

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

Kulmiye Mini Market Inc,

Appellant,

v.

Case Number: C0206531

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 levied by the Retailer Operations Division against the former owners of Kulmiye Mini Market Inc. (Kulmiye Mini Market or Appellant) for selling and/or transferring a store that was permanently 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 February 26, 2018.

CASE CHRONOLOGY

The administrative record documents that the firm and ownership were permanently disqualified from participation as a SNAP retailer on March 7, 2016, for trafficking in SNAP benefits. The permanent disqualification letter dated February 22, 2016, stated that if ownership 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). As noted in the letter, the amount of the TOCMP is calculated based on the SNAP regulations at 7 CFR § 278.6(g).

The case record documents that the former owners sold Kulmiye Mini Market **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**, to a new owner on or about May 27, 2016. These documents were provided to FNS when the new store owner applied for SNAP retailer authorization at this location. The Retailer Operations Division, in a letter dated February 26, 2018, notified the former owners of Kulmiye Mini Market that the USDA had assessed a TOCMP in the amount of

\$44,000 in accordance with the SNAP regulations at 7 CFR § 278.6(f)(2)-(4) for the sale or transfer of the firm during a period of disqualification.

By letter dated March 9, 2018, Appellant, 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 clear 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

7 USC § 2023 and the 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."

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). Part 278.6(f)(2) establishes the authority upon which a civil money penalty may be imposed against a disqualified retail food store or wholesale food concern in the event that it has been sold or the ownership is otherwise transferred.

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 . . .

7 CFR § 278.6(f)(3) reads, in part:

. . . the Food and Consumer Service may request the Attorney General institute a civil action to collect the penalty from the person or persons subject to the penalty in a district court of the United States . . .

7 CFR § 278.6(f)(4) reads, in part:

A bona fide transferee of a retail food store shall not be required to pay a civil money penalty imposed on the firm prior to its transfer.

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.

7 CFR § 278.6(g) and § 3.91(b)(3)(i) establish an \$11,000.00 per violation limit as the maximum amount for a TOCMP. The Act, at Section 12, on the subject of transfer of ownership, supports the responsibility of ownership of the firm to the penalty as follows: Section 12 (5) Hearing – In the event any retail food store or wholesale food concern that has been disqualified under subsection (a) is sold or the ownership thereof is otherwise transferred to a purchaser or transferee, the person who sells or otherwise transfers 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 retailer food store 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.

APPELLANT'S CONTENTIONS

In Appellant's March 9, 2018, administrative review request, Appellant, through counsel, stated the following summarized contentions, in relevant part:

- At the time of the store's disqualification, counsel was representing similar stores.
- Each of the stores was a Halal meat market, meaning that they sell specialty meat that is prepared in the custom of Islamic faith.
- Despite the large meat purchases, the inspector determined that the store did not have meat.
- It is not unusual to have quick transactions at Halal markets because meat purchases are tallied by the butcher at the meat counter, who produces a slip to the cashier.
- The meat order is then paid when it is completed separately from other purchases.
- Customers conduct additional transactions when they see they have additional benefits available.
- For those who shop disproportionately at small stores, return trips are not unusual.
- Failing to recognize the shopping pattern of these stores' customers who share the same culture will lead the USDA to disqualify stores based on assumptions rather than on

actual evidence of trafficking.

