

**U.S. Department of Agriculture
Food and Nutrition Service
Administrative Review Branch
Alexandria, VA 22302**

**Darsit Patel, Former Store Owner,
636 Royston,**

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0200126

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 \$55,000.00 was properly levied by the Retailer Operations Division against the former owners of 636 Royston (636 Royston or Appellant) for selling and/or transferring a store that was permanently 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 \$55,000.00 against Appellant by letter dated August 2, 2017.

AUTHORITY

7 USC § 2023 and the 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 administrative record documents that the firm and ownership were permanently disqualified from participation as a SNAP retailer on September 9, 2014, for trafficking in SNAP benefits. The permanent disqualification letter dated September 3, 2014, stated that if ownership 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). As noted in the letter, the amount of the TOCMP is calculated based on the SNAP regulations at 7 CFR § 278.6(g).

The case record documents Darsit Patel sold 636 Royston located at 636 Church Street, Royston, GA 30662. These documents were provided to FNS when the new store owner applied for SNAP retailer authorization at this location. The Retailer Operations Division, in a letter dated August 2, 2017, notified the former owner of 636 Royston that the USDA had assessed a TOCMP in the amount of \$55,000 in accordance with the SNAP regulations at 7 CFR § 278.6(f)(2)-(4) for the sale or transfer of the firm during a period of disqualification.

By letter postmarked August 21, 2017, Appellant 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 clear 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). Part 278.6(f)(2) establishes the authority upon which a civil money penalty may be imposed against a disqualified retail food store or wholesale food concern in the event that it has been sold or the ownership is otherwise transferred.

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 . . .”

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 civil money penalty imposed on the firm prior to its transfer.”

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.

7 CFR § 278.6(g) and § 3.91(b)(3)(i) establish an \$11,000.00 per violation limit as the maximum amount for a TOCMP. The Act, at Section 12, on the subject of transfer of ownership, supports the responsibility of ownership of the firm to the penalty as follows: Section 12 (5) Hearing – In the event any retail food store or wholesale food concern that has been disqualified under subsection (a) is sold or the ownership thereof is otherwise transferred to a purchaser or transferee, the person who sells or otherwise transfers 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 retailer food store 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.

APPELLANT'S CONTENTIONS

In the request for administrative review postmarked August 21, 2017, and subsequent correspondence, Appellant, through counsel, stated the following summarized contentions, in relevant part:

- The penalty bears no relationship to the loss suffered by the United States and is clearly intended to be punitive.
- The maximum assessment allowed by the “cap” limits the penalty and results in a comparative slap on the wrist for a large retailer and Armageddon for a small retailer.
- The gas station was sold 5 U.S.C. § 552 (b)(6) & (b)(7)(C) and the inventory was sold 5 U.S.C. § 552 (b)(6) & (b)(7)(C).
- The CMP assessed is greater than the amount the firm was paid even adding in the cost of the inventory.
- The sale of the business occurred one year after the disqualification for trafficking.
- There are no time limits that can be imposed on the collection period for debts to the Federal government.
- The CMP bears no relation to the amount received by selling the firm.
- The lack of time limit for assessing a CMP allows the agency to assess the penalty whenever it receives an application for a location that has been previously disqualified, if there has been a sale, no matter how long after the disqualification takes place.
- The assessment of a CMP under the current regulations is arbitrary and capricious.
- The fact that the secretary failed to establish a time limit for determining when a transfer of ownership occurs or even how it occurs has created a regulation that is ambiguously broad and cannot be consistently interpreted as being what Congress intended.
- The disqualification for trafficking based on a set of criteria programmed into the FNS computers and a CMP later assessed that is either punitive or not punitive depending on the size of the disqualified firm rather than the severity of the violation is a violation of common sense and fundamental rights granted under the due process clause of the Constitution.

In support of tis contentions, Appellant submitted Asset Purchase Agreement, the Conditional Bill of Sale, the status report for 636 Royston, LLC from the Secretary of State, and a draft financial report prepared by the firm’s accountant.

