

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

**Former Store Owner,
ARCO AM/PM,**

Appellant,

v.

**Retailer Operations Division
Respondent.**

C0253915

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 \$55,000 was properly levied by the Retailer Operations Division against the former owner of ARCO AM/PM (Appellant) for selling and/or transferring a store that was disqualified from participation in 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), (3), and (4) and 7 CFR § 278.6(f)(2) and (g), in its administration of the SNAP when it assessed a TOCMP in the amount of \$55,000 against Appellant by letter dated March 31, 2022.

CASE CHRONOLOGY

The Retailer Operations Division permanently disqualified ARCO AM/PM from participation as a SNAP retailer on September 27, 2019, for trafficking SNAP benefits. Both the August 8, 2019, charge letter and the September 26, 2019, disqualification letter stated that if the owner(s) 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)(3) and (4). The letters also noted that the amount of the TOCMP would be calculated based on regulations at 7 CFR § 278.6(g).

The case record documents the former store owner of ARCO AM/PM sold or transferred the firm to a new owner on or about October 31, 2020. These documents were provided to FNS when the new store owner applied for SNAP retailer re-authorization at this location. As a

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result, the Retailer Operations Division, in a letter dated March 31, 2022, notified the former owner of ARCO AM/PM that it had assessed a TOCMP in the amount of \$55,000 in accordance with the SNAP regulations.

By letter dated April; 14, 2022, the former owner, through counsel, appealed the Retailer Operations Division's assessment of the TOCMP and requested administrative review of this action. The appeal was granted and implementation of the sanction has been held in abeyance pending completion of this 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 LAW

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). 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 USC § 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.

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 . . .

The following steps, based on the regulations at 7 CFR § 278.6(g), are used to calculate the amount of a TOCMP:

Step 1: Determine the cumulative redemptions for the 12-month period immediately preceding the issuance of the Retailer Operations Division's 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).

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.) The result is the amount of the TOCMP.

APPELLANT'S CONTENTIONS

In Appellant's July 20, 2022, administrative review request, and subsequent information e-mailed on August 16, 2022, Appellant stated the following summarized contentions, in relevant part:

- Neither member of LLC was involved in the fraudulent scheme perpetrated by a rogue employee.
- In October 2013 we were surprised to receive a letter from the USDA charging our business with trafficking and threatening us with permanent disqualification and the maximum fine of \$59,000.
- Appellant promptly submitted an appeal and it was denied in November 2013 for failure to supply sufficient evidence to ensure effective SNAP compliance.
- Appellant feels strongly that based on this record that it respected the integrity of the program and did our utmost to prevent violations.
- The maximum penalty should be reserved for flagrant, complicit, or willful violators done on a massive scale.
- Appellant feels the current fine of \$55,000 levied upon last November's sale of our business is unwarranted given Appellant already suffered significant damages and punishment by being disqualified from SNAP for the last eight years of doing business.
- It's not an exaggeration to estimate that we lost between \$135,000 and \$200,000 during the last eight years Appellant owned the business due to disqualification.
- Appellant offered SNAP benefits for seven years with zero violations with the exception of the trafficking crime committed the former employee.

In support of its contentions, Appellant submitted documentation related to the original permanent disqualification including a letter explain the employees responsible, a copy the Food Stamp Program Training Guide for Retailers, and other documentation related to training.

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

ANALYSIS AND FINDINGS

The purpose of this review is limited to determining whether the Retailer Operations Division's decision to assess a TOCMP against Appellant was appropriate. The disqualification itself is not under review. Thus, any contentions pertaining to the original disqualification action by the Retailer Operations Division are not subject to review.

Appellant admits to selling the store and the documents in the case file show that Appellant sold and/or transferred the disqualified store to a new owner on or about November 16, 2021, and that this was the basis of the Retailer Operations Division's assessment of an \$55,000 TOCMP. The disqualification letter dated November 14, 2013, informed Appellant 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).

TOCMP Calculation

A review of the case record documents that the Retailer Operations Division correctly calculated the amount of the TOCMP under 7 CFR § 278.6(g). Modifications to the TOCMP may occur only when there is an error in calculation, or the amount exceeds the agency limit. 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.

The Retailer Operations Division correctly determined that the initial calculated amount of the TOCMP was \$141,600.00. However, the Retailer Operations Division further determined that this initial calculated TOCMP was above the agency limit and assessed the final TOCMP at \$55,000.00.

No Previous Violations

Appellant explains that the owners have never had any other violation of any type. A record of participation in the SNAP with no previously documented instance of violations does not constitute valid grounds for dismissal of the current charges of violations or for mitigating the impact of the violations upon which they are based. There is no provision in the Act or regulations that reverses or reduces a sanction based upon a lack of prior violations by a firm and its owners, managers and/or employees.

Appellant Hardship

Appellant explains that it has already suffered greatly due to not being allowed to redeem SNAP benefits for a period of eight years. It is recognized that economic hardship is a likely consequence whenever a store is disqualified from participation in SNAP. However, there is no provision in the SNAP regulations for a waiver or reduction of an administrative penalty assessment based on possible economic hardship to the firm resulting from imposition of such penalty. To excuse ownership from assessed administrative penalties based on purported

economic hardship to the firm would render virtually meaningless the enforcement 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 firm 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 been disqualified from the program in the past for similar violations. Therefore, Appellant's contention that the firm has already suffered an economic hardship based on the assessment of an administrative penalty does not provide any valid basis for dismissing the charges or for mitigating the penalty imposition.

Summary

The SNAP regulations at 7 CFR § 278.6(f)(2) authorize FNS to assess a TOCMP against the owner of a disqualified retail food store that has been sold or in which the ownership is otherwise transferred. The Retailer Operations Division determined that a transfer of ARCO AM/PM did occur and is supported by documents in the record. Appellant's contentions do not give any legal grounds for vacating or reducing the TOCMP. Moreover, the regulations at 7 CFR § 278.6(g) outline how to calculate the amount of the TOCMP, and do not provide any authority to waive or reduce the assessed TOCMP. As such, there is no discretion in the calculation of the TOCMP amount.

CONCLUSION

This review finds that the evidence provided by the Retailer Operations Division is sufficient to support its determination to assess a transfer of ownership CMP against Appellant in the amount of \$55,000.

RIGHTS AND REMEDIES

Applicable rights to a judicial review of this decision are set forth in 7 USC § 2023 and 7 CFR § 279.7. 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 owners 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, 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.

Mary Kate Karagiorgos
ADMINISTRATIVE REVIEW OFFICER

March 22, 2023