

**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 Indiana Chicken and Grocery,**

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0213049

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 \$55,000.00 was properly imposed by the Retailer Operations Division against **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**, former owner of Indiana Chicken and Grocery (hereinafter “Appellant”), for selling or transferring ownership of a store that 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 \$55,000.00 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 February 25, 2016, FNS’s Retailer Operations Division charged Indiana Chicken and Grocery, under the ownership of **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**, with five counts of trafficking in SNAP benefits – a program violation with a potential penalty of permanent disqualification from SNAP. The record further

shows that a determination letter was sent by FNS to the firm on May 3, 2016. Upon receipt of the determination letter, Indiana Chicken and Grocery was permanently disqualified from SNAP effective May 4, 2016. The Appellant requested an administrative review of this decision, but the sanction was upheld in a Final Agency Decision dated November 28, 2016. The case record indicates that the firm did not file a request for a judicial review. Accordingly, FNS closed its case effective January 9, 2017.

Both the charge and determination letters stated that in the event that ownership of the store was sold or transferred after the firm's 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 § 278.6(f)(2) and (g).

Documentation in the case record shows that on June 30, 2018, a SNAP application was submitted to FNS for a new store at the same location where Indiana Chicken and Grocery had previously operated. According to the application, this new store, 5 U.S.C. § 552 (b)(6) & (b)(7)(C), owned 5 U.S.C. § 552 (b)(6) & (b)(7)(C), began its operations effective May 31, 2018.

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 5 U.S.C. § 552 (b)(6) & (b)(7)(C) to 5 U.S.C. § 552 (b)(6) & (b)(7)(C) was bona fide. In response to this request, the new store owner submitted a number of documents, including a Contract for Sale of Business and a lease agreement, both dated May 31, 2018. These documents, which verified that a bona fide transfer of ownership had occurred, were signed by both 5 U.S.C. § 552 (b)(6) & (b)(7)(C) and 5 U.S.C. § 552 (b)(6) & (b)(7)(C) and indicated that the business was sold for 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

In a letter dated November 6, 2018, the Retailer Operations Division informed the Appellant that because the store was sold or transferred during its disqualification period, a TOCMP in the amount of \$55,000 was being assessed against the former owner of Indiana Chicken and Grocery in accordance with SNAP regulations at 7 CFR § 278.6(f)(2), (3) and (4), and § 278.6(g).

In a letter postmarked November 15, 2018, the Appellant appealed the assessment of a 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. It should be noted that in a letter postmarked December 11, 2018, the Appellant provided additional documentation to support its request for 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 AND REGULATIONS

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:

- 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....The civil money penalty may not exceed an amount specified in § 3.91(b)(3)(i) for each violation.

Although regulations at 7 CFR § 3.91(b)(3)(i) provide for a maximum penalty of \$113,894 for each Program violation, FNS has established an \$11,000 limit per violation. 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:

- There are numerous reasons why the store owner had to sell the business. After being disqualified from SNAP, he had six medical procedures which have left him unable to perform the duties the business required of him.
- In addition to his medical issues, the owner feared for his life due to the increased crime in the area where the store is located. This includes multiple shootings, two of which involved the owner.
- These incidents have left the owner in a very bad position financially. He has lost everything.
- Appellant requests that the penalty fee be waived.

In support of these contentions, the Appellant submitted approximately 40 pages of documentation, including a police incident report and roughly 30 pages of medical records detailing the owner's various ailments.

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 and evidence presented, including any not specifically summarized or explicitly referenced in this document.

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 \$55,000 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 its disqualification period. This review has no authority to dismiss or modify a TOCMP 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 an analysis of the evidence in this case, it is the finding of this review that a sale or transfer of ownership did, in fact, occur between the Appellant, 5 U.S.C. § 552 (b)(6) & (b)(7)(C), and 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Documentation provided by 5 U.S.C. § 552 (b)(6) & (b)(7)(C) clearly shows that a transfer of ownership occurred on May 31, 2018, which is after Indiana Chicken and Grocery was permanently disqualified from SNAP participation.

All documentation of new ownership appears to be legitimate and proof of a bona fide sale. Furthermore, there does not appear to be any dispute from the Appellant that a sale of the store took place. Therefore, it is the determination of this review that the assessment of a TOCMP against Indiana Chicken and 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.

Hardship to Appellant

The Appellant owner contends that he had to sell the store due to medical issues he was experiencing and because of increased crime in the area that had him fearing for his safety. According to the Appellant, these incidents left the owner in a very bad financial position. He stated, “I have lost everything.” Accordingly, the Appellant requests that the civil money penalty be waived. To help demonstrate that the Appellant owner was suffering financially, he provided approximately 40 pages of documentation, including a police incident report and medical records.

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.

As noted earlier, this review has no authority to dismiss or modify a TOCMP 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. Such circumstances do not exist in this case. Accordingly, a reduction of the TOCMP amount or a dismissal of the case altogether cannot be considered. It may be worth noting that in accordance with 7 CFR § 278.6(h), a TOCMP may be paid in installments.

TOCMP Calculation

Regulations at 7 CFR § 278.6(g) outline the steps for calculating the TOCMP amount. The TOCMP amount 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 amount may occur only when there is an error in calculation or when

the TOCMP amount 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)(7)(E)

5 U.S.C. § 552 (b)(7)(E)

In this case, the calculated TOCMP of \$220,080.00 exceeds the agency sanction limit, which is \$55,000. Each trafficking pattern identified in the February 25, 2016, charge letter is considered a single violation of the SNAP regulations. Therefore, the TOCMP was assessed using five violations at a maximum amount of \$11,000 each. Based on regulations cited at 7 CFR § 278.6(g), it is the determination of this review that a TOCMP in the amount of \$55,000 was properly assessed in this matter.

CONCLUSION

The permanent disqualification of Indiana Chicken and Grocery took effect on May 4, 2016. A review of the evidence in this case clearly indicates that the store was sold to a buyer on May 31, 2018. 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 to impose a \$55,000 civil money penalty against 5 U.S.C. § 552 (b)(6) & (b)(7)(C), former owner of Indiana Chicken and 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

June 3, 2019