

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

**Former Owners of Ocean Mart 1,**

**Appellant,**

**v.**

**Retailer Operations Division,**

**Respondent.**

**Case Number: C0216581**

**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 5 U.S.C. § 552 (b)(6) & (b)(7)(C) was properly assessed against 5 U.S.C. § 552 (b)(6) & (b)(7)(C), the former owners of Ocean Mart 1, for selling or transferring a store that has been permanently disqualified 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) in its administration of the SNAP, when it assessed a TOCMP in the amount of 5 U.S.C. § 552 (b)(6) & (b)(7)(C) against Ocean Mart 1 on April 23, 2019.

**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 documents that FNS permanently disqualified Ocean Mart 1, under the ownership of the Appellant, from the SNAP effective August 1, 2018 for trafficking in SNAP benefits. The permanent Disqualification Letter dated July 26, 2018 stated that if the Appellant/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). As noted in the

letter, the amount of the TOCMP is calculated based on the SNAP regulations at 7 CFR § 278.6(g).

On or about August 14, 2018, the Appellant sold Ocean Mart 1 to a new store owner as agreed upon by both the Seller and the Buyer as documented by a Bill of Sale and a Commercial Lease Agreement in the case record. When the new store owner was authorized to participate in the SNAP on March 28, 2019, the Retailer Operations Division discovered that Ocean Mart 1 had been sold or otherwise transferred by the former owners/Appellant. As a result, the Retailer Operations Division, in a letter dated April 23, 2019, notified the Appellant that it had assessed a TOCMP in the amount of 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in accordance with the SNAP regulations.

In a letter postmarked May 7, 2019, the Appellant requested an administrative review of the assessment of the TOCMP. FNS granted the Appellant's request for administrative review by letter dated May 14, 2019 and the assessment of the TOCMP was 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 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 STATUTE AND REGULATIONS**

The controlling statute in this matter is contained in the Food and Nutrition Act of 2008, as amended, 7 U.S.C. § 2021 and 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 . . . If the retail food store or wholesale food concern has been permanently disqualified, the civil money penalty shall be double the penalty for a ten year disqualification period.

7 CFR § 278.6(g) which provides the steps for calculating the TOCMP, 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) Multiple the average monthly redemption figure by 10 percent.
- (3) Multiply the [average monthly redemption times 10 percent] by the number of months for which the firm would have been disqualified . . .

Notwithstanding the above, there is an agency limit of \$11,000.00 per violation as the maximum TOCMP amount.

### **APPELLANT'S CONTENTIONS**

The following may represent only a brief summary of the Appellant's contentions presented in this matter. However, in reaching a decision, full attention and consideration have been given to all contentions presented, including any not fully recapitulated or specifically referenced herein.

In response to the Retailer Operations Division's determination via a request for administrative review, the Appellant argued that:

- The Appellant was sold by the former owners; however, they believe that the imposed civil money penalty is not deserved.
- The trafficking violation that occurred at the Appellant firm was due to a miscommunication between the confidential informant and the staff member as the employee had limited proficiency in the English language.
- When the confidential informant returned to the store seven days later, he/she was denied cash back which proves that trafficking was not a pattern at the firm.
- Due to the permanent SNAP disqualification, the owners were forced to transfer the business at a loss as SNAP sales provided the majority of the firm's sales.
- The owners cannot afford to pay the imposed civil money penalty as the ownership transfer of the store is still imposing financial debt upon them.
- The owners request that FNS impose a lesser civil money penalty.

In support of these contentions, the following documents were submitted to FNS:

- Appellant's request for administrative review of the permanent SNAP disqualification (dated August 8, 2018);
- Copy of Exhibits F and G (dated February 7, 2018 and February 14, 2018) of the Investigative Report;
- Cash register receipts dated October 17, 2017, October 18, 2017, January 3, 2018, January 24, 2018, January 26, 2018, February 7, 2018, and February 14, 2018;
- Employee training record;
- Appellant's response to the permanent SNAP disqualification Charge Letter; and
- Appellant's response (dated July 18, 2018) to the permanent SNAP disqualification Charge Letter.

## ANALYSIS AND FINDINGS

Ocean Mart 1, under the ownership of the Appellant, was permanently disqualified from the SNAP effective August 1, 2018. Documents in the case file show that the Appellant sold and/or transferred the permanently disqualified store to a new store owner on or about August 14, 2018, and that this was the basis of the Retailer Operations Division's assessment of an 5 U.S.C. § 552 (b)(6) & (b)(7)(C) TOCMP.

