

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

**Nicholas Moyer, former owner of  
Cigs and Soda,**

**Appellant,**

**v.**

**Retailer Operations Division,**

**Respondent.**

**Case Number: C0203461**

**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 Nicholas Moyer, former owner of Cigs and Soda (hereinafter “Appellant”), for selling or transferring ownership of a store which 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 April 2, 2012, FNS’s Retailer Operations Division charged Cigs and Soda, under the ownership of Nicholas Moyer, with five violations of trafficking in SNAP benefits. The record further shows that a determination letter was sent to the firm on May 15, 2012. As a result of these actions, Cigs and Soda was permanently disqualified from SNAP effective May 17, 2012.

The agency's 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 letter 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 January 3, 2013, a SNAP application was submitted to FNS for a new store at the same location where Cigs and Soda had previously operated. According to the application, this new store, 5 U.S.C. § 552 (b)(6) & (b)(7)(C). This application was never completed.

On July 23, 2017, another SNAP application was submitted for the same location. This time it was submitted by 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

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, 5 U.S.C. § 552 (b)(6) & (b)(7)(C) submitted a number of documents, including a signed Business Sale Offer and Acceptance Agreement, dated July 18, 2017, verifying that a bona fide change of ownership had occurred.

In a letter dated November 8, 2017, the Retailer Operations Division informed the Appellant that because its 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 Cigs and Soda in accordance with SNAP regulations at 7 CFR § 278.6(f)(2), (3) and (4), and § 278.6(g).

In a letter postmarked November 13, 2017, the Appellant 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. 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:

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.

Multiply the average monthly redemption figure by 10 percent.

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)**. 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:

- **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**, doing business as Cigs and Soda and owned by Nicholas Moyer, was closed years ago. It was not sold. Mr. Moyer was unable to oversee the business due to being focused on life-altering events. The staff that was employed at the time took advantage of that.
- Appellant is well now, and looks forward to clearing up this matter.

- The trade name, Cigs and Soda, has lasted through a few different owners, and Mr. Moyer was fortunate to be a part of the business in 2017.
- 5 U.S.C. § 552 (b)(6) & (b)(7)(C), not 5 U.S.C. § 552 (b)(6) & (b)(7)(C), is the company that sold off the name Cigs and Soda, inventory and assets.
- Appellant feels that a review is warranted due to misleading information USDA has received.
- Appellant has documentation to show that the business (5 U.S.C. § 552 (b)(6) & (b)(7)(C)) closed on July 13, 2011.
- Appellant has collected data to show that 5 U.S.C. § 552 (b)(6) & (b)(7)(C). dba Cigs and Soda has been a defunct business and was not sold.
- 5 U.S.C. § 552 (b)(6) & (b)(7)(C) began operating as Cigs and Soda at the same address on April 30, 2015. That store was closed in 2017.
- Mr. Moyer was authorized to act as seller/owner to conduct the closing of 5 U.S.C. § 552 (b)(6) & (b)(7)(C). All of 5 U.S.C. § 552 (b)(6) & (b)(7)(C) assets have been sold.

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

- Appellant’s original SNAP application submitted in 2009;
- Letter from City of Portsmouth stating that 5 U.S.C. § 552 (b)(6) & (b)(7)(C). was closed effective July 13, 2011;
- “Certificate of Assumed or Fictitious Name,” dated April 30, 2015, showing that Cigs and Soda is being operated by 5 U.S.C. § 552 (b)(6) & (b)(7)(C), located at 5 U.S.C. § 552 (b)(6) & (b)(7)(C);
- Business license from 5 U.S.C. § 552 (b)(6) & (b)(7)(C) (dba Cigs & Soda) showing April 30, 2015, as the date the business began;
- Letter from the Internal Revenue Service showing the Taxpayer Identification Number for 5 U.S.C. § 552 (b)(6) & (b)(7)(C);
- Articles of Incorporation for 5 U.S.C. § 552 (b)(6) & (b)(7)(C), dated October 15, 2014, showing 5 U.S.C. § 552 (b)(6) & (b)(7)(C), as incorporator;
- “Shopping Center Lease,” dated December 1, 2015, showing 5 U.S.C. § 552 (b)(6) & (b)(7)(C) as tenant.

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 the penalty 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 evidence provided by the Appellant as well as documentation in the case record, it is the determination of this review that a sale or transfer of the business did, in fact, occur.

After Cigs and Soda was permanently disqualified from SNAP participation in May 2012, a new SNAP application was submitted to FNS roughly six months later. This new application was submitted by 5 U.S.C. § 552 (b)(6) & (b)(7)(C). As is typical with applications submitted for a location where SNAP violations have previously occurred, FNS requested a number of documents from 5 U.S.C. § 552 (b)(6) & (b)(7)(C) to verify that Nicholas Moyer was not affiliated with the new store in any way. 5 U.S.C. § 552 (b)(6) & (b)(7)(C) did not provide the required documents and the application was withdrawn.

