

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

5 U.S.C. § 552 (b)(6) & (b)(7)(C),

**Former Owners,
Newyork Express,**

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0237777

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 that a Transfer of Ownership Civil Money Penalty (TOCMP) of \$2,178.00 was properly assessed against **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**, the former owners of Newyork Express, for selling or transferring a store that was serving a six-month disqualification from 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), when it assessed a TOCMP in the amount of \$2,178.00 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 Retailer Operations Division disqualified Newyork Express, under the ownership of **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**, from the SNAP for a six-month period effective July 6, 2020 for exchanging ineligible non-food items for SNAP benefits. The determination letter dated March 17, 2020, stated that if the owners sold or transferred the store after its disqualification, they 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 that letter, the amount of the TOCMP is calculated based on the SNAP regulations at 7 CFR § 278.6(g).

While the store was serving the six-month disqualification period, the former owners sold the store inventory to a new owner for 5 U.S.C. § 552 (b)(6) & (b)(7)(C) as documented in the case record by a notarized Bill of Sale signed and dated October 1, 2020. When the new owner was authorized for the SNAP at the same location on October 13, 2020, the Retailer Operations Division discovered that the disqualified store had been sold or otherwise transferred by the former owners. As a result, the Retailer Operations Division, in a letter dated November 20, 2020, notified 5 U.S.C. § 552 (b)(6) & (b)(7)(C) that it had assessed a TOCMP in the amount of \$2,178.00 in accordance with the SNAP regulations. The TOCMP letter was delivered to the former owners at their residential addresses by UPS on November 23, 2020.

In a letter postmarked November 30, 2020, the Appellant requested an administrative review of the assessment of the TOCMP. The administrative review was granted and the assessment of the \$2,178.00 TOCMP was held in abeyance pending completion of this review.

STANDARD OF REVIEW

In appeals of adverse actions, an appellant bears the burden of proving by a preponderance of the evidence, that the administrative action should be reversed. That means an appellant has the burden of providing relevant evidence which a reasonable mind, considering the record as a whole, might accept as sufficient to support a conclusion that the matter asserted is more likely to be true than not true.

CONTROLLING LAW AND REGULATIONS

The controlling law in this matter is contained in the Food and Nutrition Act of 2008, as amended, 7 U.S.C. § 2021 and the SNAP regulations at Section 278 of Title 7 of the Code of Federal Regulations (CFR).

7 U.S.C. § 2021(e)(1) states, in part:

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.** [Emphasis added.]

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 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).... [Emphasis added.]

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.

APPELLANT'S CONTENTIONS

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

- SNAP was suspended for 180 days in this location and due to mixed impact of Covid-19 and no SNAP the business was pretty much dead. It very seriously impacted our families. The business would never have been solid if it was profitable.
- We were never aware that first of all SNAP was suspended from this site. Secondly, we question why we could not sell the business when we were struggling every day to pay bills.
- We request a waiver of the TOCMP.

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

ANALYSIS AND FINDINGS

The SNAP regulations at 7 CFR § 278.6(f)(2) **require** FNS to assess a TOCMP against the owner of a disqualified store that has been sold or otherwise transferred to a new owner. The regulations do not provide **for any exceptions** relating to the motive for the sale or transfer, the adequacy of the sale price, the store's profitability, the former owners' ability to pay, or the impact on the owners' families. In addition, the regulations at 7 CFR § 278.6(g) outline how to calculate the amount of the TOCMP and allows **no discretion** in the calculation of the TOCMP amount.

Proper Notice Given

The Appellant states that it never aware that the store was disqualified from the SNAP or notified that the store could be subject to a TOCMP if sold. Regarding this claim, the case record shows that the Appellants responded to the March 2, 2020 charge letter and later filed for administrative

review to challenge the six-month disqualification. The Appellant lost on administrative review and a copy of the Final Agency Decision dated June 3, 2020 was delivered to the Appellant on June 5, 2020. The Final Agency Decision stated that the six-month disqualification would be effective 30 days after delivery. Therefore, the Appellant was fully aware of the six-month disqualification.

Regarding the TOCMP, both the charge letter dated March 2, 2020 and the disqualification letter dated March 17, 2020 stated that if the owners 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 letters, the amount of the TOCMP is calculated based on the SNAP regulations at 7 CFR § 278.6(g). Therefore, the Appellant was given proper notice that a TOCMP would be assessed if Newyork Express was sold or otherwise transferred during the six-month disqualification period which began on July 6, 2020.

TOCMP Calculation

The case record documents that the Retailer Operations Division correctly followed agency regulations and guidelines in calculating 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 twelve (12) months prior to the firm being charged with 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 administrative review officer in this case does not have the authority to waive or negotiate a reduced TOCMP amount.

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 **\$2,178.00**. The Retailer Operations Division also properly determined that this initial calculated TOCMP was **below the agency limit**, which is \$11,000 per violation. The March 2, 2020 charge letter identified SNAP violations during four (4) compliance visits. Therefore, the Retailer Operations Division correctly assessed the final TOCMP at \$2,178.00. That calculation is shown below:

5 U.S.C. § 552 (b)(6) & (b)(7)(C)

Summary

The regulations at 7 CFR § 278.6(f)(2) **require** FNS to assess a TOCMP against the former owner(s) of a disqualified store that has been sold or otherwise transferred to a new owner. Moreover, the regulations at 7 CFR § 278.6(g) outline how to calculate the amount of the TOCMP utilizing the aforementioned formula. As such, **there is no discretion in the calculation of the TOCMP amount**. This administrative review does not have the authority to waive the TOCMP or negotiate a reduced payment.

CONCLUSION

A review of the evidence in this case indicates by a preponderance of the evidence that Newyork Express, formerly owned by 5 U.S.C. § 552 (b)(6) & (b)(7)(C), was sold or otherwise transferred to a new owner while still serving a six-month SNAP disqualification which began on July 6, 2020. Therefore, the SNAP regulation at 7 CFR § 278.6(f)(2) applies to this transfer of ownership. A review of the calculations shows that the amount of the TOCMP assessed by the Retailer Operation Division was correct and proper and the decision in this case is hereby **sustained**. In accordance with the Food and Nutrition Act of 2008, and the regulations thereunder, this penalty shall become effective thirty (30) days after receipt of this letter.

RIGHTS AND REMEDIES

Section 14 of the Food and Nutrition Act of 2008 (7 U.S.C. § 2023) and Title 7, Code of Federal Regulations, Part 279.7 (7 CFR § 279.7) addresses your right to a judicial review of this Final Agency Decision. Please note that 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 you reside or are 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. Please note that the judicial filing timeframe is specified in the Act, and this office cannot grant an extension.

Under the Freedom of Information Act, FNS is 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.

RONALD C. GWINN
Administrative Review Officer

February 19, 2021