

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

CJ's Meat Market,

Appellant,

v.

Case Number: C0202215

Retailer Operations Division,

Respondent.

FINAL AGENCY DECISION

The U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS), finds that there is sufficient evidence to support the determination by the Retailer Operations Division to impose a Transfer of Ownership Civil Money Penalty (TOCMP) in the amount of \$21,660.00 against the former owners of CJ's Meat Market for selling and/or transferring a store that was permanently disqualified from 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)-(4) and 7 CFR § 278.6(g), in its administration of the SNAP when it assessed a TOCMP in the amount of \$21,660.00 against Appellant by letter dated October 20, 2017.

AUTHORITY

According to 7 U.S.C. § 2023 and its implementing regulations at 7 CFR § 279.1, "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 received a six month disqualification from participation as a SNAP retailer for accepting SNAP benefits in exchange for ineligible merchandise. The six month disqualification letter dated September 20, 2016, stated that if ownership sold or transferred the firm subsequent to the disqualification, it would be subject to and liable for a TOCMP as provided by the SNAP regulations 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). This disqualification letter was received by store ownership on September 21, 2016, as shown by the attached UPS delivery receipt.

The case record documents that the former owners entered into an agreement dated April 15, 2017, to sell CJ's Meat Market 5 U.S.C. § 552 (b)(6) & (b)(7)(C) to a new owner effective May 1, 2017. The record also contains a copy of a personal check for 5 U.S.C. § 552 (b)(6) & (b)(7)(C) dated May 4, 2017, payable to one of the former owners. These documents were provided to FNS when the new store owner applied to operate as an authorized SNAP retailer at this location. The Retailer Operations Division, in a letter dated October 20, 2017, informed the former owners that the USDA had assessed a TOCMP in the amount of \$21,660.00 in accordance with the SNAP regulations at 7 CFR § 278.6(f)(2),(3), and (4) for the sale or transfer of the firm during a period of disqualification.

By letter dated November 3, 2017, Appellant, through counsel, appealed the Retailer Operations Division assessment of the TOCMP and requested an administrative review of this action. The appeal was granted and implementation of the sanction has been held in abeyance pending completion of this review. Counsel also submitted a Freedom of Information Act (FOIA) request dated December 7, 2017. The agency responded to this request by correspondence dated January 25, 2018, and May 3, 2018. Subsequent correspondence dated February 15, 2018, and June 7, 2018, was also received.

STANDARD OF REVIEW

In an appeal of an adverse action, Appellant bears the burden of proving by a preponderance of evidence that the administrative action should be reversed. That means Appellant has the burden of providing relevant evidence that a reasonable mind, considering the record as a whole, would accept as

sufficient to support a conclusion that the argument 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 U.S.C. § 2021), and implemented through regulation under Title 7 CFR Part 278. In particular, 7 CFR Part 278.6(f)(2) establishes the authority upon which a TOCMP 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 U.S.C. §2021(e)(1) states, in part: “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.”

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.”

7 CFR § 278.6(g), provides for the amount of civil money penalties for hardship and transfer of ownership. It reads, “FNS shall determine the amount of the civil money penalty as follows:

- (1) Determine the firm’s average monthly redemptions of coupons 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 under paragraph (e) of this section. The civil money penalty may not exceed an amount specified in § 3.91(b)(3)(i) of this title for each violation.”

7 CFR § 278.6(g), 3.91(b)(3)(i) establishes 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

The following may represent a summary of Appellant’s contentions 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 herein:

- The business was disqualified by FNS letter dated September 20, 2016, which likely was received on September 21, 2016, would have become effective on October 3, 2016, and accordingly would have been completed as served on April 3, 2017, and no other documentation was received from the USDA indicating otherwise;
- On September 22, 2016, Appellants requested administrative review of the action. Thereafter, on May 4, 2018, the Department provided supplemental documentation to the Appellants in response to the Appellants’ prior FOIA Request. Upon review of said supplemental documents, it appears that on October 3, 2016, the USDA provided the Appellants twenty-one (21) days to provide a response to the six (6) month disqualification, and that a Final Agency Decision, dated March 24, 2017, provided that the USDA properly imposed a six (6) month disqualification against the Appellants. According to the Department’s records and both FOIA responses dated January 25, 2018, and May 4, 2018, the Department has no record of when the Appellants received the following notices and/or correspondences:
 - (a) The six (6) month disqualification correspondence dated September 20, 2016;

