

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

**Former Owner of Chester Pike Mini
Market Ii Inc,**

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0252588

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 (TOCMP) of \$44,000.00 was properly assessed against the former owner of Chester Pike Mini Market Ii Inc (hereinafter “Chester Pike Mini Market Ii Inc” or “Appellant”), for selling or transferring a store that has been permanently disqualified from the Supplemental Nutrition Assistance Program (SNAP).

ISSUE

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with 7 CFR § 278.6(f)(2) in its administration of the SNAP, when it assessed a TOCMP in the amount of \$44,000.00 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 documents that FNS permanently disqualified Chester Pike Mini Market Ii Inc, under the ownership of the Appellant, from the SNAP effective March 25, 2020 for trafficking in SNAP benefits. The permanent disqualification letter dated March 24, 2020 stated that if the Appellant/owner sold or transferred the store after its disqualification, it would be subject to and liable for a TOCMP as provided by SNAP regulations at 7 CFR § 278.6(f)(2). As noted in the letter, the amount of the TOCMP is calculated based on the SNAP regulations at 7 CFR § 278.6(g).

According to the Bill of Sale on record, on or about September 30, 2021, the Appellant sold or transferred ownership of Chester Pike Mini Market Ii Inc located at 5 U.S.C. § 552 (b)(6) & (b)(7)(C) to a new store owner(s) as agreed upon by both the Seller and the Buyer(s) for 5 U.S.C. § 552 (b)(6) & (b)(7)(C) including all of the Seller's assets, including (but not limited to) inventory, goodwill, fixtures and equipment at the grocery store located at the above named address, together with the Seller's business conducted at said address; the trade, use of trade name, good will, and all other intangible assets of the business. When the new store owner was authorized to participate in the SNAP on February 22, 2022, the Retailer Operations Division discovered that Chester Pike Mini Market Ii Inc had been sold or otherwise transferred by the former owner/Appellant.

As a result of the sale or transfer of ownership, the Retailer Operations Division notified the Appellant, in a letter dated May 9, 2022, that it had assessed a TOCMP in the amount of \$44,000.00 in accordance with the SNAP regulations at 7 CFR § 278.6(f)(2), (3), (4) and § 278.6(g) for the sale or transfer of the firm during a period of disqualification.

In a letter postmarked May 20, 2022, the Appellant, through counsel, requested an administrative review of the assessment of the TOCMP. FNS granted the Appellant's request for administrative review by letter dated May 26, 2022 and the assessment of the TOCMP was held in abeyance pending completion of this review. In an email correspondence of June 14, 2022, the Appellant, through counsel, submitted additional information in support of the request for administrative review.

STANDARD OF REVIEW

In appeals of adverse actions, the Appellant bears the burden of proving by a preponderance of the evidence, that the administrative actions 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 matter asserted is more likely to be true than not true.

CONTROLLING STATUTE 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 Section 278 of Title 7 of the Code of Federal Regulations (CFR).

7 U.S.C. § 2021(e)(1) states, in part:

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. [Emphasis added.]

7 CFR § 278.6(f)(2) reads, in part,

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

7 CFR § 278.6(g) which provides the steps for calculating the TOCMP, states, in 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) Multiple the average monthly redemption figure by 10 percent.
- (3) Multiply the [average monthly redemption times 10 percent] by the number of months for which the firm would have been disqualified . . .

Notwithstanding the above, there is an agency limit of \$44,000.00 per violation as the maximum TOCMP amount.

APPELLANT'S CONTENTIONS

The following may represent only a brief summary of the Appellant's contentions presented in this matter. However, in reaching a decision, full attention and consideration have been given to all contentions presented, including any not fully recapitulated or specifically referenced herein.

In the request for administrative review and in subsequent correspondence, the Appellant, through counsel, stated the following summarized contentions, in relevant part:

- Following the March 25, 2020 permanent disqualification of the Appellant from SNAP as authorized retailers, 5 U.S.C. § 552 (b)(6) & (b)(7)(C) and Chester Pike Mini Market Ii Inc entered into a contract with 5 U.S.C. § 552 (b)(6) & (b)(7)(C) for the sale of the inventory, furniture, and fixtures.
- The Department offered no evidence to support its position that the Appellant sold its business.
- The Appellant did not transfer the business as defined or contemplated by the regulation. Instead, the Appellant entered into an agreement solely for the sale of a portion of the assets at the property located at the store's property.
- In *Corner Market vs. United States*, the court found the sale of inventory absent other transferred items demonstrated the firm had not been sold.
- There was no sale or transfer of Chester Pike Mini Market Ii Inc, but rather that Chester Pike Mini Market Ii Inc sold the assets at 5 U.S.C. § 552 (b)(6) & (b)(7)(C), to a third party.
- The submitted affidavit from the Buyer states that "I, 5 U.S.C. § 552 (b)(6) & (b)(7)(C), hereby declare and affirm that upon my purchase of the retail grocery store located at 5 U.S.C. § 552 (b)(6) & (b)(7)(C), I only bought the business' assets, furniture, fixtures, and stock inventory. I did not use or purchase the corporation pertaining to the Seller, 5

U.S.C. § 552 (b)(6) & (b)(7)(C), as I registered and established my own corporation to conduct the business in the storefront”.

- There is no evidence of a transfer of tax identification, goodwill, know-how, bank accounts, liabilities, or any of the other know-how of the business or its owners.
- There was not a real estate transfer.
- The buyer of the assets started with his own corporation to conduct the business.
- There should be no TOCMP imposed.

