

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

**5 U.S.C. § 552 (b)(6) & (b)(7)(C), Former
Owner, Cotton Street Food Mart #3,**

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0226470

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 that a Transfer of Ownership Civil Money Penalty (TOCMP) of \$33,000 was properly assessed against 5 U.S.C. § 552 (b)(6) & (b)(7)(C), the former owner of Cotton Street Food Mart #3, for selling or transferring a store that had been 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), when it assessed a TOCMP in the amount of \$33,000 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 Retailer Operations Division permanently disqualified Cotton Street Food Mart #3, under the ownership of 5 U.S.C. § 552 (b)(6) & (b)(7)(C), from the SNAP effective October 10, 2018 for trafficking in SNAP benefits. The store owner appealed that decision to the Administrative Review Branch and the permanent disqualification for trafficking was sustained on April 5, 2019. The Appellant firm did not file for judicial review even though it was informed of its right to do so within 30 days of receiving the Final Agency Decision on April 12, 2019.

The permanent disqualification letter dated September 27, 2018, stated that if the owner 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 that letter, the amount of the TOCMP is calculated based on the SNAP regulations at 7 CFR § 278.6(g).

After the store had been permanently disqualified, the former owner sold or otherwise transferred the store to a new owner 5 U.S.C. § 552 (b)(6) & (b)(7)(C) as documented in the case record by a Sale Agreement signed and dated May 3, 2019 by 5 U.S.C. § 552 (b)(6) & (b)(7)(C). The Sale Agreement stated that the seller was transferring the “grocery Store with the entire inventory and all the equipment own [sic] by the business to the new buyer.” When the new owner was authorized for the SNAP at the same location in 2020, the Retailer Operations Division determined that the permanently disqualified store had been sold or otherwise transferred by the former owner. As a result, the Retailer Operations Division, in a letter dated February 6, 2020, notified 5 U.S.C. § 552 (b)(6) & (b)(7)(C) that it had assessed a TOCMP in the amount of \$33,000 in accordance with the SNAP regulations. The TOCMP letter was delivered to the Appellant by UPS on February 7, 2020.

In a letter postmarked February 18, 2020, the Appellant requested an administrative review of the assessment of the TOCMP. The administrative review was granted and the assessment of the \$33,000 TOCMP was held in abeyance pending completion of this review.

STANDARD OF REVIEW

In appeals of adverse actions, an appellant bears the burden of proving by a preponderance of the evidence, that the administrative action should be reversed. That means an appellant has the burden of providing relevant evidence which a reasonable mind, considering the record as a whole, might accept as sufficient to support a conclusion that the matter asserted is more likely to be true than not true.

CONTROLLING LAW AND REGULATIONS

The controlling law in this matter is contained in the Food and Nutrition Act of 2008, as amended, 7 U.S.C. § 2021 and the SNAP regulations at Section 278 of Title 7 of the Code of Federal Regulations (CFR).

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. [Emphasis added.]

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 If the retail food store or wholesale food concern has been permanently disqualified, the civil money penalty shall be double the penalty for a ten year disqualification period.

7 CFR § 278.6(g) provides the steps for calculating the TOCMP and states, in 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

Notwithstanding the above, there is an agency limit of \$11,000 per violation as the maximum TOCMP amount.

APPELLANT'S CONTENTIONS

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

- The store was wrongfully accused of trafficking and punished with permanent disqualification. The Appellant is now providing inventory receipts from October 2017 to March 2018 and other documents to prove it had sufficient inventory to support its SNAP redemptions during the review period.
- With the loss of its SNAP authorization, and many other personal hardships, the former owner was forced to seek a buyer but could not find one due to the economic situation in the neighborhood. The former owner did not sell or transfer ownership of the store. Instead the former owner leased out the store location to a buyer who has started his own business.
- It is unjust for the former owner to have to choose to retain a non-profitable business or to have to pay a TOCMP.
- The Appellant is seeking reconsideration of the imposed sanction based on the economic hardship in the community, personal economic hardship, nondisclosure of the original penalty and on the basis of good faith and honesty in the former owner's actions.

The preceding may represent only a brief summary of the Appellant's contentions presented in this matter. Please be assured, however, in reaching a decision, full attention was given to all contentions presented, including any not specifically recapitulated or specifically referenced herein.

ANALYSIS AND FINDINGS

The SNAP regulations at 7 CFR § 278.6(f)(2) **require** FNS to assess a TOCMP against the owner of a disqualified store that has been sold or otherwise transferred to a new owner. The regulations do not provide **for any exceptions** relating to the motive for the sale or transfer, the adequacy of the sale price, the store's profitability or the former owner's ability to pay. In addition, the regulations at 7 CFR § 278.6(g) outline how to calculate the amount of the TOCMP and allows **no discretion** in the calculation of the TOCMP amount. Therefore, while the personal economic and familial health situations of the Appellant are noted, the reasons why the Appellant sold the store or the Appellant's current financial or familial health status are not relevant to this review.

