

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

**Former Store Owner,
Newtowne Food Mart,**

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0200988

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 \$7,333.33 was properly levied by the Retailer Operations Division against the former owners of Newtowne Food Mart (Newtowne Food 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), (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 \$7,333.33 against Appellant by letter dated May 2, 2018.

CASE CHRONOLOGY

The Retailer Operations Division issued a determination letter dated May 23, 2014, and imposed a three year SNAP reciprocal disqualification against Appellant as a result of a Women, Infants, and Children (WIC) disqualification action. This determination was reviewed by the Administrative Review Branch and sustained by Final Agency Decision (FAD) dated July 7, 2014. The FAD was appealed in court, and FNS was upheld. The Retailer Operations Division reciprocally disqualified Appellant from participation in the SNAP for a period of three years effective April 27, 2016.

By letter dated August 14, 2017, the Retailer Operations Division imposed a transfer of ownership CMP for the sale or transfer of Appellant during a period of disqualification. Appellant, through counsel, requested an administrative review of this action. The TOCMP was

rescinded by letter dated September 27, 2017, due to an error in the calculation of the CMP amount. The administrative review was closed as moot on September 28, 2017.

On December 13, 2017, the Retailer Operations Division informed the former store owner that a transfer of ownership CMP in the amount of \$22,000.00 was now being assessed. Appellant, through counsel, requested an administrative review. The action was rescinded by letter dated April 24, 2018, and the administrative review was closed as moot.

By letter dated May 2, 2018, the Retailer Operations Division informed the former store owner that a transfer of ownership CMP in the amount of \$7,777.77, calculated in accordance with 7 CFR § 278.6(f)(2) and (g), was being assessed for the sale or transfer of Appellant during a period of disqualification. By letter dated May 14, 2018, the former store owner, via counsel, requested administrative review. The appeal was granted.

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 May 14, 2018, administrative review request, and subsequent correspondence dated June 8, 2018, Appellant, through counsel, stated the following summarized contentions, in relevant part:

- There was no reason provided for the previous incorrect TOCMP.
- Appellant has spent many thousands of dollars fighting the two incorrect decisions.
- Appellant would like to get their attorney's fees paid spent fighting to unearth SNAP's mistakes; alternatively, Appellant requests a commensurate reduction in the amount of the CMP.
- Appellant has not heard back from Financial Management about a 40% reduction in the total CMP if paid in full.

- Appellant believes there was an original delay in bringing this action that has deprived them of their due process rights.
- Appellant believes the CMP is not supported by adequate findings by the Massachusetts WIC Program.

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, which was issued on May 2, 2018, to assess a transfer of ownership CMP against the former owner of a previously disqualified firm was appropriate. The 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. Using the methodology described in 7 CFR § 278.6(g), the Retailer Operations Division determined that the three year WIC disqualification was based on one violation and the agency limit is \$11,000. The \$11,000 was reduced to \$7,333.33, whereby twelve months of credit was given to Appellant for time served of its three year SNAP disqualification period. A review of the amount of the CMP confirms that it was properly computed

The record contains a bona fide executed "Bill of Sale" dated April 1, 2017, and other documents in the record, establish that Appellant was sold by the former store owner to a buyer during its period of disqualification. Appellant is therefore subject to a CMP under the SNAP regulations cited herein. The Retailer Operations 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 \$7,777.77 against Appellant.

Due Process

Counsel contends that the assessment of the CMP violates due process. As noted, regulations pertaining to the calculation of transfer-of-ownership civil money penalties are quite prescriptive and are applied consistently to all firms disqualified which are subsequently sold or the ownership thereof otherwise transferred prior to the expiration of disqualification periods.

The regulations provide no latitude to the Retailer Operations Division in the imposition of such sanctions as stipulated in 7 CFR §278.6(f)(2), as noted above and as follows: "...the person or other legal entity who sells or otherwise transfers ownership of the retail food store or wholesale food concern shall be subjected to and liable for a civil money penalty." The method for calculating the amount of such civil money penalties likewise provides no latitude

for alteration. The statute and regulations are clear regarding the basis of such sanctions. The present case clearly involves a disqualified firm which was subsequently sold during a period of disqualification. The penalty is the legitimate application of the SNAP regulations published pursuant to the Act.

Payment

Appellant explains that the Financial Management Office previously offered Appellant an alternative payment amount. Appellant also requests that the penalty be reduced. Modifications to the civil money penalty may occur only when there is an error in the calculation or the civil money penalty exceeds the agency limit. In this case, the CMP for transferring ownership of Appellant was calculated correctly. Appellant can contact Financial Management at 703-605-0483 to discuss payment of this penalty.

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 \$7,333.33.

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

August 27, 2018