

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

Mi Tierra Market,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0228195

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) was properly imposed in the amount of \$8,250.00 by the Retailer Operations Division (Retailer Operations) against the former owners of Mi Tierra Market (Appellant), for selling and/or transferring a store that was disqualified from the Supplemental Nutrition Assistance Program (SNAP) for three years as a result of WIC Program violations.

ISSUE

The issue accepted for review is whether Retailer Operations took appropriate action, consistent with Title 7 of the Code of Federal Regulations (CFR) § 278.6(f)(2) in its administration of SNAP, when it assessed a TOCMP in the amount of \$8,250.00 against Appellant's former owners.

AUTHORITY

According to 7 U.S.C. § 2023, and the implementing regulations at 7 CFR § 279.1, 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 case record documents that FNS disqualified Appellant from SNAP for three years as a result of WIC Program violations. The effective date of the SNAP disqualification was April 9, 2019. The 3-year SNAP Disqualification Letter dated March 25, 2019, stated that in the event the owners sell or transfer ownership of Appellant subsequent to the disqualification, they will be subject to and liable for a CMP as provided by SNAP Regulations at § 278.6(f)(2), (3), and (4). The amount of this sale or transfer CMP will be calculated based on 7 CFR § 278.6(g).

Appellant's former owners sold Appellant to a new store owner, as agreed upon by both the Seller and the Buyer, and is documented by a Bill of Sale dated December 31, 2019. When the new store owner was authorized to participate in SNAP on March 25, 2020, Retailer Operations discovered that Appellant had been sold or otherwise transferred by the former owners. As a result, Retailer Operations notified Appellant's former owners in a letter dated May 28, 2020, that it had assessed a TOCMP in the amount of \$8,250.00 in accordance with SNAP regulations.

In a letter dated June 8, 2020, Appellant's former owners appealed Retailer Operations' assessment and requested an administrative review of this action. The appeal was granted by letter dated June 17, 2020, and implementation of the TOCMP has been held in abeyance pending completion of this review. Appellant's former owners submitted additional information via email on July 14, 2020.

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

The controlling law in this matter is contained in the Food and Nutrition Act of 2008, as amended, (7 USC § 2021), and implemented through regulation under Title 7 CFR Part 278. In particular, 7 CFR § 278.6(f)(2) establishes the authority upon which a CMP may be imposed against a disqualified retail food store in the event that it has been sold or the ownership is otherwise transferred.

7 CFR § 278.6(e)(8) reads, in part: FNS shall disqualify from the Food Stamp Program any firm which is disqualified from the WIC Program.

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 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) reads, in part: 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) reads, in part: A bona fide transferee of a retail food store shall not be required to pay a CMP imposed on the firm prior to its transfer. A buyer or transferee (other than a bona fide buyer or transferee) may not be authorized to accept or redeem coupons and may not

accept or redeem coupons until the Secretary receives full payment of any penalty imposed on such store or concern.

7 CFR § 278.6(g) which provides the steps for calculating the TOCMP, reads, 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 \$11,000.00 per violation as the maximum TOCMP amount.

APPELLANT'S CONTENTIONS

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

- We sold our firm. We lost our WIC and SNAP licenses and got hit with a huge penalty from NY WIC, which has been paid.
- It was hard to stay in business without WIC and SNAP. We had a triple net lease and had to pay rent and taxes for all three, and were forced to close the store permanently.
- We are not arguing the decision, but request the CMP be waived or some break from this huge penalty and allow more time to make payments.

As proof of payment for the WIC penalty, a copy of an email from the NY Department of Health (DOH) WIC and a copy of the cashier's check, payable to NY DOH WIC, in the amount of \$59,404.30 was submitted.

ANALYSIS AND FINDINGS

The purpose of this review is limited to determining whether Retailer Operations' decision to assess a TOCMP against Appellant was appropriate. SNAP Regulations at § 278.6(f) authorize FNS to assess a TOCMP against ownership of a disqualified retail food store that has been sold or the ownership is otherwise transferred. 7 CFR § 278.6(g) outlines how to calculate the amount of a TOCMP.

Documents in the case record show that Appellant's ownership sold and/or transferred the disqualified store to a new owner on December 31, 2019, and that this was the basis of Retailer Operations' assessment of an \$8,250.00 TOCMP. The SNAP 3-year disqualification letter dated March 26, 2020, and received by Appellant's former owners on March 27, 2019, informed ownership 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 7 CFR § 278.6(f)(2),

(3), and (4). The amount of this sale or transfer CMP will be calculated based on SNAP Regulations at 7 CFR § 278.6(g).” Accordingly, Appellant’s ownership received proper legal notice that a TOCMP could be imposed if the business was sold after the date of disqualification.

Appellant’s former owners contend they closed Appellant permanently and sold it due to financial hardship circumstances. They request the CMP be waived, reduced, or allow more time to pay the penalty as soon as possible.

While FNS is sympathetic to the former owners’ circumstances, neither the Food and Nutrition Act of 2008 nor its implementing regulations allow for factoring in individual circumstances such as profitability when determining whether a TOCMP is warranted because of the sale of a business. There is clear indication in the case file that Appellant was sold while it was disqualified. As such, it has been determined that there is enough evidence to support Retailer Operations’ Determination that this does constitute a sale of a business making Appellant’s former owners subject to the TOCMP, as outlined in 7 CFR § 278.6(f)(2).

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.

A review of the case record documents that Retailer Operations correctly determined that using the methodology described in 7 CFR § 278.6(g), the calculated amount of the TOCMP was \$8,250.00. This includes \$2,750.00 in credit for the nine months the former owners owned the firm from the date of the SNAP disqualification (April 2019) to the transfer of ownership date (December 2019).

CONCLUSION

Based on a review of the evidence in this case, Appellant was sold on December 31, 2019, after it had been disqualified from SNAP for three years, effective April 9, 2019. Therefore, SNAP Regulations at § 278.6(f)(2) applies to this transfer of ownership. A review of the calculations shows that the amount of the TOCMP assessed by Retailer Operations was correct and proper and 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 email delivery receipt of this Decision.

It should be noted that SNAP regulations do provide that an installment plan be allowed for paying the TOCMP over the period of disqualification. Please contact FNS’ Financial Management Accounting Division at (703) 605-0483 to discuss payment options, or follow the instructions in Retailer Operations’ letter dated May 28, 2020, regarding online or check payment options.

Please direct operations questions to Jeffrey Sparman at 916-228-8198 or Jeff.Sparman@usda.gov.

RIGHTS AND REMEDIES

Section 14 of the Food and Nutrition Act of 2008 (7 U.S.C. § 2023) and 7 CFR § 279.7 address your right to a judicial review of this Decision. 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 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 30 days of delivery of this Decision. Please note that the judicial filing timeframe is mandated in the Act, and this office cannot 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

October 25, 2021