

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

Express Mart,

Appellant,

v.

Case Number: C0214704

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 levy a Transfer of Ownership Civil Money Penalty of \$22,000 against the former ownership of Express Mart (“Appellant”) for having sold a store during a period of disqualification from the Supplemental Nutrition Assistance Program (SNAP).

ISSUE

The purpose of this review is to determine whether the Retailer Operations Division took appropriate action, consistent with Title 7 of the Code of Federal Regulations (CFR) § 278.6(f)(2), when it levied a Transfer of Ownership Civil Money Penalty (TOCMP) against Appellant on January 29, 2019.

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

In a letter received by the former owner on December 6, 2016, Appellant was notified that it was permanently disqualified as a SNAP-authorized retailer. A purchase agreement dated on or about November 27, 2018 established Appellant sold Express Mart. In the Retailer Operations Division’s letter dated January 29, 2019, Appellant was assessed a lump sum Transfer of

Ownership Civil Money Penalty (TOCMP) of \$22,000 in accordance with 7 CFR § 278.6(f)(2) for the sale or transfer of ownership of Express Mart during a period of disqualification.

On February 6, 2019, Appellant appealed the Retailer Operations Division's assessment and requested an administrative review of this action. The appeal was granted and implementation of the sanction has been on hold pending completion of this review.

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 § 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

APPELLANT'S CONTENTIONS

Appellant's responses regarding this matter are essentially as follows:

- The former owner did not sell the firm, but only leased it.
- Appellant cannot afford the civil money penalty.
- Appellant did not do anything wrong, and believes it is being penalized unfairly.
- Appellant was not aware of a fine if the store was sold.

These explanations may represent only a brief summary of Appellant's contentions. However, in reaching a decision, full consideration has been given to all contentions presented, including any others that have not been specifically listed here.

ANALYSIS AND FINDINGS

The former owner contends that he did not do anything wrong, and believes he is being penalized unfairly. This appears to be an attempt to demonstrate that the earlier permanent disqualification imposed on the firm may have been improper. In this regard, no findings or conclusions on the merits of the specific arguments presented will be made. Appellant was permanently disqualified from participation in SNAP based on trafficking violations in a previous determination letter. Those matters dealing with the firm's permanent disqualification are not subject to this particular administrative review process but are included in other review processes of which Appellant was made aware, and which Appellant pursued.

The matter of the permanent disqualification imposed cannot properly be re-addressed in this context. The issue in this review is solely whether the Retailer Operations Division took appropriate action, consistent with 7 CFR § 278.6(f)(2) of the SNAP regulations, when it assessed a \$22,000 Transfer of Ownership Civil Money Penalty against Appellant.

Appellant Notified of TOCMP

Appellant contends that it did not recall previous notifications of a Transfer of Ownership Civil Money Penalty (TOCMP) assessment if the store were sold. The administrative record documents that in a letter dated October 11, 2016, the Retailer Operations Division informed Appellant that it was being considered for permanent disqualification from participation in SNAP, or the imposition of a civil money penalty in lieu of disqualification. This letter was received on October 12, 2016. Appellant was subsequently informed by letter on December 2, 2016 that the firm was denied a trafficking civil money penalty and was being permanently disqualified from participation as a retail store in SNAP. This letter was received on December 6, 2016. The letter ordered the firm to cease accepting SNAP benefits, and from that time forward Appellant was subject to the provisions of 7 CFR § 278.6(f). The pertinent part of both letters stated as follows:

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

Notice of the imposition of a TOCMP for the sale or transfer of a store is also contained in the regulations at 7 CFR § 278.6(f)(2). Therefore, being unaware of the assessment of the TOCMP if the store was sold does not provide a valid basis for mitigating or dismissing the TOCMP assessed by the Retailer Operations Division.

Evidence of Transfer of Firm

Appellant contends that he leased the firm rather than the business being sold or transferred. Yet the evidence indicates that the retail food store at Appellant's address is now run by another owner. While Appellant may have made little or no profit from the transfer, the conditional Bill of Sale dated September 4, 2018 and the stock purchase agreement dated November 27, 2018, indicates that this is still a legitimate business transfer subject to a TOCMP. Neither the Food

and Nutrition Act of 2008 nor its implementing regulations allow for factoring in the loss of a lease when determining whether a TOCMP is warranted. The aforementioned Bill of Sale and other documentation in the Retailer Operations Division file verify the business's transfer on or about November 27, 2018. This evidence supports Retailer Operations Division's determination that a transfer of a business occurred, making Appellant subject to the TOCMP as outlined in the regulations at 7 CFR § 278.6(f)(2).

No Undue Hardship to Appellant

Appellant contends that the penalty would impose an extreme hardship on the former ownership. While the former owner's financial situation may be worthy of sympathy, the transfer of ownership civil money penalty cannot be reduced based on Appellant's personal circumstances.

Economic hardship is a likely consequence whenever a store is permanently disqualified from SNAP participation and is assessed a transfer of ownership civil money penalty in the amount levied in this case. However, there is no provision in the SNAP regulations for reducing an administrative penalty on the basis of possible economic hardship to the firm resulting from imposition of such penalty. To excuse Appellant from an assessed administrative penalty based on purported economic hardship to the firm would render the enforcement provisions of the Food and Nutrition Act of 2008 and the enforcement efforts of the USDA virtually meaningless.

Moreover, considering the firm for economic hardship would forsake fairness and equity, not only to competing stores and other participating retailers who are complying fully with program regulations, and also to those retailers who have been disqualified from the program in the past for similar violations and also assessed civil money penalties. Therefore, Appellant's contention that it will incur economic hardship based on the assessment of an administrative penalty does not provide any valid basis for dismissing the charges or for mitigating the imposed penalty.

Summary

Based on a review of the evidence, Express Mart was, indeed, sold following its disqualification from SNAP on December 6, 2016. Therefore, 7 CFR § 278.6(f)(2) of the SNAP regulations is applicable in this case as it pertains to a civil money penalty for the sale or transfer of a disqualified firm.

CONCLUSION

Based on the discussion above, the determination by the Retailer Operations Division to levy a Transfer of Ownership Civil Money Penalty of \$22,000 against Appellant for selling Express Mart during a period of disqualification from SNAP is sustained.

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 Appellant desires a judicial review, 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.

RICH PROULX
Administrative Review Officer

March 25, 2019