

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

**Former Store Owner,
Green Apple,**

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0231731

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 a finding that a Transfer of Ownership Civil Money Penalty (TOCMP) of **5 USC § 552 (b)(6) & (b)(7)(C)** was properly levied by the Retailer Operations Division against the former owner of Green Apple (Appellant) for selling and/or transferring a store that was disqualified from participation in 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), (3), and (4) and 7 CFR § 278.6(f)(2) and (g), in its administration of the SNAP when it assessed a TOCMP in the amount of \$44,000.00 against Appellant by letter dated July 9, 2020.

CASE CHRONOLOGY

The Retailer Operations Division permanently disqualified Green Apple from participation as a SNAP retailer on September 13, 2018, for trafficking SNAP benefits. Both the July 3, 2018, charge letter and the disqualification letter dated September 10, 2018, stated that if the owner(s) 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). The letters also noted that the amount of the TOCMP would be calculated based on regulations at 7 CFR § 278.6(g).

The case record documents the former store owner of Green Apple sold the firm to a new owner on or about September 30, 2019. These documents were provided to FNS when the new store owner applied for SNAP retailer re-authorization at this location. As a result, the Retailer Operations Division, in a letter dated July 9, 2020, notified the former owner of Green Apple that

it had assessed a TOCMP in the amount of 5 USC § 552 (b)(6) & (b)(7)(C) in accordance with the SNAP regulations.

By letter dated July 27, 2020, the former owner, through counsel, appealed the Retailer Operations Division's assessment of the TOCMP and requested administrative review of this action. The appeal was granted and implementation of the sanction has been held in abeyance pending completion of this review.

STANDARD OF REVIEW

In appeals of adverse actions, the Appellant bears the burden of proving by a preponderance of the evidence, that the administrative actions should be reversed. That means the 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 statute in this matter is contained in the Food and Nutrition Act of 2008, as amended, 7 USC § 2021 and § 278 of Title 7 of the Code of Federal Regulations (CFR). 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 USC § 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 . . . 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 . . .

The following steps, based on the regulations at 7 CFR § 278.6(g), are used to calculate the amount of a TOCMP:

Step 1: Determine the cumulative redemptions for the 12 month period immediately preceding the issuance of the Retailer Operations Division's Charge letter;
Step 2: Determine the firm's average monthly redemptions (AMR) by dividing the amount derived in Step 1 by 12. (Round this amount to the nearest dollar);
Step 3: Multiply the AMR (as determined in Step 2) by .10. (Round this amount to the nearest dollar);
Step 4: Multiply the amount derived in Step 3 by 240. (The number 240 is used for permanent disqualifications in accordance with the Act and the regulations.) The result is the amount of the TOCMP.

APPELLANT'S CONTENTIONS

In Appellant's July 27, 2020, administrative review request, and subsequent correspondence dated August 7, 2010, Appellant, through counsel, stated the following summarized contentions, in relevant part:

- Appellant did not sell the business but instead closed the business down and sold its assets to three separate parties.
- The most compelling evidence that the former owner did not sell the business is that the business now being operated at the location is very different from what was there before.
- Appellant operated a mini grocery catering to all types of people who live in that neighborhood but especially catering to Middle Eastern immigrants from Turkey, Sudan, Jordan, and Syria.
- The business had fresh Halal meat products, many spices used by Middle Easterners, and a large selection of fresh produce professionally displayed.
- The new business is a neighborhood convenience stores selling mostly snack foods, sodas, and a large quantity and variety of products for snacks but hardly any food that would be purchased by Middle Eastern immigrants and only a minimal amount of fresh produce.
- The business was losing money and the owner borrowed money to pay the back rent.

In support of its contentions, Appellant provided the following documents:

- Receipt for sale of the three door freezer;
- Receipt for the sale of the walk-in freezer and condenser;
- Lease Agreement;
- June 19, 2019, letter from landlord's lawyer regarding rent delinquency;
- July 17, 2019, Notice to Quit;
- Two rent checks;
- Affidavit verifying that the store owner had to borrow money to make the past due rental payment.

The preceding may represent only a brief summary of the Appellant's contentions presented 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.

ANALYSIS AND FINDINGS

The purpose of this review is limited to determining whether the Retailer Operations Division's decision to assess a TOCMP against Appellant was appropriate. The disqualification itself is not under review. Thus, any contentions pertaining to the original disqualification action by the Retailer Operations Division are not subject to review.

