

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

Former Owners of Kosher Land Inc,

Appellant,

v.

Case Number: C0210880

Retailer Operations Division,

Respondent.

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 \$44,000.00 was properly assessed against **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**, the former owners of Kosher Land Inc., for selling or transferring a store that has been permanently disqualified from 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) in its administration of the SNAP, when it assessed a TOCMP in the amount of \$44,000.00 against Kosher Land Inc. on August 9, 2018.

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 documents that FNS permanently disqualified Kosher Land Inc., under the ownership of the Appellant, from the SNAP effective July 22, 2013 for trafficking in SNAP benefits. The permanent Disqualification Letter dated July 19, 2013 stated that if the Appellant/owner 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). As noted in the letter, the amount of the TOCMP is calculated based on the SNAP regulations at 7 CFR § 278.6(g).

On or about January 1, 2018, the Appellant sold Kosher Land Inc. to a new store owner for 5 U.S.C. § 552 (b)(6) & (b)(7)(C) including all equipment and inventory, and agreed upon by both the Seller and the Buyer as documented by a Bill of Sale, Iowa Commercial Lease Agreement, and the Lease to Buy Agreement in the case record. The new owner agreed to make payments to the former store owner/Appellant for the purchase via installments as noted in the Lease to Buy Agreement. When the new store owner was authorized to participate in the SNAP on July 19, 2018, the Retailer Operations Division discovered that Kosher Land Inc. had been sold or otherwise transferred by the former owner/Appellant. As a result, the Retailer Operations Division, in a letter dated August 9, 2018, notified the Appellant that it had assessed a TOCMP in the amount of \$44,000.00 in accordance with the SNAP regulations.

In a letter postmarked August 20, 2018, the Appellant, through counsel, requested an administrative review of the assessment of the TOCMP. FNS granted the Appellant's request for administrative review by letter dated September 14, 2018 and the assessment of the TOCMP was 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 STATUTE AND REGULATIONS

The controlling statute in this matter is contained in the Food and Nutrition Act of 2008, as amended, 7 U.S.C. § 2021 and Section 278 of Title 7 of the Code of Federal Regulations (CFR).

7 U.S.C. § 2021(e)(1) states, in part:

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. [Emphasis added.]

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 . . . If the retail food store or wholesale food concern has been permanently disqualified, the civil money penalty shall be double the penalty for a ten year disqualification period.

7 CFR § 278.6(g) which provides the steps for calculating the TOCMP, states, in 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 [average monthly redemption times 10 percent] by the number of months for which the firm would have been disqualified . . .

Notwithstanding the above, there is an agency limit of \$11,000.00 per violation as the maximum TOCMP amount.

APPELLANT'S CONTENTIONS

The following may represent only a brief summary of the Appellant's contentions presented in this matter. However, in reaching a decision, full attention and consideration have been given to all contentions presented, including any not fully recapitulated or specifically referenced herein.

In response to the Retailer Operations Division's determination via a request for administrative review and in a subsequent correspondence to FNS, the Appellant, through counsel, argued that:

- The size of the penalty is arbitrary, capricious, and inconsistent with principles of fairness. Under the binding precedent from the United States Court of Appeals for the Eighth Circuit, "[a] fine based entirely on this formula [in § 278.6] . . . must be overturned as arbitrary, capricious, and contrary to the statute". *Corder v. United States*, 107 F.3d 595, 597-98 (8th Cir. 1997). In lieu of blind adherence to the formula, the USDA must "follow principles of fairness that Congress has more clearly delineated in other laws administered by the Department of Agriculture, such as the Packers and Stockyards Act, 7 U.S.C. § 213(b)." *Id.* At 598. This includes consideration of the "gravity of the offense, the size of the business involved, and the effect of the penalty on the person's ability to continue in business". *Id.* Other factors should be considered, including those applicable to determining the appropriate size of a criminal fine such as "defendant's ability to pay, the burden a fine will impose on defendant and any dependents, the loss defendant inflicted upon others, and so forth". *Id.* (citing 18 U.S.C. § 3572). These factors overwhelmingly demonstrate the excessiveness of the proposed \$44,000.00 fine.
- Kosher Land Inc. was a small grocery store in Northeast Iowa with only one employee besides the owners. It primarily served the needs of the area's Hasidic Jewish community. The owners had no prior experience in the grocery store industry but opened the store to try to help the area rebound from the financial devastation caused by Agriprocessors' demise. It did not generate significant profits before or after disqualification from the SNAP. The issues that led to the store's disqualification from the SNAP revolved around a cultural and legal misunderstanding of the SNAP requirements. The owners allowed Hasidic SNAP customers to purchase food items on credit. The owners immediately ended this practice upon being informed of the SNAP

