

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

**Former Store Owner,  
Mini Grocery Mart**

**Appellant,**

**v.**

**Retailer Operations Division,**

**Respondent.**

**Case Number: C0217955**

**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 \$33,000.00 was properly levied by the Retailer Operations Division against the former owner of Mini Grocery Mart Corporation (Mini Grocery Mart or Appellant) for selling and/or transferring a store that was 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) and (g), in its administration of the SNAP when it assessed a TOCMP in the amount of \$33,000 against Appellant.

**AUTHORITY**

7 USC § 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 Retailer Operations Division permanently disqualified Mini Grocery Mart from participation as a SNAP retailer on June 2, 2017, for trafficking SNAP benefits. Both the March 13, 2017, charge letter and the disqualification letter dated May 16, 2017, stated that if the owner(s) 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). The letters also noted that the amount of the TOCMP would be calculated based on regulations at 7 CFR § 278.6(g).

The case record documents the former store owner of Mini Grocery Mart sold the firm to a new owner on or about May 31, 2017. These documents were provided to FNS when the new store owner applied for SNAP retailer authorization at this location. As a result, the Retailer Operations Division, in a letter dated May 23, 2019, notified the former owner of Mini Grocery Mart that it had assessed a TOCMP in the amount of \$33,000.00 in accordance with the SNAP regulations.

By letter postmarked June 3, 2019, 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.

On June 20, 2019, counsel requested documents under the Freedom of Information Act (FOIA). FNS responded to this request on June 27, 2019. Appellant provided supporting documentation for its administrative review on August 23, 2019.

### **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 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). 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 USC § 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 . . . 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(g) provides the steps for calculating the TOCMP and 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 product arrived at in paragraph (g)(2) by the number of months for which the firm would have been disqualified ....

Notwithstanding the above, there is an agency limit of \$11,000 per violation as the maximum TOCMP amount. 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 USC § 2021(e)(1) and SNAP regulations at 7 CFR § 278.6(f)(2)

### **APPELLANT'S CONTENTIONS**

In its June 3, 2019, administrative review request, and subsequent correspondence dated August 23, 2019, Appellant stated the following summarized contentions, in relevant part:

- The penalty is excessive and disproportionate to its sale price.
- Appellant only participated in SNAP for 14 months.
- Appellant charged the program less than 5 U.S.C. § 552 (b)(6) & (b)(7)(C).
- The \$33,000 CMP is excessive in light of the minimum benefits derived from participating in the program.
- Appellant only sold the business for 5 U.S.C. § 552 (b)(6) & (b)(7)(C) and as such the fine is in violation of the client Eight Amendment Constitutional Right.
- Appellant was not provided with the basic information detailing how the \$33,000 was reached; and without this basic information, Appellant is being denied due process.
- The determination without explanation is arbitrary and capricious.
- After reviewing 7 CFR 278.6(g) and considering the above mentioned factors, any fine over \$8,393.00 would be arbitrary and capricious. (See *Motor Vehicle Mfgs. Ass'n of U.S. Inc. v. State Farm Mut. Auto Inc. Co.* 103 S. Ct 2856. (U.S. Supreme Court 1983).
- Appellant requests a reduction down to \$8,000.

In support of its contentions, Appellant provided a copy of its June 27, 2019, FOIA response from FNS and attachments.

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**

The purpose of this review is limited to determining whether the Retailer Operations Division's decision to assess a TOCMP against Appellant was appropriate. The disqualification itself is not under review. Thus, any contentions pertaining to the original disqualification action by the Retailer Operations Division are not subject to review.

Mini Grocery Mart was permanently disqualified from the SNAP effective June 2, 2017. Documents in the case file show that Appellant sold and/or transferred the permanently disqualified store to a new owner on or about May 31, 2017, and that this was the basis of the Retailer Operations Division's assessment of a \$33,000.00 TOCMP.

### **Due Process**

Counsel explains that Appellant was not provided with the basic information detailing how the \$33,000 was calculated and that without this basic information, Appellant is being denied due process. Appellant further contends that the determination without explanation is arbitrary and capricious.

The permanent disqualification letter dated May 16, 2017, informed Appellant that:

“[I]n 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).”

The May 23, 2019, letter sent to Appellant states the following:

“Our records show that you have sold your firm. As a result, we have assessed a civil money penalty (CMP) in the amount of \$33,000.00. This penalty is calculated in accordance with Section 278.6(f)(2) and (g) of the SNAP regulations.”

7 CFR 278.6 (f)(2) states that if a firm has been permanently disqualified, the civil money penalty shall be double the penalty for a ten year disqualification period. The regulations at 7 CFR 278.6(g) also clearly describe how the TOCMP should be calculated. Although the calculations were not provided to Appellant, the evidence does not support that Appellant was not provided with information concerning how its penalty was derived.

### **TOCMP Calculation**

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.

The Retailer Operations Division correctly determined, using the methodology described in 7 CFR § 278.6(g) that the initial calculated amount of the TOCMP was \$170,400.00. However, the Retailer Operations Division properly determined that the initial calculated TOCMP of \$170,400.00 was above the agency limit, which is \$11,000 per violation. The March 13, 2017 trafficking charge letter identified three patterns of trafficking based on irregular SNAP transaction data. Therefore, the Retailer Operations Division correctly assessed the final TOCMP at \$33,000.00 which is the agency limit per violation multiplied by the number of trafficking patterns (\$11,000.00 x 3 trafficking patterns).

Counsel states that Appellant was only authorized for 14 months. However, this does not factor into the calculation of the penalty. The penalty is based on the firm's average monthly SNAP redemptions for the twelve months prior to receiving the charge letter. This average is then multiplied by 10 percent. The final calculation involves multiplying the amount calculated thus far by the number of months for which the firm **would have been disqualified**. As indicated previously, 7 CFR 278.6 (f)(2) states that if a firm has been permanently disqualified, the civil money penalty shall be double the penalty for a ten year disqualification period. Thus, it is multiplied by 240 (the number of months in a 20 year period). Thus, the penalty is based on years that disqualification is intended to serve and not on how many years the firm has been authorized.

### **Profitability**

Appellant explains that Appellant only sold the business for **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** and such a fine is in violation of the client's Eight Amendment Constitution Right. 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.

### **Case Law and Constitutional Arguments**

Appellant cites some case law as well as contends that that the retailer's constitutional rights have been violated. 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. Constitutional challenges to the laws and regulations governing the SNAP and any application of a judicial precedent would be addressed in a judicial review in a court of law.

### **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 Mini Grocery Mart did occur on or about May 31, 2017, 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**

This review finds that the evidence provided by the Retailer Operations Division as to a bona fide sale of a disqualified retail food store is sufficient to support its determination to assess a transfer of ownership CMP against Appellant in the amount of \$33,000.00.

### **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 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

September 9, 2019