### Trafficking Charges

The Appellant contends that the firm was sold by the former owners; however, they believe that the imposed civil money penalty is not deserved. The trafficking violation that occurred at the Appellant firm was due to a miscommunication between the confidential informant and the staff member as the employee had limited proficiency in the English language. When the confidential informant returned to the store seven days later, he/she was denied cash back which proves that trafficking was not a pattern at the firm. In support of these contentions, the Appellant provided FNS with the above noted documents for review.

With regard to the Appellant's contentions, the record reflects that the Appellant was provided an opportunity to reply to the May 23, 2018 Charge Letter (which the Appellant received on May 25, 2018 per UPS confirmation) issued by the Section Chief of the Retailer Operations Division. The Appellant responded to the violations outlined in the Charge Letter via phone and written responses to the Retailer Operations Division of May 31, 2018, June 12, 2018, and July 25, 2018. The Appellant was also offered administrative review rights via the Retailer Operations Division's Determination Letter dated July 26, 2018 and received by the Appellant on August 1, 2018 (per UPS confirmation). The Appellant availed itself of the opportunity to request an administrative review by letter postmarked August 10, 2018. A request for administrative review was conducted and completed by FNS and the Retailer Operations Division's original determination to permanently disqualify Ocean Mart 1 from the SNAP was sustained by FNS. As such, the permanent disqualification imposed upon the firm constitutes the agency's final administrative determination and is not subject to further administrative review. Accordingly, as the sanction is beyond the scope of this review, no further decision is rendered regarding this contention.

### Financial Hardship

The Appellant contends that due to the permanent SNAP disqualification, the owners were forced to transfer the business at a loss as SNAP sales provided the majority of the firm's sales. In addition, the owners cannot afford to pay the imposed civil money penalty as the ownership transfer of the store is still imposing financial debt upon them.

While FNS is sympathetic to the store owners' circumstances, 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 the sale of a business. There is clear indication in the Retailer Operations Division case file that the Appellant, in fact,

sold the former business while it was disqualified. As such, it has been determined that there is enough evidence to support the Retailer Operations Division's determination that this does constitute a sale of a business making Ocean Mart 1 subject to the TOCMP as outlined in the Federal regulations at 7 CFR §278.6(f)(2).

### **Reduction of TOCMP Amount**

The owners request that FNS impose a lesser civil money penalty. 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.

As mentioned above, the formula for the computation for the TOCMP is specific per 7 CFR §278.6(g) and does not allow for any reductions. However, the regulations do provide that an **installment plan be allowed** for paying the TOCMP over the period of disqualification. The regulations, 7 CFR §278.6(h), state the following:

A firm has 15 days from the date the FNS Retailer Operations Division notifies the firm in writing in which to pay the civil money penalty or to notify the Retailer Operations Division in writing of its intent to **pay in installments** as specified by the Retailer Operations Division ... The civil money penalty must be paid in full by the end of the period for which the firm would have been disqualified (emphasis added). FNS shall:

- (1) Disqualify the firm for the period determined to be appropriate under paragraph (e) of this section if the firm refuses to pay any of the civil money penalty;
- (2) Disqualify the firm for a period corresponding to the unpaid part of the civil money penalty if the firm does not pay the civil money penalty in full or in installments as specified by the FNS Retailer Operations Division ...

The Retailer Operations Division correctly determined that, using the methodology described in 7 CFR § 278.6(g), the initial calculated amount of the TOCMP was 5 U.S.C. § 552 (b)(6) & (b)(7)(C). However, the initial calculated TOCMP of 5 U.S.C. § 552 (b)(6) & (b)(7)(C) is above the agency limit, which is \$11,000.00 per violation. The May 23, 2018 Charge Letter identified 5 U.S.C. § 552 (b)(6) & (b)(7)(C) charged incidence of SNAP violations (i.e., 5 U.S.C. § 552 (b)(6) & (b)(7)(C) trafficking violation). Therefore, the TOCMP was correctly assessed at 5 U.S.C. § 552 (b)(6) & (b)(7)(C) which is the agency limit per violation multiplied by the number of trafficking violations (\$11,000.00 x 5 U.S.C. § 552 (b)(6) & (b)(7)(C)).

The FNS Financial Management Accounting Division can be contacted at 1-703-605-0483 to discuss payment options or other related topics.

## **Summary**

The regulations at 7 CFR § 278.6(f) 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.

## **CONCLUSION**

A review of the evidence in this case indicates by a preponderance of the evidence that Ocean Mart 1, formerly owned by the Appellant, was sold on or about August 14, 2018 after it had been permanently disqualified effective August 1, 2018. Therefore, the SNAP regulations 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 Operations 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 Regulations, Part 279.7 (7 CFR § 279.7) addresses your right to a judicial review of this determination. 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 the Appellant resides 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.

Under the Freedom of Information Act (FOIA), 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.

LORIE L. CONNEEN  
ADMINISTRATIVE REVIEW OFFICER

July 1, 2019