regulations and the SNAP did not suffer any loss from this practice relative to what the Hasidic families would have been entitled to purchase had the regulations been followed.

- The permanent SNAP disqualification of Kosher Land Inc. contributed to the Appellant's inability to make the business profitable from July 2013 onward. The disqualification decision therefore in and of itself imposed a severe financial penalty on the Appellant. The Appellant has already been punished financially.
- The Appellant does not have the ability to pay the \$44,000 fine or any other amount. The sale price of the store 5 U.S.C. § 552 (b)(6) & (b)(7)(C), payable in installments over a five year period. It is unclear whether the business has sufficient viability for the purchase price to be paid in full. Even if it is, a substantial portion of the proceeds will be used to pay down the owners' personal debt, most of which was incurred while trying to keep Kosher Land Inc. afloat after the SNAP disqualification decision. The owners have no meaningful assets to contribute toward the payment of the penalty and too many dependents and other obligations to support to make it feasible or reasonable to require payment over time.
- The Appellant requests that FNS provide information regarding the manner in which the purported civil money penalty was calculated as the letter from the Retailer Operations Division did not provide this information.

In support of these contentions, the following documents were submitted to FNS:

- Declaration 5 U.S.C. § 552 (b)(6) & (b)(7)(C);
- Information regarding two home mortgages; and
- Credit card debt information for six different credit cards.

ANALYSIS AND FINDINGS

Quick Stop, under the ownership of the Appellant, was permanently disqualified from the SNAP effective July 22, 2013. Documents in the case file show that the Appellant sold and/or transferred the permanently disqualified store to a new store owner on or about January 1, 2018, and that this was the basis of the Retailer Operations Division's assessment of a \$44,000.00 TOCMP.

Appropriateness of Fine Amount

The Appellant contends that the size of the penalty is arbitrary, capricious, and inconsistent with principles of fairness. Under the binding precedent from the United States Court of Appeals for the Eight Circuit, "[a] fine based entirely on this formula [in § 278.6] ... must be overturned as arbitrary, capricious, and contrary to the statute". *Corder v. United States*, 107 F.3d 595, 597-98 (8th Cir. 1997). In lieu of blind adherence to the formula, the USDA must "follow principles of fairness that Congress has more clearly delineated in other laws administered by the Department of Agriculture, such as the Packers and Stockyards Act, 7 U.S.C. § 213(b)." *Id.* At 598. This includes consideration of the "gravity of the offense, the size of the business involved, and the effect of the penalty on the person's ability to continue in business". *Id.* Other factors should be considered, including those applicable to determining the appropriate size of a criminal fine such as "defendant's ability to pay, the burden a fine will impose on defendant and any dependents,

the loss defendant inflicted upon others, and so forth”. *Id.* (citing 18 U.S.C. § 3572). These factors overwhelmingly demonstrate the excessiveness of the proposed \$44,000.00 fine.

With regard to the Appellant’s contentions, Constitutional challenges or considerations of legal precedent through case law are beyond the scope of this review. This administrative review is limited to whether the Retailer Operations Division appropriately followed the Food and Nutrition Act of 2008, as amended, and the regulations promulgated under the Act, and whether the action taken is sustainable by a preponderance of the evidence. Therefore, any Constitutional challenges or application of a supposed judicial precedent would best be addressed in a judicial review in a court of law. Accordingly, no further findings or conclusions are rendered in this regard.

