CMP in the amount of \$11,000.00 against Appellant.

AUTHORITY

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.

CASE CHRONOLOGY

The record supports that the USDA notified the owner that Appellant was permanently disqualified from participation in the SNAP as an authorized retail food store in March 2005 due to violations on one data Attachment. The Determination letter states that in the event the owners 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).

Retailer Operations informed the former store owners by letter dated March 12, 2018, that a transfer of ownership CMP in the amount of \$11,000.00, calculated in accordance with 7 CFR § 278.6(f)(2) and (g), was being assessed for the sale or transfer of the firm during a period of disqualification. By letter misdated May 16, 2018, postmarked March 16, 2018, the former store owners, appealed Retailer Operations' assessment of the CMP, and requested review.

The appeal was granted by letter dated March 29, 2018. The former store owners provided copies of SNAP regulations at 271.5(b)(1-3). The former store owners provided an additional letter dated April 3, 2018 and attached one page of regulations highlighted relative to Section 271.5(b)(1-3).

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

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."

The controlling statute in this matter is contained in the Food and Nutrition Act of 2008, as amended, 7 USC § 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 Section 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 following steps, based on the regulations at 7 CFR § 278.6(g), 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); 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 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

- In the book I got in 2004 it said "if such coupons or authorization cards [sic] are of the value of 5 U.S.C. § 552 (b)(6) & (b)(7)(C) or more but less than 5 U.S.C. § 552 (b)(6) & (b)(7)(C)....be fined not more than \$10,000.00" and "if such coupon are of a value of less than 5 U.S.C. § 552 (b)(6) & (b)(7)(C), shall be guilty of a misdemeanor and upon the first conviction thereof, shall be fined not more than 5 U.S.C. § 552 (b)(6) & (b)(7)(C) or imprisoned for not more than one year."
- All the transaction in our store at that time are [sic] always less than 5 U.S.C. § 552 (b)(6) & (b)(7)(C).
- We request review and reduce the penalty money.
- We do not know the amount of penalty is calculated based on the law in 2018 or the time the change happened in 2005.
- We think it's fair to calculate the penalty at the time of the charge in 2005.

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 appropriate. The permanent disqualification itself is not under review. The SNAP regulations at 7 CFR § 278.6(f) authorize FNS to assess a CMP against the owner(s), 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.

A review of the amount of the CMP reveals that it was properly computed. Using the methodology described in 7 CFR § 278.6(g), Retailer Operations correctly determined that the initial calculated amount of the transfer of ownership CMP was above the agency limit. Therefore, the CMP was assessed at \$11,000.00, which is the agency limit per violation.

The record contains an executed Bill of Sale dated September 18, 2017. This document establishes that Appellant was sold by the former store owners to a buyer during its period of permanent disqualification. The record supports that there was a legitimate business sale or transfer of a permanently disqualified firm. Appellant is subject to a CMP under the SNAP regulations cited herein. The regulations cited by the owners in their contentions are not relevant to a transfer of ownership CMP. Therefore, 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 \$11,000.00 against Appellant.

CONCLUSION

This review finds that the evidence provided by Retailer Operations as to a bona fide sale of a permanently disqualified retail food store is sufficient to support its determination to assess a transfer of ownership CMP against Appellant. The amount of \$11,000.00 was properly computed.

RIGHTS AND REMEDIES

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. 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 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

May 7, 2018