Documents in the case file show that Appellant sold and/or transferred the disqualified store to a new owner on or about September 30, 2019, and that this was the basis of the Retailer Operations Division's assessment of a **5 USC § 552 (b)(6) & (b)(7)(C)** TOCMP. The disqualification letter dated September 10, 2018, informed Appellant 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)"

Appellant denied that it sold and transferred the business. Counsel reports that the retailer went out of business and sold off its equipment to three different entities. Counsel provided receipts of the sale of some of the pieces that were sold. However, the Bill of Sale in the Retailer Operations Division file verify that the retail food business was transferred on September 30, 2019. The Bill of Sale states that Appellant sells "all of its tangible assets (inventory, office supplies, and office equipment)" to the new owner. The retail food business at Appellant's former address is now owned and operated by another entity; the fact that there is a new owner at the same location also supports that this is a legitimate business transfer subject to a TOCMP under the SNAP rules.

Counsel contends that the business that is now operated at the former location of Green Apple is a very different business. It is important to note that the new business is now named Green Apple Supermarket instead of Green Apple; however, Green Apple is still the name outside of the building as of the January 17, 2020, store visit. If it was a different business model, there would likely be a name change. A comparison of store visit photographs between both stores show similar stocking patterns. Although the new store may have less fresh produce and less inventory, the stocked items are quite similar. As such, there is enough evidence to support the Retailer Operations Division's contention that this Bill of Sale does constitute a transfer of a store, making Appellant subject to the TOCMP as outlined in the Federal regulations at 7 CFR § 278.6(f)(2).

Appellant Hardship

Counsel explained that the business was suffering prior to its sale and that the former store owner needed to borrow money to pay the landlord the back rent. Neither the Food and Nutrition Act of 2008 nor its implementing regulations allow for factoring in individual circumstances such as profitability when determining whether a TOCMP is warranted because of a sale of a business. As such, there is no authority in this administrative review to reduce or eliminate the TOCMP based on the former owner's financial situation.

With regard to these contentions, 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 regulations for a waiver or reduction of an administrative penalty on the basis of possible economic hardship to either the ownership personally or to the firm itself.

To allow store ownership to be excused from administrative penalties based on a purported financial hardship 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.

TOCMP Calculation

A review of the case record documents that the Retailer Operations Division correctly calculated the amount of the TOCMP under 7 CFR § 278.6(g). Modifications to the TOCMP may occur only when there is an error in calculation or the amount exceeds the agency limit.

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.

5 USC § 552 (b)(6) & (b)(7)(C)

The Retailer Operations Division correctly determined that the initial calculated amount of the TOCMP was 5 USC § 552 (b)(6) & (b)(7)(C). However, the Retailer Operations Division properly determined that this initial calculated TOCMP was above the agency limit, which is \$11,000 per violation or trafficking pattern in an EBT case. The July 3, 2018, trafficking charge letter identified four patterns of trafficking based on irregular SNAP transaction data. Therefore, the Retailer Operations Division correctly assessed the final TOCMP at 5 USC § 552 (b)(6) & (b)(7)(C) which is the agency limit per violation multiplied by the number of trafficking patterns 5 USC § 552 (b)(6) & (b)(7)(C).

Summary

In summary, the SNAP regulations at 7 CFR § 278.6(f)(2) authorize FNS to assess a TOCMP against the owner of a disqualified retail food store that has been sold or in which the ownership is otherwise transferred. The Retailer Operations Division determined that a legal sale of Green Apple did occur and this is supported by documents in the case record. Appellant's contentions do not give any legal grounds for vacating or reducing the TOCMP. Moreover, the regulations at 7 CFR § 278.6(g) outline how to calculate the amount of the TOCMP, as described above, and do not provide any authority to waive or reduce the assessed TOCMP. As such, there is no discretion in the calculation of the TOCMP amount.

CONCLUSION

This review finds that the evidence provided by the Retailer Operations Division as to a bona fide sale of a disqualified retail food store is sufficient to support its determination to assess a transfer of ownership CMP against Appellant in the amount of 5 USC § 552 (b)(6) & (b)(7)(C).

RIGHTS AND REMEDIES

Applicable rights to a judicial review of this decision are set forth in 7 USC § 2023 and 7 CFR § 279.7. 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's owner resides or is 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.

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.

Mary Kate Karagiorgos
ADMINISTRATIVE REVIEW OFFICER

September 24, 2020