

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

Marathon,

Appellant,

v.

Case Number: C0196969

Retailer Operations Division,

Respondent.

FINAL AGENCY DECISION

The U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS) finds that there is sufficient evidence to support the determination by the Retailer Operations Division to levy a Transfer of Ownership Civil Money Penalty of \$44,000 against the former ownership of Marathon (“Appellant”) for having sold a store during a period of disqualification from the Supplemental Nutrition Assistance Program (SNAP).

ISSUE

The purpose of this review is to determine whether the Retailer Operations Division took appropriate action, consistent with Title 7 of the Code of Federal Regulations (CFR) § 278.6(f)(2), when it levied a Transfer of Ownership Civil Money Penalty (TOCMP) against Appellant on April 20, 2016.

AUTHORITY

According to 7 U.S.C. § 2023 and its implementing regulations at 7 CFR § 279.1, “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

In a letter dated April 20, 2016, Appellant was notified that it was permanently disqualified as a SNAP-authorized retailer. A purchase agreement dated June 22, 2016 established Appellant sold Marathon. In the Retailer Operations Division’s letter dated February 6, 2017, Appellant was assessed a lump sum Transfer of Ownership Civil Money Penalty (TOCMP) of \$44,000 in

accordance with 7 CFR § 278.6(f)(2) for the sale or transfer of ownership of Marathon during a period of disqualification.

On March 20, 2017, Appellant appealed the Retailer Operations Division's assessment and requested an administrative review of this action. The appeal was granted and implementation of the sanction has been on hold pending completion of this review.

STANDARD OF REVIEW

In an appeal of an adverse action, Appellant bears the burden of proving by a preponderance of evidence that the administrative action should be reversed. That means Appellant has the burden of providing relevant evidence that a reasonable mind, considering the record as a whole, would accept as sufficient to support a conclusion that the argument asserted is more likely to be true than untrue.

CONTROLLING LAW

The controlling law in this matter is contained in the Food and Nutrition Act of 2008, as amended (7 U.S.C. § 2021), and implemented through regulation under Title 7 CFR Part 278. In particular, 7 CFR § 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

APPELLANT'S CONTENTIONS

Appellant's responses regarding this matter are essentially as follows:

- Appellant sold its inventory and did not sell the firm;
- A \$44,000 TOCMP would be an extreme hardship to the former owner; and,
- Appellant only leased the commercial space where the store was located. Appellant provided a seven-page commercial lease, a bill of sale, and an inventory invoice.

These explanations may represent only a brief summary of Appellant's contentions. However, in reaching a decision, full consideration has been given to all contentions presented, including any others that have not been specifically listed here.

ANALYSIS AND FINDINGS

No Undue Hardship to Appellant

Appellant contends that the penalty would impose an extreme hardship on the former ownership. While the former owner's financial situation may be worthy of sympathy, the transfer of ownership civil money penalty cannot be reduced based on Appellant's personal circumstances.

Economic hardship is a likely consequence whenever a store is permanently disqualified from SNAP participation and is assessed a transfer of ownership civil money penalty in the amount levied in this case. However, there is no provision in the SNAP regulations for reducing an administrative penalty on the basis of possible economic hardship to the firm resulting from imposition of such penalty. To excuse Appellant from an assessed administrative penalty based on purported economic hardship to the firm would render the enforcement provisions of the Food and Nutrition Act of 2008 and the enforcement efforts of the USDA virtually meaningless.

Moreover, giving special consideration to the firm for economic hardship would forsake fairness and equity, not only to competing stores and other participating retailers who are complying fully with program regulations, and also to those retailers who have been disqualified from the program in the past for similar violations and also assessed civil money penalties. Therefore, Appellant's contention that it will incur economic hardship based on the assessment of an administrative penalty does not provide any valid basis for dismissing the charges or for mitigating the imposed penalty.

Evidence of Transfer of Firm

Appellant contends that this transaction does not constitute a transfer of ownership; Appellant was leasing the space and sold only the old store's inventory and assets. When determining whether a TOCMP is warranted, neither the Food and Nutrition Act of 2008 nor its implementing regulations allow for factoring in whether the new owner assumed the old business liabilities, goodwill, or independently established their own name and identity in a store transfer. Many new retail establishments, in fact, do establish their own identity independent of the former business prior to applying to be an authorized retailer in the SNAP. The aforementioned Bill of Sale and other documentation in the ROD file verify that the retail food business was transferred on June 22, 2016.

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. As such, there is enough evidence to support the ROD's contention that this 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):

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 or persons who sell or otherwise transfer ownership of the retail food store or wholesale food concern shall be subjected to a civil penalty...

The language taken from the Act above makes no accommodation to insulate any individual acting in the role of officer in a corporation from being assessed a TOCMP. This is especially true if that individual is the sole officer in a privately-owned corporation and was directly involved in the sale of the store's assets and inventory. Accordingly, this contention is not a valid basis for a waiver or the reduction of the TOCMP under review.

Summary

Based on a review of the evidence, Marathon was, indeed, sold following its disqualification from SNAP on April 20, 2016. Therefore, 7 CFR § 278.6(f)(2) of the SNAP regulations is applicable in this case as it pertains to a civil money penalty for the sale or transfer of a disqualified firm.

CONCLUSION

Based on the discussion above, the determination by the Retailer Operations Division to levy a Transfer of Ownership Civil Money Penalty of \$44,000 against Appellant for selling Marathon during a period of disqualification from SNAP is sustained.

RIGHTS AND REMEDIES

Applicable rights to a judicial review of this decision are set forth in 7 U.S.C. § 2023 and 7 CFR § 279.7. If Appellant desires a judicial review, the complaint must be filed in the U.S. District Court for the district in which Appellant's owner resides, is engaged in business, or in any court of record of the State having competent jurisdiction. This complaint, naming the United States as the defendant, 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.

RICH PROULX
Administrative Review Officer

November 27, 2017