- When a particular culture is profiled because its constituents behave in a manner different from the majority of the population, the result is a statistical bias and application of supposedly objective criteria in a discriminatory fashion.
- Instead of comparing Appellant with similar Halal markets, FNS compared Appellant to the State.
- In the other cases, FNS stated that the contactor failed to look inside Appellant's freezer and falsely determined that Appellant had limited amounts of meat, poultry, and fish products.
- The incompetence of the inspector is not a valid ground for a wronged conclusion that Appellant did not sell meat, particularly after receipts of wholesale purchases were provided.
- The bias shown is FNS' assumption that a large family is more likely to demonstrate signs of trafficking.
- This viewpoint is necessarily prejudicial toward communities where family sizes tend to be large.
- The USDA's position is based solely on some raw data generated by a computer, without any analysis of the provider's business, its clientele, and its market.
- The conclusions are based on false statement made by its inspector and assumptions that are biased against consumers and retailers whose behaviors are normal within their communities, but are different from the accumulated averages of all consumers and stores.
- It is surprising that FNS upheld the disqualification while it withdrew the disqualification of seven other stores represented by counsel.
- FNS should have never disqualified Appellant but it certainly should have addressed its errors when it was addressing the disqualification of the cases counsel was representing.
- Appellant's transfer of interest of Appellant does not meet the policy consideration that underlie 7 CFR 278.6(f)(2).
- The regulation prohibits the transfer of ownership of a store but not the sale of the store's assets.
- The owners of the market effectively transferred the store's assets
5 U.S.C. § 552 (b)(6) & (b)(7)(C).
- There is almost no meat market with inventory, a walk-in freezer, and meat cutting equipment with assets 5 U.S.C. § 552 (b)(6) & (b)(7)(C).
- Clients are fluent in English and are plainly aware that the way they described their transaction had an impact, but the reality is that the disqualification cost them the value of the store and they were forced in desperation to abandon the store for less than the asset value.
- Their unfortunate use of a document describing the sale of shares should not obscure the obvious economics of this sale.
- Appellant request that the CMP is reconsidered and not imposed.

In support of its contentions, Appellant provided the following documents with its administrative review request:

- February 26, 2018, CMP letter;
- May 4, 2016, Final Agency Decision;
- Settlement Agreement and Release, Kahin et al. v. Unites States, Case 0:15-cv-00338; and
- Settlement Agreement and Release, Elmi et al. v. Unites States, Case 0:16cv-4073.

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

This review is to determine whether the Retailer Operations Division's decision to assess a transfer of ownership CMP against the former owners of a previously permanently disqualified firm was appropriate. The permanent disqualification itself is not under review. Thus, any contentions pertaining to the original disqualification action by the Retailer Operations Division for trafficking in SNAP benefits are not subject to review.

The SNAP regulations at 7 CFR § 278.6(f) authorize FNS to assess a CMP against the owner, or other legal entity, who sells or otherwise transfers ownership of a disqualified retail food store in an amount to reflect that portion of the disqualification period that has not expired.

A review of the amount of the CMP reveals that it was properly computed. Using the methodology described in 7 CFR § 278.6(g), the Retailer Operations Division correctly determined that the initial calculated amount of the transfer of ownership CMP was above the agency limit. The Charge letter identified four trafficking patterns based on EBT transaction data. Therefore, the CMP was correctly assessed at \$44,000.00, which is the agency limit per violation multiplied by the number of trafficking patterns.

The record contains an executed Bill of Sale and a Stock Sales Agreement. Clearly the building/property located **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** was not sold, as supported by the lease agreement in the record. However, the assets of the business operating as Kulmiye Mini Market were sold. FNS considers the sale of a business's assets, which in this case included all of the equipment, inventory, supplies, and all other business assets, as the sale of the firm for the purposes of the SNAP. As noted, all saleable assets of said business were in fact sold and/or the ownership thereof otherwise transferred. The evidence under review supports that a retail food business at the same address as Appellant is now owned and operated by another owner. The record supports that there was a legitimate business sale or transfer of a permanently disqualified firm. As such, Appellant is subject to a CMP under the SNAP regulations.

Therefore, 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 CMP in the amount of \$44,000.00 against Appellant.

Permanent Disqualification Contentions

This review is to determine whether the Retailer Operations Division's decision to assess a transfer of ownership CMP against the former owner of a previously permanently disqualified firm was appropriate. The permanent disqualification itself is not under review. Thus, any contentions pertaining to the original disqualification action by the Retailer Operations Division for trafficking in SNAP benefits are not subject to review.

Although the contentions are not relevant, many of Appellant's contentions are based on the assumption that a FNS contractor that visited the other store's that counsel represented was also the individual who conducted Appellant's store visit. This is not correct. The record is clear that a different FNS contractor conducted Appellant's store visit.

Profitability

Counsel explains that after it was permanently disqualified Appellant was forced to abandon the store for less than the asset value. 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, the regulations require that a TOCMP be assessed and there is no authority in this administrative review to reduce or eliminate the TOCMP based on the former owner's financial situation.

CONCLUSION

This review finds that the evidence provided by the Retailer Operations Division as to a bona fide sale of a permanently disqualified retail food store is sufficient to support its determination to assess a transfer of ownership CMP against Appellant in the amount of \$44,000.00.

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 owners reside 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, 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

June 25, 2018