It appears clear to this review that the submission of a new application by 5 U.S.C. § 552 (b)(6) & (b)(7)(C) was an attempt to circumvent a period of disqualification through a purported transfer of ownership. No action to impose a TOCMP against Nicholas Moyer was taken in 2013 because there was no evidence at that time that a bona fide transfer of ownership had occurred.

The Appellant has submitted a number of documents showing that effective April 30, 2015, a company called 5 U.S.C. § 552 (b)(6) & (b)(7)(C) became the owner of Cigs and Soda. According to the Appellant, it was 5 U.S.C. § 552 (b)(6) & (b)(7)(C) that owned the store at the time of the sale to 5 U.S.C. § 552 (b)(6) & (b)(7)(C). The Appellant has claimed that the firm owned by Nicholas Moyer went out of business in 2011 and that there was no actual sale or transfer of the firm's ownership. With this claim, Nicholas Moyer implies that he simply vacated the premises and a new owner (Cigs and Soda Corp., followed by 5 U.S.C. § 552 (b)(6) & (b)(7)(C)) took over. The Appellant further claims that he was "fortunate to be part of the business this year," and was "authorized to act as seller/ owner to conduct the closing" of the sale between 5 U.S.C. § 552 (b)(6) & (b)(7)(C) and 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

Unfortunately, these claims are not credible. According to the Appellant's evidence, 5 U.S.C. § 552 (b)(6) & (b)(7)(C) dba Cigs and Soda is owned by 5 U.S.C. § 552 (b)(6) & (b)(7)(C). The address for 5 U.S.C. § 552 (b)(6) & (b)(7)(C) is 5 U.S.C. § 552 (b)(6) & (b)(7)(C), which is Nicholas Moyer's home address. The listing of 5 U.S.C. § 552 (b)(6) & (b)(7)(C) as owner of 5 U.S.C. § 552 (b)(6) & (b)(7)(C) appears to be little more than straw ownership. The likelihood is very high that Nicholas Moyer continued to be the owner of Cigs and Soda from the time of the disqualification or that he returned to the firm's ownership sometime during 2016 or 2017. This appears to be confirmed in the July 18, 2017, document provided by 5 U.S.C. § 552 (b)(6) & (b)(7)(C). This document, entitled "Business Sale Offer and Acceptance Agreement," is signed by Nicholas Moyer, who identifies himself as the owner and seller of the business. Nicholas Moyer has argued that he was "authorized to act as seller/owner to conduct the closing" of the sale. But the Appellant has offered no documentation to prove that he wasn't an owner, such as power of attorney, to

substantiate this claim. There is no evidence showing that on July 18, 2017, Nicholas Moyer was not the firm's owner, but was only "acting" as owner for purposes of the sale. The only signature on behalf of the seller is that of "owner" Nicholas Moyer.

This review finds it very likely that Nicholas Moyer was not only the owner of Cigs and Soda at the time of the SNAP violations, but was still the owner at the time of the sale to 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in July 2017.

According to the sales agreement, the firm was sold to 5 U.S.C. § 552 (b)(6) & (b)(7)(C). The Agreement states that Nicholas Moyer agrees to sell to 5 U.S.C. § 552 (b)(6) & (b)(7)(C) all of the assets and properties pertaining to the business known as Cigs and Sodas located at 5 U.S.C. § 552 (b)(6) & (b)(7)(C). The business to be conveyed...includes all of the seller's furnishings, furniture, fixtures, and equipment, goodwill, inventory, customer records, past event records, employees/employment contracts, materials, supplies, transferable licenses... business name(s), telephone number(s), lease, leasehold interest and improvements, software and software licenses, trade secrets, patents, intellectual property, and all other assets of the business.

Of all documents in the case record, the July 2017 Business Sale Offer and Acceptance Agreement is the most clear and definitive evidence as to whether or not a transfer of ownership occurred. Therefore, it is the finding of this review that a sale or transfer of ownership of Cigs and Soda, a permanently disqualified store, did take place. As such, a transfer of ownership civil money penalty is warranted.

### **TOCMP Calculation**

As noted earlier, regulations at 7 CFR § 278.6(g) outline the steps for calculating the TOCMP amount. The TOCMP 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 may occur only when there is an error in calculation or when the TOCMP 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). Each trafficking pattern identified in the April 2, 2012, charge letter is considered a single violation of the SNAP regulations. Therefore, 5 U.S.C. § 552 (b)(6) & (b)(7)(C). 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 Cigs and Soda took effect on May 17, 2012. A review of the evidence in this case clearly indicates that the store was sold to a buyer on July 18, 2017. 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 Nicholas Moyer, former owner of Cigs and Soda, 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

May 21, 2018