

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

**Former Store Owner,
Flatland Grocery Inc.,**

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C033318

FINAL AGENCY DECISION

The U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS), finds that there is sufficient evidence that a Transfer of Ownership Civil Money Penalty (TOCMP) in the amount of \$33,000.00 was properly levied by the Retailer Operations Division (Retailer Operations) against the former owner of Flatland Grocery Inc. (Appellant), for selling and/or transferring ownership of 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 SNAP when it assessed a TOCMP in the amount of \$33,000.00 against Appellant.

CASE CHRONOLOGY

By Determination Letter dated February 28, 2011, Retailer Operations notified Appellant's former Counsel, that it was permanently disqualified from SNAP, as an authorized retail food store, due to trafficking violations. Trafficking violations were detailed in three data patterns in the Attachment to the Charge Letter. The Determination Letter stated that in the event the owner sells or transfers ownership of the store, subsequent to the permanent disqualification, it will be subject to and liable for a TOCMP pursuant to 7 CFR § 278.6(f)(2), (3), and (4).

By letter dated March 10, 2011, Appellant's former Counsel requested administrative review of the permanent disqualification decision. The request for administrative review was granted by letter dated March 16, 2011, and assigned Case Number C0138203. The TOCMP was held in abeyance pending USDA's Final Agency Decision.

The permanent disqualification was sustained in a Final Agency Decision dated April 18, 2011. The case record contains proof of delivery to Appellant's former Counsel's office via UPS on April 19, 2011, at 9:23 a.m.

Documents were provided to FNS when the new store owner applied to operate as an authorized SNAP retailer at this location. By letter dated August 18, 2020, Retailer Operations informed Appellant's former owner that a TOCMP in the amount of \$33,000 was being assessed in accordance with 7 CFR § 278.6(f)(2) for the sale and/or transfer of Appellant during a period of disqualification.

By letter dated September 3, 2020, Appellant's current Counsel appealed Retailer Operations' assessment and requested an administrative review of this action. Counsel also provided an executed Letter of Representation with the administrative review request. The appeal was granted by letter dated September 11, 2020, and assigned Case Number C0233318. Implementation of the sanction has been held in abeyance pending completion of this review.

STANDARD OF REVIEW

In an appeal of an adverse action, Appellant bears the burden of proving by a preponderance of the evidence that the administrative action should be reversed. That means Appellant has the burden of providing relevant, credible evidence that 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 untrue.

CONTROLLING LAW AND REGULATIONS

The controlling law in this matter is contained in the Food and Nutrition Act of 2008, as amended (7 USC § 2021), and 7 CFR § 278.

7 CFR § 278.6(f)(2) states, in part: 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 CMP.

7 CFR § 278.6(f)(3) states, in part: FNS 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(g) states, in part: FNS shall determine the amount of the CMP as follows: (1) Determine the firm's average monthly redemptions of coupons for the 12-month period ending with the month immediately preceding that month during which the firm was charged with violations. (2) Multiply the average monthly redemption (AMR) figure by 10%. (3) Multiply the product arrived at in paragraph (g)(2) by the number of months for which the firm would have been disqualified under paragraph (e) of this section. The CMP may not exceed an amount specified in § 3.91(b)(3)(i) of this title for each violation.

APPELLANT'S CONTENTIONS

Appellant, through Counsel, presented the following contentions in its request for administrative review. All contentions, listed herein or not, have been considered prior to rendering a decision.

- I have been informed that the EBT machine for this store has been disabled since March 2, 2011, and that the owner and the firm requested Administrative Review, which has not been received from your office by this owner or his counsel.
- My client submits that upon requesting Administrative Review, there has been no "final determination" as stated in your letter of determination dated March 2, 2011. There can be no "Transfer of Ownership Civil Money Penalty" as there has been no Final Agency Decision which would permanently disqualify this owner and firm.
- Any sale or transfer, if it did occur, was merely to satisfy Internal Revenue Service claims of underpaid taxes by this same owner and firm. Should FNS now impose the CMP it will create double jeopardy, whereby a forced sale by one governmental agency triggers a CMP by another.

