

**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 Jeremy Grocery Deli Corp,**

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0233333

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 Jeremy Grocery Deli Corp. (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 **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 June 3, 2019, FNS’s Retailer Operations Division charged Jeremy Grocery Deli Corp., under the ownership of **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**, with **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** 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 both the store and its attorney on July 16, 2019. Upon receipt of the determination letter, Jeremy Grocery Deli Corp. was permanently

disqualified from SNAP effective July 18, 2019. The Appellant requested an administrative review of this decision, but the sanction was upheld in a Final Agency Decision dated November 13, 2019. The case record indicates that the firm did not file a request for a judicial review. Accordingly, FNS closed its case effective January 15, 2020.

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(g).

Documentation in the case record shows that on February 25, 2020, a SNAP application was submitted to FNS for a new store at the same location where Jeremy Grocery Deli Corp. had previously operated. According to the application, this new store, 5 U.S.C. § 552 (b)(6) & (b)(7)(C), owned by 5 U.S.C. § 552 (b)(6) & (b)(7)(C), began its business operations effective February 1, 2020.

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 owners were 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 verifying that a legitimate sale of the business had occurred, including a Bill of Sale and Promissory Note, dated December 27, 2019, which indicated that the business was sold to 5 U.S.C. § 552 (b)(6) & (b)(7)(C) for 5 U.S.C. § 552 (b)(6) & (b)(7)(C). The documents were notarized on February 1, 2020, and were signed by both parties.

In a letter dated August 26, 2020, 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 5 U.S.C. § 552 (b)(6) & (b)(7)(C) was being assessed against the former owners of Jeremy Grocery Deli Corp. in accordance with SNAP regulations at 7 CFR § 278.6(f)(2), (3) and (4), and § 278.6(g).

In a letter postmarked September 2, 2020, the Appellant, through counsel, 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.

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 \$113,894.00 for each program violation, FNS has established an \$11,000.00 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, through counsel, made the following summarized contentions in its request for administrative review, in relevant part:

- The Appellant owner was unaware of the TOCMP requirement and has retired from the business.
- Appellant requests reconsideration of the penalty, and asks for a payoff schedule since, due to COVID-19, the owner has no income.

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 5 U.S.C. § 552 (b)(6) & (b)(7)(C) transfer of ownership civil money penalty against the Appellant. 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 the following circumstances:

- Evidence shows that a transfer of ownership did not occur; or
- The monetary penalty was assessed in a manner not in accordance with regulation; or
- 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 buyer 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Documentation provided by 5 U.S.C. § 552 (b)(6) & (b)(7)(C) shows that the transfer of ownership occurred on December 27, 2019, which is after Jeremy Grocery Deli Corp. 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 Jeremy Grocery Deli Corp., under the ownership of 5 U.S.C. § 552 (b)(6) & (b)(7)(C), is appropriate and was imposed in accordance with established statute and regulation.

As to the Appellant's contention that it was not aware of the potential TOCMP, this review finds such a claim to lack credibility. As noted earlier, the charge and determination letters – both issued earlier in 2019 – 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(g). Because the Appellant was notified twice of this requirement, its contention that it was not aware of this issue does not provide a valid basis for this review to dismiss or modify the penalty.

Hardship to Appellant

The Appellant contends that the store owner has retired from the business and claims that due to the COVID-19 pandemic, he has no income. The Appellant further requests a payoff schedule. These contentions imply that 5 U.S.C. § 552 (b)(6) & (b)(7)(C) will experience hardship if the TOCMP sanction is upheld.

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 the ownership of the firm.

As noted earlier, this review has no authority to dismiss or modify a TOCMP for any reason except in limited circumstances. 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 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)(6) & (b)(7)(C)

In this case, the calculated TOCMP of 5 U.S.C. § 552 (b)(6) & (b)(7)(C) exceeds the agency sanction limit, which is \$11,000 per violation. The June 3, 2019 charge letter identified 5 U.S.C. § 552 (b)(6) & (b)(7)(C) violations of trafficking. Therefore, the TOCMP was assessed on the basis of 5 U.S.C. § 552 (b)(6) & (b)(7)(C) 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 5 U.S.C. § 552 (b)(6) & (b)(7)(C) was properly assessed in this matter.

CONCLUSION

The permanent disqualification of Jeremy Grocery Deli Corp. took effect on July 18, 2019. A review of the evidence in this case clearly indicates that the store was sold to a buyer on December 27, 2019. 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 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 Jeremy Grocery Deli Corp., 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. The judicial filing timeframe is mandated by the Act, and this office cannot grant an extension.

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

November 4, 2020