

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

**5 U.S.C. § 552 (b)(6) & (b)(7)(C), former
owner of MLK Last Stop,**

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0208891

FINAL AGENCY DECISION

It is the decision of the U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS) that a Transfer of Ownership Civil Money Penalty (TOCMP) in the amount of **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** was properly imposed by the Retailer Operations Division against **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**, former owner of MLK Last Stop (hereinafter “Appellant”), for selling or transferring ownership of a store that was permanently disqualified from the Supplemental Nutrition Assistance Program (SNAP).

ISSUE

The issue accepted for review is whether or not the Retailer Operations Division took appropriate action, consistent with 7 CFR § 278.6(f)(2) and 7 CFR § 278.6(g) in its administration of SNAP when it assessed a TOCMP in the amount of **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** against the Appellant.

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 indicates that in a letter dated February 23, 2017, FNS’s Retailer Operations Division charged MLK Last Stop, under the ownership of **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**, with **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** trafficking in SNAP benefits. A determination letter was sent to the firm on April 27, 2017. As a result, MLK Last Stop was permanently disqualified from SNAP effective April 28, 2017. The Appellant, through counsel, appealed the sanction determination by

requesting an administrative review, but the sanction was upheld in a Final Agency Decision dated November 30, 2017.

Both the charge letter and determination letter stated that in the event that the firm's ownership sold or transferred ownership of 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).

Documentation in the case record shows that on February 16, 2018, a SNAP application was submitted to FNS for a new store at the same location where MLK Last Stop had previously operated. According to the application, this new store, 5 U.S.C. § 552 (b)(6) & (b)(7)(C), began its operations effective February 14, 2018.

Upon discovering that a new application had been submitted at a location where SNAP violations had previously occurred, the Retailer Operations Division requested additional documentation from the new store owner to verify that the disqualified owner was not affiliated with the new store in any way and to ascertain whether or not the transfer of ownership from the Appellant to 5 U.S.C. § 552 (b)(6) & (b)(7)(C) was bona fide. In response to this request, the new store owner submitted a number of documents, including a notarized affidavit, business licenses, Articles of Incorporation, a Lease Agreement, and an Asset Purchase Agreement dated January 17, 2018 and signed by both parties, verifying that a bona fide change of ownership had occurred.

In a letter dated May 23, 2018, the Retailer Operations Division informed the Appellant that because the store was sold or transferred during its disqualification period, a TOCMP in the amount of 5 U.S.C. § 552 (b)(6) & (b)(7)(C) was being assessed against the former owner of MLK Last Stop in accordance with SNAP regulations at 7 CFR § 278.6(f)(2), (3) and (4), and § 278.6(g).

In a letter postmarked June 4, 2018, the Appellant appealed the Retailer Operations Division's assessment of the TOCMP by requesting an administrative review. The request was granted and implementation of the TOCMP has been held in abeyance pending completion of this review.

STANDARD OF REVIEW

In an appeal of adverse action, such as the imposition of a civil money penalty, an Appellant bears the burden of proving by a preponderance of the evidence that the administrative action should be reversed. This means that an 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 law in this matter is found in the Food & Nutrition Act of 2008, as amended (7 U.S.C. § 2021), and promulgated through regulation under Title 7 CFR Part 278. 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 U.S.C. § 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 or wholesale food concern 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 in an amount to reflect that portion of the disqualification period that has not expired, to be calculated using the method found at § 278.6(g). If the retail food store...has been permanently disqualified, the civil money penalty shall be double the penalty for a ten year disqualification period...

7 CFR § 278.6(g) outlines the steps for calculating the TOCMP amount, in relevant 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....The civil money penalty may not exceed an amount specified in § 3.91(b)(3)(i) for each violation.

Although regulations at 7 CFR § 3.91(b)(3)(i) provide for a maximum penalty of \$113,894 for each Program violation, 5 U.S.C. § 552 (b)(7)(E). 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 U.S.C. § 2021(e)(1) and SNAP regulations at 7 CFR § 278.6(f)(2).

APPELLANT'S CONTENTIONS

The Appellant, through counsel, made the following summarized contentions in its request for administrative review, in relevant part:

- Appellant seeks a review of the case to ensure that FNS properly assessed the allegations against the firm and correctly calculated the civil money penalty.
- It is the Appellant's intention to achieve closure with FNS in order to remain free and clear to pursue any and all future business endeavors.
- It is not the Appellant's intention to in any way downplay the seriousness of the situation or minimize the conduct at hand. Rather it is to simply show the economic impact the permanent disqualification from SNAP has had upon the store owner.
- The amount of lost annual revenue, based on SNAP income from the year 2016, was approximately 5 U.S.C. § 552 (b)(6) & (b)(7)(C). This was a significant portion of the firm's business.
- The significant economic impact of this permanent ban cannot be ignored. Based on the firm's clientele and local demographics, it was clear that a SNAP disqualification would irreparably harm the economic prospects of the business. This is why the disqualification was appealed.
- The November 30, 2017, Final Agency Decision gave little notice to the owner, who was unfamiliar with the legal nuances of SNAP, as to the ramifications she may face in the future. Her legal counsel at the time provided little to no guidance.
- Within weeks of receiving the Final Agency Decision, the Appellant owner was hospitalized. The store also experienced a sudden loss of business resulting from the firm's permanent disqualification. These circumstances led to the owner deciding to sell the business. It was not the preferred decision, but one the owner had to make.
- For these reasons, the Appellant requests a review of the 5 U.S.C. § 552 (b)(6) & (b)(7)(C) CMP, as it will be the owner personally covering the costs rather than the defunct business. The penalty will undoubtedly pose a substantial financial burden that the Appellant owner may not be able to overcome. As such, Appellant asks for a sum that would satisfy the penal nature of the fine while taking into account the nature and circumstances of the sale of the store. There must be a fine that is sufficient to reach the necessary penal goals without imposing sure economic harm on the owner.

In support of these contentions, the Appellant submitted the following documentation:

- IRS Form 1099-K, "Payment Card and Third Party Network Transactions," from 2016, showing 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in gross payment card/third party network transactions.
- A copy of the November 30, 2017, Final Agency Decision.
- A letter, dated January 8, 2018, from the Appellant owner to the United States District Court, Central District of Illinois, requesting an extension to file a complaint in District Court.
- A letter, dated January 12, 2018, from the District Court clerk, stating that the case is not known to the Court and thus the clerk cannot be of further assistance.

The preceding may represent only a brief summary of the Appellant's contentions presented in this matter. However, in reaching a decision, full attention was given to all contentions presented, including any not specifically summarized or explicitly referenced herein.

ANALYSIS AND FINDINGS

The primary issue for review in this case is whether or not it was lawful for the Retailer Operations Division to impose a 5 U.S.C. § 552 (b)(6) & (b)(7)(C) transfer of ownership civil money penalty against the Appellant firm. To this regard, statute at 7 U.S.C. § 2021 and SNAP regulations at 7 CFR § 278.6(f)(2) are clear that a TOCMP **shall be** assessed if a store which has been disqualified is subsequently sold or the ownership of the firm is transferred prior to the end of the disqualification period. This review has no authority to dismiss or modify a TOCMP for any reason except in those cases where it is shown that a transfer of ownership did not occur, a monetary penalty was assessed in a manner not in accordance with regulation, or when there was an error in calculating the TOCMP amount.

Based on a review of the sales documents in this case, it is the finding of this review that a sale or transfer of ownership did, in fact, occur between the Appellant, 5 U.S.C. § 552 (b)(6) & (b)(7)(C), and 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Evidence provided by the owner of 5 U.S.C. § 552 (b)(6) & (b)(7)(C) clearly shows that a transfer of ownership occurred on January 17, 2018, which is after MLK Last Stop was permanently disqualified from SNAP participation.

All documentation of new ownership appears to be legitimate and proof of a bona fide sale. Furthermore, there does not appear to be any dispute from the Appellant that a sale of the store took place. Therefore, it is the determination of this review that the assessment of a TOCMP against MLK Last Stop, under the ownership of 5 U.S.C. § 552 (b)(6) & (b)(7)(C), is wholly appropriate and was imposed in accordance with established statute and regulation.

Contentions Related to Permanent Disqualification

The Appellant owner contends that the significant economic impact of the firm's permanent disqualification cannot be ignored. According to the Appellant, the amount of lost revenue as a result of the firm's disqualification irreparably harmed the economic prospects of the business, which is why the firm appealed the disqualification in the first place. Upon receiving the November 30, 2017, Final Agency Decision, the Appellant claims that she tried to further appeal the decision in District Court, but was unfamiliar with the legal nuances of SNAP and got no help from her attorney at the time. Additionally, within a few weeks of receiving the Final Agency Decision, the Appellant became hospitalized. With the sudden loss of income as a result of the SNAP disqualification combined with significant health concerns, the Appellant concluded that her only option was to sell the store.

With regard to these contentions, it is critical to note that this review cannot reevaluate any portion of the previously issued Final Agency Decision or the economic circumstances that resulted from the firm's permanent disqualification. Additionally, there can be no consideration of the circumstances surrounding the firm's unsuccessful filing of a complaint in District Court. The November 30, 2017, decision clearly indicated that if a complaint was to be filed in District Court, it must be filed within 30 days of receipt of the decision. Because the Appellant did not request a judicial review within 30 days, all avenues of appeal regarding the permanent disqualification action have been exhausted.