- (b) The October 3, 2016, correspondence; or
 - (c) The March 24, 2017, Final Agency Decision.
- On April 15, 2017, the Appellants entered into a sale agreement for the sale of the assets of the retail meat market
5 U.S.C. § 552 (b)(6) & (b)(7)(C). The closing date for the sale was to be May 1, 2017. The closing commenced during the week of May 1, 2017, but was not completed until Monday, May 8, 2017. The sales agreement was stamped May 8, 2017, and the cancelled check from the purchasers for the total purchase price
(5 U.S.C. § 552 (b)(6) & (b)(7)(C)) is attached hereto. This check, 5 U.S.C. § 552 (b)(6) & (b)(7)(C), was cleared by Wells Fargo bank on May 8, 2017;
- On October 20, 2017, the Appellants received correspondence advising them that on May 8, 2017, they were disqualified from SNAP for six (6) months. There is no letter that was ever produced by the Department nor received by the Appellants that shows a suspension occurring on May 8, 2017. The sale of the business closed that day (which appears to be the only significance to that date) but there was no disqualification in effect on that date. The only disqualification that occurred was that which took effect on or about October 3, 2016 (to the knowledge of the Appellants), and lasted through April 13, 2017, as indicated in the Department's letter. The FOIA request returned no letter pertaining to a May 8, 2017, disqualification. The September 20, 2016, letter was all that put the Appellants on notice, and by the very terms on its face, said that the disqualification would commence after the ten (10) day administrative review request period ran. As stated above, there are no records indicating that the Appellants ever received the October 3, 2016, correspondence or the March 24, 2017, Final Agency Decision. The Appellants did not receive either of these letters, and were under the belief that the disqualification took place ten days after the original agency decision, and relied upon that date to sell the business. Accordingly, there is no basis to support the issuance of a TOCMP nor is there a dispute as to when the sale occurred;
- This case begins with one significant point: there was no May 8, 2017 disqualification. The only disqualification issued by the Department for which there was proper service of process was dated September 20, 2016, effective on or about October 3, 2016. Neither of Administrative Review Officer Yorgason's letters ever made it to the Appellants, and accordingly, no responses or appeals were made. Without proper service of the entire administrative review portion of the original case, the Appellants' six (6) month disqualification expired on April 13, 2017. Thereafter, in reliance upon the Department's correspondence dated September 20, 2016 (and in the absence of any correspondence to the contrary), the Appellants entered into a Purchase of Business Agreement on April 15, 2017, which outlined that the closing of the purchase and sale of the assets of CJ's Meat Market would take

place on May 1, 2017. The actual closing occurred on May 8, 2017, (as evidenced by the stamped date on the top of the Agreement and by the Wells Fargo cancelled check confirmation) – roughly one (1) month after the completion and satisfaction of the Appellants’ six (6) month disqualification term pursuant to the terms of the September 20, 2016, correspondence. Without any other disqualification, and with the timeframe having elapsed, the former owners had the right and authority to sell their business without incurring a Transfer CMP;

- Based upon the records produced by the Department, it is clear that FNS has two options at this juncture – (1) concede that it cannot prove that either letters in the administrative review process were ever received by the Appellants, and thus that the Appellants’ due process rights were unsatisfied, or (2) concede that there was no May 8, 2017, disqualification and that the TOCMP issued as a result thereof was issued as a result of an erroneous clerical oversight, and a horrendously documented Administrative Record;
- It has come to counsel’s attention that some Administrative Review Officers are of the opinion that the Division is not responsible for making legal evaluations of the applicability of case law to a particular matter. Counsel requests the Division seeks legal advice regarding the issue of notice in this case; and,
- The regulations are clear that FNS must serve a retailer with a notice prior to the issuance of a sanction. Specifically, pursuant to 7 CFR § 278.6(b)(1), where a retailer is being considered for disqualification or imposition of a civil money penalty, “[t]he FNS regional office shall send the firm a letter of charges before making such determination.” See *Estremera v. United States*, 442 F.3d 580, 584 (7th Cir. 2006) (Finding that the firm “was, in fact, on notice that selling the business would result in the imposition of a penalty”, evidenced by the charging letter previously served upon the firm.). Here, FNS failed to ever serve the Appellants with a letter indicating that a May 8, 2017, disqualification had occurred. Further, the Department has failed to produce any service of process documents in either of its FOIA responses (and suspiciously excluded the entire Administrative Review portion of the case from the initial FOIA response). Thus, it is evident that the issuance of the TCMP [sic] against the Appellants as set forth in the October 20, 2017, correspondence from FNS was based upon either a fictitious charge letter, or an unserved Administrative Review for which the Appellants had no notice. As such, the TOCMP must be rescinded. To hold otherwise would require the retailer to have knowledge of case proceedings and disqualifications despite a complete absence of service of process. Furthermore, the failure of FNS to serve the Appellants with the letters violates Appellants’ due process rights. Pursuant to the Fifth Amendment of the United States Constitution,

an individual cannot be deprived of his/her property or liberty without due process of law. Finally, even had the disqualification period not completely run, the Appellants would have been entitled to a pro-rata reduction in the CMP as a result of having served a portion (if not the entirety) of the disqualification that had been issued the previous September.

Appellant submitted a copy of the Purchase of Business Agreement and a copy of the cancelled check in support of these contentions.

ANALYSIS AND FINDINGS

Appellant contends that store ownership did not receive the six (6) month disqualification determination letter dated September 20, 2016; the October 3, 2016, correspondence accepting their administrative review request; or the March 24, 2017, Final Agency Decision. Ownership was under the belief that the disqualification took place ten days after the original agency decision, and relied upon that date to sell the business.

