

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

**5 U.S.C. § 552 (b)(6) & (b)(7)(C), former
owner of
39 Lott Grocery Inc,**

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0211644

FINAL AGENCY DECISION

It is the decision of the U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS) that a Transfer of Ownership Civil Money Penalty (TOCMP) in the amount of **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** was properly imposed by the Retailer Operations Division against **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**, former owner of 39 Lott Grocery Inc. (hereinafter “Appellant”), for selling or transferring ownership of a store that was permanently disqualified from the Supplemental Nutrition Assistance Program (SNAP).

ISSUE

The issue accepted for review is whether or not the Retailer Operations Division took appropriate action, consistent with 7 CFR § 278.6(f)(2) and 7 CFR § 278.6(g) in its administration of SNAP when it assessed a TOCMP in the amount of **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** 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 indicates that in a letter dated March 24, 2015, FNS’s Retailer Operations Division charged 39 Lott Grocery Inc., under the ownership of **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**, with four violations of trafficking in SNAP benefits. A determination letter was sent to the firm on February 22, 2018. Upon receipt of the determination letter, 39 Lott Grocery Inc. was permanently disqualified from SNAP effective February 23, 2018. The Appellant did not request an administrative review of the disqualification action.

Both the charge and determination letters stated that in the event that ownership of the store was sold or transferred after the firm's 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).

Documentation in the case record shows that on April 26, 2018, a SNAP application was submitted to FNS for a new store at the same location where 39 Lott Grocery Inc. had previously operated. According to the application, this new store, also called 39 Lott Grocery Inc., owned by 5 U.S.C. § 552 (b)(6) & (b)(7)(C), began its operations effective January 27, 2018.

Upon discovering that a new application had been submitted at a location where SNAP violations had previously occurred, the Retailer Operations Division requested additional documentation from the new store owner to verify that the disqualified owner was not affiliated with the new store in any way and to ascertain whether or not the transfer of ownership from the Appellant to 5 U.S.C. § 552 (b)(6) & (b)(7)(C) was bona fide. In response to this request, the new store owner submitted a number of documents, including a Bill of Sale, a Purchase Agreement, and a Promissory Note, all dated April 16, 2018. These documents, which verified that a bona fide transfer of ownership had occurred, were signed by both 5 U.S.C. § 552 (b)(6) & (b)(7)(C) and 5 U.S.C. § 552 (b)(6) & (b)(7)(C) and indicated that the business was being sold for 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

In a letter dated August 28, 2018, the Retailer Operations Division informed the Appellant that because the store was sold or transferred during its disqualification period, a TOCMP in the amount of 5 U.S.C. § 552 (b)(6) & (b)(7)(C) was being assessed against the former owner of 39 Lott Grocery Inc. in accordance with SNAP regulations at 7 CFR § 278.6(f)(2), (3) and (4), and § 278.6(g).

In a letter postmarked September 7, 2018, the Appellant appealed the assessment of a TOCMP by requesting an administrative review. The request was granted and implementation of the TOCMP has been held in abeyance pending completion of this review. It should be noted that in letters postmarked October 24, 2018, and November 16, 2018, the Appellant provided additional contentions and documentation to support its request for review.

STANDARD OF REVIEW

In an appeal of adverse action, such as the imposition of a civil money penalty, an Appellant bears the burden of proving by a preponderance of the evidence that the administrative action should be reversed. This means that an 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 law in this matter is found in the Food & Nutrition Act of 2008, as amended (7 U.S.C. § 2021), and promulgated through regulation under Title 7 CFR Part 278. 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 U.S.C. § 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. The disqualification period imposed under subsection (b) shall continue in effect as to the person or persons who sell or otherwise transfer ownership of the retail food store or wholesale food concern notwithstanding the imposition of a civil penalty under this subsection.

7 CFR § 278.6(f)(2) reads, in part,

In the event any retail food store or wholesale food concern 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 in an amount to reflect that portion of the disqualification period that has not expired, to be calculated using the method found at § 278.6(g). If the retail food store...has been permanently disqualified, the civil money penalty shall be double the penalty for a ten year disqualification period...

7 CFR § 278.6(g) outlines the steps for calculating the TOCMP amount, in relevant 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) Multiply the average monthly redemption figure by 10 percent.
- 3) Multiply the product arrived at in paragraph (g)(2) by the number of months for which the firm would have been disqualified....The civil money penalty may not exceed an amount specified in § 3.91(b)(3)(i) for each violation.

Although regulations at 7 CFR § 3.91(b)(3)(i) provide for a maximum penalty of \$113,894 for each Program violation, 5 U.S.C. § 552 (b)(7)(E). It is also important to note that in Step 3 of § 278.6(g), above, 240 is the number of months used to calculate the civil money penalty for permanent disqualifications. This is in accordance with 7 U.S.C. § 2021(e)(1) and SNAP regulations at 7 CFR § 278.6(f)(2).

APPELLANT'S CONTENTIONS

The Appellant made the following summarized contentions in its request for administrative review, in relevant part:

- The Appellant went through a financial hardship at the time it lost its SNAP license. As a result it was not able to pay its rent. It also “overdrafted” on its bank accounts and lost its credit lines. These hardships brought the firm’s finances to a near bankruptcy situation.
- Appellant understands that SNAP regulations and procedures work their own way. The Appellant also knows how small deli groceries work in order to not be in default with landlords and other companies. Because of this, the Appellant had no other remedy but to transfer the business to another person who can keep it running and as a way to avoid personal legal action against the firm.
- Appellant requests reconsideration in regard to the amount of the civil money penalty.

