

**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 Family Deli & Grocery,**

**Appellant,**

**v.**

**Retailer Operations Division,**

**Respondent.**

**Case Number: C0202803**

**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 Family Deli & Grocery (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 October 26, 2016, FNS’s Retailer Operations Division charged Family Deli & Grocery with 5 U.S.C. § 552 (b)(6) & (b)(7)(C) violations of trafficking in SNAP benefits. The record shows that the Appellant did not reply to these charges. After further reviewing the evidence in the case, the Retailer Operations Division concluded that trafficking violations did occur. As a result, the Appellant firm was permanently disqualified from

SNAP effective November 21, 2016. The Appellant did not request an administrative review of this decision.

The agency's determination letter, dated November 18, 2016, 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 July 10, 2017, a SNAP application was submitted to FNS for a new store at the same location where Family Deli & Grocery had previously operated. According to the application, this new store, 5 U.S.C. § 552 (b)(6) & (b)(7)(C), began its operations effective January 3, 2017.

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 Agreement, dated February 15, 2017, verifying that a bona fide change of ownership had occurred.

In a letter dated October 5, 2017, the Retailer Operations Division informed the Appellant that because the store was sold 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 Family Deli & Grocery in accordance with SNAP regulations at 7 CFR § 278.6(f)(2), (3) and (4), and § 278.6(g).

In a letter postmarked October 10, 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.

- 1) 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:

- The firm was struggling financially when it lost the EBT program.
- Appellant did not commit trafficking violations, but did not respond to the charge letter because he was out of the country at the time. Appellant has proof of this absence.

- When Appellant returned to the United States in November 2016, he tried to sell the store, but could not find a buyer because business was slow.
- Appellant eventually planned to shut the store down, but then met someone who offered to pay for the inventory. This buyer also got a new lease from the landlord. There was no assignment of lease. However, Appellant had to put the transfer on paper for the inventory, which the buyer needed for license purposes. Otherwise, there was no contract and bill of sale. The money the Appellant received from the sale of the inventory was used to pay debts.
- Appellant now has a low income and a large family. Appellant is struggling financially and cannot afford the harsh penalty. FNS has already removed the Appellant from SNAP. Why does it impose this financial penalty as well? The penalty is unfair and will cause more damage and pain to the Appellant's family.
- Appellant requests reconsideration of the TOCMP due to financial hardship, or reduce it to a more affordable amount. Appellant offers to settle the case for 5 U.S.C. § 552 (b)(6) & (b)(7)(C), and pay in installments.
- If Appellant knew that FNS would impose such a penalty, he would have shut the store down and thrown the inventory into the trash.
- The only documents the Appellant is able to furnish are the pages from his passport showing that he returned to the United States on November 18, 2016.
- Appellant was out of the country when the charge letter was sent, and Appellant did not have an opportunity to defend himself and prove that the trafficking allegations were wrong.
- The trafficking allegations were based on speculation.

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 sales documents in this case it is the determination of this review that a sale of the business did, in fact, occur. Evidence provided by the owner of 5 U.S.C. § 552 (b)(6) & (b)(7)(C) clearly shows that a transfer of ownership occurred on February 15, 2017, which is after Family Deli & Grocery was permanently disqualified from SNAP participation.

Specifically, the Business Sale Agreement, which was signed by both 5 U.S.C. § 552 (b)(6) & (b)(7)(C) and 5 U.S.C. § 552 (b)(6) & (b)(7)(C), states the following: “This agreement is made to sell said business owned (100%) and managed by first party (5 U.S.C. § 552 (b)(6) & (b)(7)(C))... Second party 5 U.S.C. § 552 (b)(6) & (b)(7)(C) who is the successor of said business shall own all business interest and occupancy of said business and location starting...15 day of Feb 2017. Sale of business will include the business, merchandises and equipments as detailed and listed in Exhibit A.”

The Agreement further states: “First party (5 U.S.C. § 552 (b)(6) & (b)(7)(C)) is consent to assignment of lease to second party with proper landlord approval. First party has no right to conduct or participate in any business activity at said premises.”

Exhibit A of the Agreement specifically identifies the transaction as a “Transfer of Ownership,” and states: “Seller sells and transfers to buyer the following property: 5 U.S.C. § 552 (b)(6) & (b)(7)(C).”

All documentation of new ownership in this case appears to be legitimate and proof of a bona fide sale. As such, all of the Appellant’s contentions that imply that a sale of the business did not occur, or that the sale involved only a transfer of inventory, are not credible. Therefore, it is the determination of this review that the assessment of a TOCMP against Family Deli & Grocery, 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 Trafficking Allegations**

In its request for administrative review, the Appellant claimed that the allegations of trafficking were false and were based upon speculation. The Appellant further contended that it did not respond to the original charges because he was out of the country at the time the charge letter was sent. As such, he was unable to defend himself against the allegations. In support of these contentions, the Appellant submitted a copy of his stamped passport showing that he arrived in the United States on November 18, 2016, roughly three weeks after the charge letter was issued.

It is critical to note that this review cannot reevaluate the decision to permanently disqualify Family Deli & Grocery from SNAP participation. At this point, the Appellant has exhausted all avenues of appeal in that case. The permanent disqualification took effect on November 21, 2016. 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. Even though the Appellant had returned to New York by that time, the firm did not make such an appeal. Because the window of time for reviewing the merits of the disqualification has passed, the permanent disqualification decision is final and this review has no authority to revisit it.

The sole issue for review in this case is whether or not the Retailer Operations Division appropriately imposed a 5 U.S.C. § 552 (b)(6) & (b)(7)(C) transfer of ownership civil money penalty.

It also bears repeating that the Appellant was made aware of the penalty for transferring ownership of the store, so his claim that he did not know that he could incur a TOCMP is not believable. The agency's determination letter, dated November 18, 2016, clearly 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).

### **Hardship to Appellant**

The Appellant contends that he cannot afford a 5 U.S.C. § 552 (b)(6) & (b)(7)(C) penalty and argues that the penalty is unfair and will cause hardship to him and his family. The Appellant offers to settle the case with a penalty amount of 5 U.S.C. § 552 (b)(6) & (b)(7)(C), to be paid in installments.

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 economic 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 has incurred or may incur economic hardship based on the assessment of an administrative penalty does not provide a valid basis for dismissing the charges or for mitigating the penalty imposed.

### **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)

5 U.S.C. § 552 (b)(6) & (b)(7)(C) and 5 U.S.C. § 552 (b)(7)(E). 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 Family Deli & Grocery took effect on November 21, 2016. A review of the evidence in this case clearly indicates that the store was sold to a buyer on February 15, 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 5 U.S.C. § 552 (b)(6) & (b)(7)(C), former owner of Family Deli & Grocery, 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

April 25, 2018