It also bears repeating that the Appellant was twice made aware of the penalty for transferring ownership of the store. The agency's charge and determination letters clearly state that in the event that the firm's ownership sold or transferred ownership of the store after its disqualification, it would be subject to and liable for a TOCMP.

Hardship to Appellant

The Appellant, through counsel, contends that she is personally responsible for covering the costs of the TOCMP and claims that a 5 U.S.C. § 552 (b)(6) & (b)(7)(C) penalty will pose a substantial financial burden that she may not be able to overcome. As such, the Appellant asks for a sum that would satisfy the penal nature of the fine while taking into account the nature and circumstances of the sale of the store. According to the Appellant, there must be a fine that is sufficient to reach the necessary penal goals without imposing sure economic harm on the owner.

With regard to this contention, it is recognized that some degree of economic hardship is a likely consequence whenever a store is disqualified from participation in SNAP or when a civil money penalty is imposed. However, there is no provision in statute or in SNAP regulations for waiver or reduction of an administrative penalty on the basis of possible economic hardship to either the ownership personally or to the firm itself resulting from the imposition of such a penalty.

To allow store ownership to be excused from administrative penalties based on a purported financial hardship to the Appellant or firm would render virtually meaningless the provisions of the Food and Nutrition Act of 2008 and the enforcement efforts of the USDA. Moreover, giving special consideration to economic hardship to the Appellant would forsake fairness and equity, not only to competing stores and other participating retailers who are complying fully with Program regulations, but also to those retailers who have incurred monetary penalties in the past for similar violations. Therefore, the Appellant's contention that it will incur financial hardship based on the assessment of a TOCMP does not provide a valid basis for dismissing the charges or for mitigating the penalty imposed.

As noted earlier, this review has no authority to dismiss or modify a TOCMP for any reason except in those cases where it is shown that a transfer of ownership did not occur, a monetary penalty was assessed in a manner not in accordance with regulation, or when there was an error in calculating the TOCMP amount. Such circumstances do not exist in this case. Accordingly, a reduction of the TOCMP amount or a dismissal of the case altogether cannot be considered. It should be noted that in accordance with 7 CFR § 278.6(h), a TOCMP may be paid in installments.

TOCMP Calculation

Regulations at 7 CFR § 278.6(g) outline the steps for calculating the TOCMP amount. The TOCMP amount is derived from the firm's SNAP redemption volume during the 12 months immediately prior to being charged with the violations that led to the store's disqualification. Modifications to a TOCMP amount may occur only when there is an error in calculation or when the TOCMP amount exceeds the statutory limit. This review has no authority to modify a TOCMP amount for any other reason. The calculation of the TOCMP in this case is as follows:

5 U.S.C. § 552 (b)(6) & (b)(7)(C)

In this case, the calculated TOCMP of 5 U.S.C. § 552 (b)(6) & (b)(7)(C) exceeds the agency sanction limit, which is 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Each trafficking pattern identified in the February 23, 2017, charge letter is considered a single violation of the SNAP regulations. Therefore, the TOCMP was assessed using 5 U.S.C. § 552 (b)(6) & (b)(7)(C) violations at a maximum amount of 5 U.S.C. § 552 (b)(6) & (b)(7)(C) each. Based on regulations cited at 7 CFR § 278.6(g), it is the determination of this review that a TOCMP in the amount of 5 U.S.C. § 552 (b)(6) & (b)(7)(C) was properly assessed in this matter.

CONCLUSION

The permanent disqualification of MLK Last Stop took effect on April 28, 2017. A review of the evidence in this case clearly indicates that the store was sold to a buyer on January 17, 2018. Therefore, 7 CFR § 278.6(f)(2) of the SNAP regulations is applicable, and the assessment of a TOCMP is required. A review of the calculation indicates that the amount of the TOCMP as assessed by the Retailer Operations Division is proper as noted in the analysis above. Thus, the decision by the Retailer Operations Division to impose a 5 U.S.C. § 552 (b)(6) & (b)(7)(C) civil money penalty against 5 U.S.C. § 552 (b)(6) & (b)(7)(C), former owner of MLK Last Stop, is sustained.

To arrange payment, the Appellant must contact FNS's Financial Management Accounting Division at (703) 605-0483 within 30 days of receipt of this decision.

RIGHTS AND REMEDIES

Applicable rights to a judicial review of this decision are set forth in Section 14 of the Food and Nutrition Act of 2008 (7 U.S.C. § 2023) and in Section 279.7 of the SNAP regulations. 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 owner resides or is engaged in business, or in any court of record of the State having competent jurisdiction. If a complaint is filed, it must be filed within 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.

JON YORGASON
Administrative Review Officer

November 19, 2018