In support of these contentions, the Appellant submitted the following documentation:

- Three merchant services statements from 5 U.S.C. § 552 (b)(6) & (b)(7)(C), a third-party, point-of-sale provider. The statements are dated May 31, 2018, June 29, 2018, and July 31, 2018. These were provided by the Appellant to show the decline of sales at the store after the loss of its EBT authorization.

The preceding may represent only a brief summary of the Appellant’s contentions presented in this matter. However, in reaching a decision, full attention was given to all contentions presented, including any not specifically summarized or explicitly referenced herein.

ANALYSIS AND FINDINGS

The primary issue for review in this case is whether or not it was lawful for the Retailer Operations Division to impose a 5 U.S.C. § 552 (b)(6) & (b)(7)(C) transfer of ownership civil money penalty against the Appellant firm. To this regard, statute at 7 U.S.C. § 2021 and SNAP regulations at 7 CFR § 278.6(f)(2) are clear that a TOCMP **shall be** assessed if a store which has been disqualified is subsequently sold or the ownership of the firm is 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.

Based on an analysis of the sales documents in this case, it is the finding of this review that a sale or transfer of ownership did, in fact, occur between the Appellant, 5 U.S.C. § 552 (b)(6) & (b)(7)(C), and 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Evidence provided by 5 U.S.C. § 552 (b)(6) & (b)(7)(C) clearly shows that a transfer of ownership occurred on April 16, 2018, which is after 39 Lott Grocery Inc., under the ownership of 5 U.S.C. § 552 (b)(6) & (b)(7)(C), was permanently disqualified from SNAP participation.

All documentation of new ownership appears to be legitimate and proof of a bona fide sale. Furthermore, there does not appear to be any dispute from the Appellant that a sale of the store took place. Therefore, it is the determination of this review that the assessment of a TOCMP against 39 Lott Grocery Inc., under the ownership of 5 U.S.C. § 552 (b)(6) & (b)(7)(C), is wholly appropriate and was imposed in accordance with established statute and regulation.

Hardship to Appellant

The Appellant contends that it had no other option except to transfer ownership of the firm. According to the Appellant, this was done because the firm was suffering financially after its disqualification from SNAP, almost to the point of bankruptcy. A sale of the firm was necessary to help avoid legal actions against the firm. To help demonstrate that the Appellant was suffering financially, it provided three merchant services statements from May, June, and July 2018. These statements apparently show a decline in sales since the disqualification took effect.

With regard to these contentions, this review finds it very unusual that the Appellant even had merchant services statements for 39 Lott Grocery Inc. for the months of May, June, and July 2018, when 5 U.S.C. § 552 (b)(6) & (b)(7)(C) ownership of the firm ended on April 16, 2018. Notwithstanding that peculiarity, it is recognized that some degree of economic hardship is a likely consequence whenever a store is disqualified from participation in SNAP or when a civil money penalty is imposed. However, there is no provision in statute or in SNAP regulations for waiver or reduction of an administrative penalty on the basis of possible economic hardship to either the ownership personally or to the firm itself resulting from the imposition of such a penalty.

To allow store ownership to be excused from administrative penalties based on a purported financial hardship to the Appellant or firm 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 the 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. Therefore, the Appellant's contention that it will incur financial hardship based on the assessment of a TOCMP does not provide a valid basis for dismissing the charges or for reducing the penalty imposed.

As noted earlier, 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. 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. It should be noted that in accordance with 7 CFR § 278.6(h), a TOCMP may be paid in installments.

TOCMP Calculation

Regulations at 7 CFR § 278.6(g) outline the steps for calculating the TOCMP amount. The TOCMP amount is derived from the firm's SNAP redemption volume during the 12 months immediately prior to being charged with the violations that led to the store's disqualification. Modifications to a TOCMP amount may occur only when there is an error in calculation or when the TOCMP amount exceeds the statutory limit. This review has no authority to modify a TOCMP amount for any other reason. The calculation of the TOCMP in this case is as follows:

5 U.S.C. § 552 (b)(6) & (b)(7)(C)

In this case, the calculated TOCMP of 5 U.S.C. § 552 (b)(6) & (b)(7)(C) exceeds the agency sanction limit, which is 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Each trafficking pattern identified in the March 24, 2015, charge letter is considered a single violation of the SNAP regulations. Therefore, the TOCMP was assessed using four violations at a maximum amount of 5 U.S.C. § 552 (b)(6) & (b)(7)(C) each. Based on regulations cited at 7 CFR § 278.6(g), it is the determination of this review that a TOCMP in the amount of 5 U.S.C. § 552 (b)(6) & (b)(7)(C) was properly assessed in this matter.

CONCLUSION

The permanent disqualification of 39 Lott Grocery Inc. took effect on February 23, 2018. A review of the evidence in this case clearly indicates that the store was sold to a buyer on April 16, 2018. Therefore, 7 CFR § 278.6(f)(2) of the SNAP regulations is applicable, and the assessment of a TOCMP is required. A review of the calculation indicates that the amount of the TOCMP as assessed by the Retailer Operations Division is proper as noted in the analysis above. Thus, the decision to impose a 5 U.S.C. § 552 (b)(6) & (b)(7)(C) civil money penalty against 5 U.S.C. § 552 (b)(6) & (b)(7)(C), former owner of 39 Lott Grocery Inc., is sustained.

To arrange payment, the Appellant must contact FNS's Financial Management Accounting Division at (703) 605-0483 within 30 days of receipt of this decision.

RIGHTS AND REMEDIES

Applicable rights to a judicial review of this decision are set forth in Section 14 of the Food and Nutrition Act of 2008 (7 U.S.C. § 2023) and in Section 279.7 of the SNAP regulations. 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 owner resides or is engaged in business, or in any court of record of the State having competent jurisdiction. If a complaint is filed, it must be filed within 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.

JON YORGASON
Administrative Review Officer

March 13, 2019