

**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 Brock Avenue Market,**

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0208921

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 Brock Avenue Market (hereinafter “Appellant”), for selling or transferring ownership of a store that was 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 December 11, 2017, FNS’s Retailer Operations Division charged Brock Avenue Market, under the ownership of **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**, with **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** violations of unlawfully exchanging ineligible nonfood merchandise for SNAP benefits. A determination letter was sent to the firm on January 4, 2018. As a result, Brock Avenue Market was disqualified from SNAP for a period of six months. The Appellant appealed the sanction determination by requesting an administrative review, but

the disqualification was upheld in a Final Agency Decision dated April 10, 2018. Both the charge letter and determination letter stated that in the event that the firm's ownership sold or transferred ownership of 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).

Documentation in the case record shows that on February 7, 2018, a SNAP application was submitted to FNS for a new store at the same location where Brock Avenue Market had previously operated. According to the application, this new store, 5 U.S.C. § 552 (b)(6) & (b)(7)(C), began its operations effective March 1, 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 large number of documents. Chief among them was a document entitled "Bill of Sale of All Assets of Corporation," dated January 19, 2018, and signed by both parties, verifying that a bona fide sale of the business had occurred.

In a letter dated June 12, 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 owners of Brock Avenue Market in accordance with SNAP regulations at 7 CFR § 278.6(f)(2), (3) and (4), and § 278.6(g).

In a letter postmarked June 20, 2018, the Appellant, through counsel, appealed the Retailer Operations Division's assessment of the 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.

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... 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)...

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.

5 U.S.C. § 552 (b)(7)(E).

APPELLANT'S CONTENTIONS

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

- During 2016, the Appellant, 5 U.S.C. § 552 (b)(6) & (b)(7)(C), did not operate the store. During that time, operation of the store, "including receipts and disbursements, and all day by day business transactions," had been turned over to a pair of recent Bangladeshi immigrants who verbally agreed to pay the Appellant one-half of all profits from operation of the store. Unfortunately, the Appellant never received any payments from them. They even forged the Appellant's name on documents and checks.
- Because of their mismanagement, 5 U.S.C. § 552 (b)(6) & (b)(7)(C) fired the couple in January 2018. He then sold the store for no consideration except for their expenses.
- 5 U.S.C. § 552 (b)(6) & (b)(7)(C) has never been in the position of authority or direct operation of the store at any time. It is the Appellant's understanding that a prerequisite for the imposition of a civil penalty applies to the person or persons who were actually in

charge of the operation of the store. It would be unfair to penalize the Appellant for the breach of obligation committed by the Bangladeshi couple.

- The imposition of a penalty on a stockholder simply because he is a stockholder is not correct. The regulations that apply would seem to effect merely a prima facie case which can and should be rebutted by the actual circumstances of the case. 5 U.S.C. § 552 (b)(6) & (b)(7)(C) was not operating the store and did not know what was being sold; therefore, any violations were not caused by him, nor was he aware of any violations.
- When the Appellant received the June 12, 2018, letter regarding the TOCMP, he did not know the reason for the disqualification and does not now understand the reason for the TOCMP. He believes that the penalty was for having sold coffee to a customer in a paper cup. In other words, the penalty far outweighs any infractions for which he may be responsible.
- 5 U.S.C. § 552 (b)(6) & (b)(7)(C) did sell his store on January 18, 2018, and had to terminate all licensing agreements. As to what has transpired since the sale, 5 U.S.C. § 552 (b)(6) & (b)(7)(C) has no knowledge.
- The circumstances of the disqualification and assessment of a penalty have placed 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in a very untenable and precarious position. He is currently unemployed, derives no income from Brock Avenue Market, is married with four children, and does not have the wherewithal to pay USDA the money requested.
- Appellant requests suspension or elimination of the TOCMP, or in the alternative, set up a hearing on the merits of his claims.