Trafficking Charges

The Appellant contends that Kosher Land Inc. was a small grocery store in Northeast Iowa with only employee besides the owners. It primarily served the needs of the area’s Hasidic Jewish community. The owners had no prior experience in the grocery store industry but opened the store to try to help the area rebound from the financial devastation caused by Agriprocessors’ demise. It did not generate significant profits before or after disqualification from the SNAP. The issues that led to the store’s disqualification from the SNAP revolved around a cultural and legal misunderstanding of the SNAP requirements. The owners allowed Hasidic SNAP customers to purchase food items on credit. The owners immediately ended this practice upon being informed of the SNAP regulations and the SNAP did not suffer any loss from this practice relative to what the Hasidic families would have been entitled to purchase had the regulations been followed.

With regard to the Appellant’s contentions, the record reflects that the Appellant was provided an opportunity to reply to the June 12, 2013 Charge Letter (which the Appellant received on June 13, 2013 per UPS confirmation) issued by the Section Chief of the Retailer Operations Division. The Appellant, through counsel, responded to the violations outlined in the Charge Letter via a written letter to the Retailer Operations Division dated July 3, 2013. The Appellant was also offered administrative review rights via the Retailer Operations Division’s Determination Letter dated July 19, 2013 and received by the Appellant on July 22, 2013 (per UPS confirmation). The Appellant, through counsel, availed itself of the opportunity to request an administrative review by letter postmarked July 30, 2013. A request for administrative review was conducted and completed by FNS and the Retailer Operations Division’s original determination to permanently disqualify Kosher Land Inc. from the SNAP was sustained by FNS. As such, the permanent disqualification imposed upon the firm constitutes the agency’s final administrative determination and is not subject to further administrative review. Accordingly, as the sanction is beyond the scope of this review, no further decision is rendered regarding this contention.

Financial Impact of SNAP Disqualification

The Appellant contends that the permanent SNAP disqualification of Kosher Land Inc. contributed to the Appellant’s inability to make the business profitable from July 2013 onward.

The disqualification decision therefore in and of itself imposed a severe financial penalty on the Appellant. The Appellant has already been punished financially.

While FNS is sympathetic to the store owners' circumstances, 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 the sale of a business. There is clear indication in the Retailer Operations Division case file that the Appellant, in fact, sold the former business while it was disqualified. As such, it has been determined that there is enough evidence to support the Retailer Operations Division's determination that this does constitute a sale of a business making Kosher Land Inc. subject to the TOCMP as outlined in the Federal regulations at 7 CFR §278.6(f)(2).

Inability to Pay TOCMP

The Appellant contends that it does not have the ability to pay the \$44,000 fine or any other amount. The sale price of the store is 5 U.S.C. § 552 (b)(6) & (b)(7)(C), payable in installments over a five year period. It is unclear whether the business has sufficient viability for the purchase price to be paid in full. Even if it is, a substantial portion of the proceeds will be used to pay down the owners' personal debt, most of which was incurred while trying to keep Kosher Land Inc. afloat after the SNAP disqualification decision. The owners have no meaningful assets to contribute toward the payment of the penalty and too many dependents and other obligations to support to make it feasible or reasonable to require payment over time. In support of its contentions, the Appellant provided FNS with a declaration 5 U.S.C. § 552 (b)(6) & (b)(7)(C), information regarding two home mortgages, and credit card debt information for six different credit cards.

While FNS is sympathetic to the former owners' situation, the SNAP regulations do not allow for such accommodation when assessing or determining the amount of the TOCMP for this type of action. As such, the Administrative Review Officer has no authority to reduce or eliminate the TOCMP based on the former owners' personal or financial situation.

TOCMP Amount

The Appellant requests that FNS provide information regarding the manner in which the purported civil money penalty was calculated as the letter from the Retailer Operations Division did not provide this information.

