

**U.S. Department of Agriculture
Food and Nutrition Service
Administrative Review Branch
Alexandria, VA 22302**

**Former Store Owner,
Maxiel Deli Grocery Corp,**

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0201766

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 \$22,000.00 was properly levied by the Retailer Operations Division against the former owner of Maxiel Deli Grocery Corp. (Maxiel Deli 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 \$22,000.00 against Appellant by letter dated September 29, 2017.

AUTHORITY

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.”

CASE CHRONOLOGY

The administrative record documents that the firm and ownership were permanently disqualified from participation as a SNAP retailer on September 22, 2016, for trafficking in SNAP benefits. The permanent disqualification letter dated September

21, 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 owner sold Maxiel Deli located at 2710 Atlantic Avenue, Brooklyn, New York to a new owner on or about October 18, 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 September 29, 2017, notified the former owner of Maxiel Deli that the USDA had assessed a TOCMP in the amount of \$22,000 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 postmarked October 10, 2017, Appellant 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

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 the request for administrative review postmarked October 10, 2017, Appellant stated the following summarized contentions, in relevant part:

- Appellant was not aware of the regulation and does not have the funds to pay the penalty in full.
- Appellant is experiencing a hardship and requests that the penalty be reduced.

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

Maxiel Deli was permanently disqualified from the SNAP effective September 22, 2016. Documents in the case file show that Appellant sold and/or transferred the

permanently disqualified store to a new owner on or about October 18, 2016, and that this was the basis of the Retailer Operations Division's assessment of a \$22,000 TOCMP. The permanent disqualification letter dated September 21, 2016, informed Appellant that "in the event that you sell or transfer ownership of your store subsequent to your disqualification, you will be subject to and liable for a CMP as provided by SNAP regulations Sections 278.6(f)(2), (3), and (4). The amount of this sale or transfer CMP will be calculated based on SNAP regulations at 278.6(g)." Appellant received proper legal notice that a TOCMP could be imposed if Maxiel Deli was sold after the date of disqualification.

Economic Hardship

Appellant explains that it does not have the funds to pay the penalty in full and is experiencing a hardship. It is recognized that some degree of economic hardship is a likely consequence whenever a transfer of ownership CMP is assessed. However, there is no provision in the SNAP regulations for waiver or reduction of an administrative penalty assessment on the basis of possible economic hardship to the former store owner resulting from imposition of such penalty based on the sale or transfer of a permanently disqualified store.

To allow the former store owner to be excused from an assessed administrative penalty based on purported economic hardship would render virtually meaningless the enforcement provisions of the Food and Nutrition Act of 2008 and the enforcement efforts of the USDA. Furthermore, giving special consideration to economic hardship to the former store owner would forsake fairness and equity, to those retailers who have been assessed transfer of ownership civil money penalties in the past. Therefore, the contention does not provide any valid basis for dismissing the CMP for \$22,000.00.

TOCMP Calculation

A review of the case record documents that the Retailer Operations Division correctly calculated the amount of the TOCMP under 7 CFR § 278.6(g). That regulation states that the TOCMP is to be calculated on a formula which includes the SNAP redemption volume of the store during the 12 months prior to the firm being notified of the violations that led to the store's disqualification. Modifications to the TOCMP may occur only when there is an error in calculation or the amount exceeds the agency limit.

Using the methodology described in 7 CFR § 278.6(g), the Retailer Operations Division correctly determined that the initial calculated amount of the TOCMP was \$184,320.00. However, the initial calculated TOCMP of 184,320.00 is above the agency limit, which is \$11,000 per violation. The August 5, 2016, charge letter identified two patterns of trafficking based on EBT redemption data. Therefore, the TOCMP was correctly assessed at

\$22,000.00, which is the agency limit per violation multiplied by the number of trafficking patterns (\$11,000.00 x 2 trafficking patterns).

Summary

In summary, the SNAP regulations at 7 CFR § 278.6(f)(2) authorize FNS to assess a TOCMP against the owner of a disqualified retail food store that has been sold or in which the ownership is otherwise transferred. The Retailer Operations Division determined that a legal sale of Maxiel Deli did occur on or about October 18, 2016, and this is supported by documents in the case record. Appellant's contentions do not give any legal grounds for vacating or reducing the TOCMP. Moreover, the regulations at 7 CFR § 278.6(g) outline how to calculate the amount of the TOCMP, as described above, and do not provide any authority to waive or reduce the assessed TOCMP. As such, there is no discretion in the calculation of the TOCMP amount.

CONCLUSION

The evidence indicates that Maxiel Deli was sold and/or transferred on or about October 18, 2016. Therefore, 7 CFR § 278.6(f)(2) of the SNAP regulations is applicable and the assessment of a TOCMP is correct. The amount of the TOCMP assessed by the Retailer Operations Division is also correct. The action by the Retailer Operations Division is sustained.

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 owner resides or is 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

November 30, 2017