Permanent Disqualification

The Appellant seeks to reopen a review concerning the store's permanent disqualification for trafficking which was effective on October 10, 2018. The Appellant may not do so as it has **exhausted all its administrative remedies**. The Appellant's permanent disqualification from the SNAP was sustained in administrative review on April 5, 2019. The Final Agency Decision was delivered to the Appellant by UPS on April 12, 2019. The Appellant did not file a request for judicial review in a court of law even though it was informed of its right to do so within 30 days of receipt of the Final Agency Decision. Therefore, the Appellant's contentions regarding its permanent disqualification **may not be reopened** and evidence relating to the trafficking violations was not and cannot be considered in the administrative review of the TOCMP assessment.

Sales Documents

The case record documents that the Appellant sold the store **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** to a new owner as shown by a Sale Agreement in the case record dated May 3, 2019. The notarized Sale Agreement that was signed and dated by **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** and the new owner states, in part:

I, **5 U.S.C. § 552 (B)(6) & (B)(7)(C)** (seller) ... hereby certify that I'm selling **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** & COTTON ST FOOD MARKET, LLC located at **[5 U.S.C. § 552 (b)(6) & (b)(7)(C)]** Cotton Street Reading PA 19606

- The sales price of the business **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**
- The seller is transferring to [sic] grocery Store with the entire inventory and all the equipment own by the business to the new buyer

The case record documents by a preponderance of the evidence that the sale of the permanently disqualified store by the former owner as described above is a transfer of ownership within the meaning of 7 CFR § 278.6(f)(2). It does not matter that the Appellant may still own the real property and is leasing the real property to the new store owner. This transfer of ownership occurred after the store was permanently disqualified for trafficking in SNAP benefits effective October 10, 2018.

Proper Notice Given

The permanent disqualification letter dated September 27, 2018, stated that if the owner 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). Therefore, the Appellant was given proper notice that a TOCMP would be assessed if Cotton Street Food Mart #3 was sold or otherwise transferred after it was permanently disqualified from the SNAP.

TOCMP Calculation

The case record documents that the Retailer Operations Division correctly followed agency regulations and guidelines in calculating 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 twelve (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. It should be noted that the administrative review officer in this case does not have the authority to negotiate a different amount.

The Retailer Operations Division correctly determined, using the methodology described in 7 CFR § 278.6(g) that the initial calculated amount of the TOCMP was **\$240,720.00**. However, the Retailer Operations Division properly determined that the initial calculated TOCMP of \$240,720.00 was **above the agency limit**, which is \$11,000 per violation or trafficking pattern in an EBT case. The July 31, 2018 trafficking charge letter identified three (3) patterns of trafficking based on irregular SNAP transaction data. Therefore, the Retailer Operations Division correctly assessed the final TOCMP at \$33,000.00 which is the agency limit per violation multiplied by the number of trafficking patterns (\$11,000.00 x 3 trafficking patterns). That calculation is shown below:

5 U.S.C. § 552 (b)(6) & (b)(7)(C)

Summary

The regulations at 7 CFR § 278.6(f)(2) **require** FNS to assess a TOCMP against the former owner of a disqualified store that has been sold or otherwise transferred to a new owner. Moreover, the regulations at 7 CFR § 278.6(g) outline how to calculate the amount of the TOCMP utilizing the aforementioned formula. As such, **there is no discretion in the calculation of the TOCMP amount**. This administrative review does not have the authority to negotiate a reduced payment or abatement.

CONCLUSION

A review of the evidence in this case indicates by a preponderance of the evidence that a permanently disqualified store, Cotton Street Food Mart #3, formerly owned by 5 U.S.C. § 552 (b)(6) & (b)(7)(C), was sold or otherwise transferred to a new owner after it had been permanently disqualified effective October 10, 2018. Therefore, the SNAP regulation at 7 CFR § 278.6(f)(2) applies to this transfer of ownership. A review of the calculations shows that the amount of the TOCMP assessed by the Retailer Operation Division was correct and proper and the decision in this case is hereby **sustained**. In accordance with the Food and Nutrition Act of 2008, and the regulations thereunder, this penalty shall become effective thirty (30) days after receipt of this letter.

RIGHTS AND REMEDIES

Section 14 of the Food and Nutrition Act of 2008 (7 U.S.C. § 2023) and Title 7, Code of Federal Regulations, Part 279.7 (7 CFR § 279.7) addresses your right to a judicial review of this determination. Please note that 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 you reside or are 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. Please note that the judicial filing timeframe is specified in the Act, and this office cannot grant an extension.

Under the Freedom of Information Act, FNS is 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.

RONALD C. GWINN
Administrative Review Officer

May 12, 2020