As a matter of course in this review, the amount of the TOCMP was recalculated in accordance with the applicable FNS regulations to ensure that the amount assessed by the Operations Division is the appropriate amount. As indicated in Table 1 below, the amount of the TOCMP has been recalculated to be \$44,000.00 which is the same as the original amount that was assessed against Kosher Land Inc. by the Retailer Operations Division in its August 9, 2018 letter. The formula for computing the TOCMP does not provide for discretion and is directly related to the amount of SNAP violations, redemptions and the length of time in the disqualification period. Therefore, this amount cannot be reduced.

5 U.S.C. § 552 (b)(7)(E).

The Retailer Operations Division correctly determined that, using the methodology described in 7 CFR § 278.6(g), the initial calculated amount of the TOCMP was \$189,120.00. However, the initial calculated TOCMP of \$189,120.00 is above the agency limit, which is \$11,000.00 per violation. The June 12, 2013 Charge Letter identified four charged incidences of SNAP violations (i.e., four separate trafficking violations) that occurred during the investigation of Kosher Land Inc. Therefore, the TOCMP was correctly assessed at \$44,000.00 which is the agency limit per violation multiplied by the number of trafficking violations (\$11,000.00 x 4 trafficking violations).

The above calculation conforms to the regulations at 7 CFR §278.6(g) and agency policy and, accordingly, is affirmed as correct and appropriate. It is noted for the record that the Retailer Operations Division has no latitude to calculate TOCMPs by any method other than that described at 7 CFR § 278.6(g). The constitutionality of the sanction has been discussed in the foregoing.

As mentioned above, the formula for the computation for the TOCMP is specific per 7 CFR §278.6(g) and does not allow for any reductions. However, the regulations do provide that an installment plan be allowed for paying the TOCMP over the period of disqualification. The regulations, 7 CFR §278.6(h), state the following:

A firm has 15 days from the date the FNS Retailer Operations Division notifies the firm in writing in which to pay the civil money penalty or to notify the Retailer Operations Division in writing of its intent to pay in installments as specified by the Retailer Operations Division ... The civil money penalty must be paid in full by the end of the period for which the firm would have been disqualified (emphasis added). FNS shall:

- (1) Disqualify the firm for the period determined to be appropriate under paragraph (e) of this section if the firm refuses to pay any of the civil money penalty;
- (2) Disqualify the firm for a period corresponding to the unpaid part of the civil money penalty if the firm does not pay the civil money penalty in full or in installments as specified by the FNS Retailer Operations Division ...

The FNS Financial Management Accounting Division can be contacted at 1-703-605-0483 to discuss payment options or other related topics.

Summary

The regulations at 7 CFR § 278.6(f) require FNS to assess a TOCMP against the former owners of a disqualified store that has been sold or otherwise transferred to a new owner. Moreover, the regulations at 7 CFR § 278.6(g) outline how to calculate the amount of the TOCMP utilizing the aforementioned formula. As such, there is no discretion in the calculation of the TOCMP amount.

CONCLUSION

A review of the evidence in this case indicates by a preponderance of the evidence that Kosher Land Inc., formerly owned by the Appellant, was sold on or about January 1, 2018 after it had been permanently disqualified effective July 22, 2013. Therefore, the SNAP regulation at 7 CFR § 278.6(f)(2) applies to this transfer of ownership. A review of the calculations shows that the amount of the TOCMP assessed by the Retailer Operations Division was correct and proper and the decision in this case is hereby sustained. In accordance with the Food and Nutrition Act of 2008, and the regulations thereunder, this penalty shall become effective thirty (30) days after receipt of this letter.

RIGHTS AND REMEDIES

Section 14 of the Food and Nutrition Act of 2008 (7 U.S.C. § 2023) and Title 7, Code of Regulations, Part 279.7 (7 CFR § 279.7) addresses your right to a judicial review of this determination. Please note that 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 resides or are 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 (FOIA), FNS is 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.

LORIE L. CONNEEN
Administrative Review Officer

March 12, 2019