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

636 Royston, under the ownership of Darsit Patel, was permanently disqualified from the SNAP effective September 9, 2014. Documents in the case file show that Appellant sold and/or transferred the permanently disqualified store to a new owner on or about December 31, 2015, and that this was the basis of the Retailer Operations Division's assessment of a \$55,000 TOCMP. The permanent disqualification letter dated September 3, 2014, 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)." Appellant received proper legal notice that a TOCMP could be imposed if 636 Royston was sold after the date of disqualification.

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 regulations at 7 CFR § 278.6(f) authorize FNS to assess a TOCMP against the owner of a disqualified retail food store that has been sold or the ownership is otherwise transferred. Moreover, the regulations at 7 CFR § 278.6(g) outline how to calculate the amount of this TOCMP as demonstrated herein. As such, there is no discretion in the calculation or abatement of the TOCMP amount. The record demonstrates that a bona fide legal sale/transfer of 636 Royston did occur, and the Appellant does not dispute such.

Profitability

Appellant, through counsel, explains that the CMP assessed is greater than the amount the firm was paid. 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 a sale of a business. As such, the regulations require that a TOCMP be assessed and there is no authority in this administrative review to reduce or eliminate the TOCMP based on the former owner's financial situation.

Arbitrary and Capricious

Counsel contends that the assessment of the CMP is arbitrary and capricious and is based on regulations that deny due process. As noted, regulations pertaining to the calculation of transfer-of-ownership civil money penalties are quite

prescriptive and are applied consistently to all firms disqualified which are subsequently sold or the ownership thereof otherwise transferred prior to the expiration of disqualification periods.

The regulations provide no latitude to the Retailer Operations Division in the imposition of such sanctions as stipulated in 7 CFR §278.6(f)(2), as noted above and as follows: "...the person or other legal entity who sells or otherwise transfers ownership of the retail food store or wholesale food concern shall be subjected to and liable for a civil money penalty." The method for calculating the amount of such civil money penalties likewise provides no latitude for alteration. As the statute and departmental regulations are clear regarding the basis of such sanctions, as the sold, as Appellant offers no evidence that such a sanction was arbitrarily imposed and as the record likewise contains no information so indicating, Appellant's contention is not accepted as compelling. The present case clearly involves a disqualified firm which was subsequently sold. The penalty is not arbitrary and capricious but rather the legitimate application of the SNAP regulations published pursuant to the Act.

Unconstitutional

Appellant contends that the regulation is ambiguously broad and cannot be consistently interpreted as being what Congress intended. Counsel also contends that the application of the TOCMP, that is either punitive or not punitive depending on the size of the disqualified firm rather than the severity of the violation, is a violation of common sense and fundamental rights granted under the due process clause of the Constitution. With regard to this contention, the administrative review process does not include an assessment of the constitutionality of the laws, regulations and policies under which the agency imposed adverse actions, but rather whether the agency actions undertaken were proper pursuant to those laws and regulations and sustainable by a preponderance of evidence. As such, this office does not have the authority to assess whether the United States Congress, in its enactment of legislation, has conformed to Constitutional mandates. Additionally, challenges to the laws and regulations governing the SNAP are more appropriately the province of judicial review. Accordingly, no further findings or conclusions are rendered in this regard.

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). 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 agency limit.

Using the methodology described in 7 CFR § 278.6(g), the Retailer Operations Division correctly determined that the initial calculated amount of the TOCMP was above the agency limit, which is \$11,000 per violation. The July 2, 2015, charge letter identified five patterns of trafficking based on EBT redemption data. Therefore, the TOCMP was correctly assessed at \$55,000.00, which is the agency limit per violation multiplied by the number of trafficking patterns (\$11,000.00 x 5 trafficking patterns).

Summary

In 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 legal sale of 636 Royston did occur on or about December 31, 2015, and this is supported by documents in the case 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, as described above, 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

The evidence indicates that 636 Royston was sold and/or transferred on or about December 31, 2015. Therefore, 7 CFR § 278.6(f)(2) of the SNAP regulations is applicable and the assessment of a TOCMP is correct. The amount of the TOCMP assessed by the Retailer Operations Division is also correct. The action by the Retailer Operations Division is sustained.

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 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 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

October 12, 2017
DATE