In support of these contentions, the Appellant, through counsel, submitted an affidavit of the new store owner dated May 25, 2022.

ANALYSIS AND FINDINGS

The purpose of this proceeding is limited to determining whether the Retailer Operations Division’s decision to assess a TOCMP against the former owner was the appropriate course of action. 7 USC § 2021 and the regulations at 7 CFR § 278.6(f) authorize FNS to assess a TOCMP against the owner(s) of a disqualified retail food store that has been sold or the ownership is otherwise transferred prior to the end of its disqualification period. This review has no authority to dismiss or modify a TOCMP for any reason except in those cases where it is shown that a transfer of ownership did not occur, a monetary penalty was assessed in a manner not in accordance with regulation, or when there was an error in calculating the TOCMP amount.

The record shows that the Appellant was permanently disqualified from the SNAP effective March 25, 2020. Documents in the case file show that the Appellant sold and/or transferred the permanently disqualified store to a new owner on or about September 30, 2021, and that this was the basis of the Retailer Operations Division’s assessment of a \$44,000.00 TOCMP. The SNAP permanent disqualification determination letter dated March 24, 2020, and received by the former store owner on March 25, 2020, included notification to the effect 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).” Accordingly, the former owner received proper legal notice that a TOCMP could be imposed if the business was sold after the date of disqualification.

The Appellant contends that this transaction does not constitute a transfer of ownership because the Appellant only sold the store’s assets to a third party. The documentation that was submitted when the new store owner applied for SNAP retailer authorization at this location verify that the retail food business was transferred on or about September 30, 2021. The retail food business at the Appellant’s former address is now owned and operated by another entity; the fact that there is a new owner at the same location also supports that this is a legitimate business transfer subject to a TOCMP under the SNAP rules. The Bill of Sale on record states that the Appellant/Seller sold or transferred ownership of Chester Pike Mini Market Ii Inc located at 5 U.S.C. § 552 (b)(6) & (b)(7)(C) to a new store owner(s) as agreed upon by both the Seller and the Buyer(s) for 5 U.S.C. § 552 (b)(6) & (b)(7)(C) including all of the Seller’s assets, including (but not limited to) inventory, goodwill, fixtures and equipment at the grocery store located at the above named address, together with the Seller’s business conducted at said address; the trade, use of trade

name, good will, and all other intangible assets of the business. As such, there is enough evidence to support the Retailer Operations Division's determination that this does constitute a transfer of a store, making Appellant subject to the TOCMP as outlined in the Federal regulations at 7 CFR § 278.6(f)(2). Accordingly, this contention is not a valid basis for a waiver or the reduction of the TOCMP under review.

TOCMP Calculation

The case record documents that, under 7 CFR § 278.6(g), the Retailer Operations Division correctly calculated the amount of the TOCMP. That regulation states that the TOCMP is to be calculated on a formula which includes the SNAP redemption volume of the store during the 12 months prior to the firm being notified of the violations that led to the store's disqualification. Modifications to the TOCMP may occur only when there is an error in calculation or the amount exceeds the statutory limit. The Retailer Operations Division correctly determined that, using the methodology described in 7 CFR § 278.6(g), the initial calculated amount of the TOCMP was 5 U.S.C. § 552 (b)(7)(E). This amount is more than the agency limit of \$11,000 per violation and therefore, the Retailer Operations Division correctly assessed the final TOCMP at \$44,000.00 (\$11,000.00 X 4 violations). The formula for computing the TOCMP does not provide for discretion and is directly related to the amount of SNAP violations, redemptions and the length of time in the disqualification. Therefore, this amount cannot be reduced.

Case Law

With regard to the case law cited by the Appellant, the consideration of legal precedent through case law is beyond the scope of this review. Instead, this administrative review is limited to whether the Retailer Operations Division appropriately followed the Food and Nutrition Act of 2008, as amended, and the regulations promulgated under the Act, and whether the action taken is sustainable by a preponderance of the evidence. Therefore, any application of a judicial precedent would be addressed in a judicial review in a court of law.

CONCLUSION

A review of the evidence in this case indicates that the Appellant business was in fact sold in a bona fide sale as stated by the Appellant. Therefore, 7 CFR § 278.6(f)(2) of the SNAP regulations is applicable, and the assessment of a TOCMP is correct. A review of the calculations indicates that the amount of the TOCMP (\$44,000.00) assessed by the Retailer Operations Division is also correct. The SNAP regulations are explicit in the requirement for a TOCMP in the event a disqualified business is subsequently sold and/or transferred and there is no Agency discretion in waiving or reducing the TOCMP amount. Thus, the action by the Retailer Operations Division is sustained.

In accordance with the Food and Nutrition Act of 2008, as amended, and the regulations there under, this penalty shall become effective thirty (30) days after receipt of this letter. The Appellant may contact the FNS Financial Management Accounting Division at 1-703-605-0483 to discuss payment options or follow the instructions in the Retailer Operations Division's letter dated May 9, 2022 regarding online or check payment options.

RIGHTS AND REMEDIES

Section 14 of the Food and Nutrition Act of 2008 (7 U.S.C. § 2023) and Title 7, Code of Regulations, Part 279.7 (7 CFR § 279.7) addresses your right 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 resides 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 (FOIA), 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.

LORIE L. CONNEEN
ADMINISTRATIVE REVIEW OFFICER

August 8, 2022