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 the 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 a review 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 January 19, 2018, which is after Brock Avenue Market received its notice of disqualification from the Retailer Operations Division.

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 Brock Avenue Market, 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.

Contentions Regarding Original Violations

In its request for administrative review, the Appellant, through counsel, submitted a large number of contentions related to the original allegations of wrongdoing. For example, the Appellant argued that during 2016, 5 U.S.C. § 552 (b)(6) & (b)(7)(C), did not operate the store because he had turned over management of the store to a couple from Bangladesh. According to the Appellant, the couple mismanaged the store and he fired them in January 2018. The Appellant claims that 5 U.S.C. § 552 (b)(6) & (b)(7)(C) has “never been in the position of authority or direct operation of the store at any time.” The Appellant believes a prerequisite for the imposition of a civil penalty applies to the person or persons who were “actually in charge of the operation of the store.” The Appellant argues that the imposition of a penalty on a “stockholder” simply because he is a stockholder is not correct. According to the Appellant, 5 U.S.C. § 552 (b)(6) & (b)(7)(C) was not operating the store and did not know what was being sold; therefore, any violations were not caused by him, nor was he aware of any violations.

With regard to these contentions, it is critical to note that this review cannot reevaluate the decision to disqualify Brock Avenue Market from SNAP participation. At this stage, the Appellant has exhausted all avenues of appeal in that case. The notice of disqualification was delivered to the firm on January 8, 2018. In accordance with regulation, the firm had 10 days from the date of receipt of the determination notice to file a request for administrative review. The Appellant took advantage of this right and filed such an appeal, but the disqualification was upheld in a Final Agency Decision dated April 10, 2018. The Final Agency Decision informed the Appellant of its right to file a request for a judicial review within 30 days of receipt of the decision; however, the Appellant did not seek such a review. Because the window of time for reviewing the merits of the disqualification has passed, the disqualification decision is final and this review has no authority to revisit it.

It should be noted that FNS records show that the Appellant owner signed an application to participate as a SNAP retailer on January 27, 2016. By signing this application, the owner agreed to accept responsibility on behalf of the firm for compliance with all statutory and regulatory requirements associated with participation in SNAP. The record clearly establishes that the Appellant owner agreed to abide by program rules, including taking responsibility for violations committed by any of the firm’s employees, whether paid or unpaid, new, full-time or part-time. An owner is not free of responsibility simply because he or she was not in the vicinity at the time the violations occurred or because he or she was uninvolved in the violations. Regardless of which clerks are operating the cash register at a given time or whom firm ownership authorizes to handle store business, the ownership of the firm is ultimately responsible for the proper training of staff and the monitoring and handling of SNAP benefit transactions. To allow store ownership to disclaim accountability for the acts of its employees would render virtually

meaningless the provisions of the Food and Nutrition Act of 2008 and the enforcement efforts of USDA.

Therefore, the Appellant's contention that a penalty should not be imposed against the owner because he was not actually in charge of operations does not provide a valid basis for dismissing the imposition of a TOCMP.

Hardship to Appellant

The Appellant, through counsel, claims that the circumstances of the disqualification and the assessment of a penalty have placed 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in a very untenable and precarious position. According to the Appellant, 5 U.S.C. § 552 (b)(6) & (b)(7)(C) is currently unemployed, derives no income from Brock Avenue Market, is married with four children, and does not have the wherewithal to pay USDA the money requested.

With regard to this contention, 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 or modifying the penalty in any way.

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 amount of 5 U.S.C. § 552 (b)(6) & (b)(7)(C) is less than the agency sanction limit of 5 U.S.C. § 552 (b)(6) & (b)(7)(C). The TOCMP is the lesser of the two amounts. 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 notice of disqualification of Brock Avenue Market was delivered to the firm on January 8, 2018. A review of the evidence in this case clearly indicates that the store was sold to a buyer on January 19, 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 by the Retailer Operations Division 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 Brock Avenue Market, 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

December 4, 2018