The purpose of this proceeding is limited to determining whether the Retailer Operations Division's decision to assess a TOCMP against the Appellant was the appropriate course of action. The regulations at 7 CFR § 278.6(f) authorize FNS to assess a TOCMP against the owner(s) of a disqualified retail food store that has been sold or the ownership is otherwise transferred. The record shows that the SNAP six month disqualification determination letter dated September 20, 2016, was received by store ownership on September 21, 2016, and included notification 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)." Accordingly, Appellant received proper legal notice that a TOCMP could be imposed if the Appellant business was sold after the date of disqualification. Records show that store ownership requested an administrative review of the six month disqualification by letter postmarked September 23, 2017. Acceptance of this request was acknowledged by FNS letter dated October 3, 2016, that was received by store ownership on October 4, 2016, as shown by the attached UPS delivery receipt. The Final Agency Decision was issued on March 24, 2017, and was received by store ownership on March 28, 2017, as shown by the attached UPS delivery receipt, and advised store ownership that the six month period of disqualification had been sustained and would become effective 30 days after receipt of the decision. The Retailer Operations Division implemented the six month disqualification period on May 8, 2017.

The Retailer Operations Division determined that a legal sale of the Appellant business was agreed to in a Purchase of Business Agreement document dated April 15, 2017, with closing scheduled to occur on or about May 1, 2017, and this is supported by documents in the case record. Appellant was properly informed of the TOCMP by letter dated October 20, 2017. The sole issue in this review is whether the Retailer Operations Division took appropriate action, consistent with 7 CFR § 278.6(f)(2) of the SNAP regulations, when it assessed a \$21,660.00 TOCMP against Appellant. Any contentions pertaining to the original disqualification action by the Retailer Operations Division are not subject to review.

A review of FNS documents shows that the six month disqualification determination letter dated September 20, 2016, was received by store ownership on September 21, 2016; the Administrative Review Branch acknowledgement letter dated October 3, 2016, was received by store ownership on October 4, 2016; and the Final Agency Decision letter dated March 24, 2017, was received by store ownership on March 28, 2017. Copies of the proof of delivery documents are attached to this decision and refute Appellant's contentions as well as the allegations of due process violations.

As noted, there is clear indication in the record that the Appellant firm was in fact sold during its period of disqualification, which, in this case was a term disqualification. The fact that the retail food business at the stated address is now owned and operated by another entity and that there are new owners at the same location indicates that this is a legitimate business transfer subject to a TOCMP under SNAP regulations. There is no indication in the record that the new owner was involved in any of the violative activity which formed the basis of the firm's previous term disqualification, that the new owner is in any way related to the former owners, or that the sale is illegitimate in any relevant respect. As such, there is sufficient evidence to support the Retailer Operations Division's determination that a TOCMP as outlined in SNAP regulations at 7 CFR § 278.6(f)(2) was correctly and appropriately imposed. Accordingly, the statute and Federal regulations afford no latitude to take any action (including failure to act) other than to impose the sanction at issue. Likewise, this Review Officer is afforded no latitude to reverse or modify a correct and appropriate administrative sanction.

The case record documents that, under 7 CFR § 278.6(g), the Retailer Operations Division correctly calculated the amount of the TOCMP. 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 statutory limit.

The Retailer Operations Division correctly determined that, using the methodology described in 7 CFR § 278.6(g), the initial calculated amount of the TOCMP was \$21,660.00. This amount is less than the agency limit of \$11,000 per violation and therefore, the Retailer Operations Division correctly assessed the final TOCMP at \$21,660.00.

CONCLUSION

A review of the evidence in this case indicates that the Appellant business was in fact sold and this is not contested by the former owners. Therefore, 7 CFR § 278.6(f)(2) of the SNAP regulations is applicable, and the assessment of a TOCMP is correct. A review of the calculations indicates that the amount of the TOCMP assessed by Retailer Operations is also correct. SNAP regulations are explicit in the requirement for a TOCMP in the event a disqualified business is subsequently sold or transferred and there is no Agency discretion in waiving or reducing the TOCMP amount. Thus, the action by the Retailer Operations Division is sustained. In accordance with the Food and Nutrition Act of 2008, as amended, and the regulations there under, this penalty shall become effective thirty (30) days after receipt of this letter. Appellant may contact the USDA-FNS Financial Management Accounting Division at (703) 605-0483 to discuss a monthly payment plan, or follow the instructions in the Retailer Operations Division's letter dated October 20, 2017, regarding online or check payment options.

RIGHTS AND REMEDIES

Applicable rights to a judicial review of this decision are set forth in 7 U.S.C. § 2023 and 7 CFR § 279.7. If a judicial review is desired, the complaint must be filed in the U.S. District Court for the district in which Appellant's owner resides, is engaged in business, or in any court of record of the State having competent jurisdiction. This complaint, naming the United States as the defendant, 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.

ROBERT T. DEEGAN
Administrative Review Officer

July 23, 2018