ANALYSIS AND FINDINGS

This review is to determine whether Retailer Operations' decision to assess a TOCMP against the former owner of a permanently disqualified firm was in accordance with the applicable regulations.

The permanent disqualification of Appellant and the former owner is not under review. That determination was afforded administrative review and it was sustained by a Final Agency Decision dated April 18, 2011. As such, the contentions pertaining to the permanent disqualification are not applicable and are not addressed in this review.

While a retailer is not subject to a TOCMP if the store is sold prior to receipt of the Determination Letter, that is not the case in this matter. The case record contains a Bill of Sale and Contract of Sale executed by Appellant's former store owner (Seller) and a new Purchaser on November 18, 2019. The Determination Letter dated February 28, 2011, states that if 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 7 CFR § 278.6(f)(2), (3), and (4).

Retailer Operations correctly determined that, using the methodology described in § 278.6(g) of the SNAP Regulations, the initial calculated amount of the TOCMP is \$351,600.00. However, Retailer Operations determined that the initial calculated TOCMP is above the Agency limit, which is \$11,000 per violation. The Charge Letter, dated August 18, 2010, identified three trafficking patterns based on EBT redemption data. Therefore, Retailer Operations correctly assessed the final TOCMP at \$33,000.00, which is the Agency limit per violation multiplied by the number of trafficking patterns (\$11,000.00 x 3 patterns of trafficking).

Appellant's Counsel contends any sale or transfer, if it did occur, was merely to satisfy Internal Revenue Service claims of underpaid taxes by Appellant's former owner. Should FNS now

impose the CMP it will create double jeopardy, whereby a forced sale by one governmental agency triggers a CMP by another.

This review has no authority to dismiss or modify a TOCMP for any reason except in limited circumstances. Such circumstances do not exist in this case. Accordingly, a reduction of the TOCMP amount or a dismissal of the case altogether cannot be considered.

While FNS is sympathetic to the former owner's circumstances, neither the Food and Nutrition Act of 2008, nor its implementing regulations, allow for factoring in individual circumstances such as profitability or economic hardship when determining whether a TOCMP is warranted because of the sale of a business.

To allow store ownership to be excused from administrative penalties based on a purported financial hardship would render virtually meaningless the provisions of the Food and Nutrition Act of 2008 and the enforcement efforts of the USDA. Moreover, giving special consideration to economic hardship to Appellant 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 incurred monetary penalties in the past for similar violations.

CONCLUSION

Appellant and its former owner were permanently disqualified from SNAP on March 2, 2011. The record supports that the sale of Appellant and/or transfer of its ownership did occur on November 19, 2019. Retailer Operations took appropriate action, consistent with SNAP Regulations at § 278.6(f)(2), (3), and (4) and § 278.6(g), in its administration of SNAP when it assessed a TOCMP against Appellant and its former owner. A review of the amount of the CMP supports that it was properly computed. The Decision in this case is hereby sustained. In accordance with the Food and Nutrition Act of 2008, and the regulations thereunder, this penalty shall become effective 30 days after receipt of this Decision.

It should be noted that SNAP regulations do provide that an installment plan be allowed for paying the TOCMP. Please contact FNS' Retailer Repayment Team at (703) 605-0483 to discuss payment options or follow the instructions in Retailer Operations' letter dated August 18, 2020, regarding online and check/money order payments.

RIGHTS AND REMEDIES

Applicable rights to a judicial review of this Decision are set forth in the Food and Nutrition Act of 2008, as amended 7 U.S.C. § 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 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 30 days of receipt of this Decision. Please note that the judicial filing timeframe is mandated in the Act, and this office is unable to grant an extension.

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.

Kim Dameron
Administrative Review Officer

January 5, 2022