

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

**Ocoena Deli Grocery Corp,**

**Appellant,**

**v.**

**Case Number: C0214395**

**Retailer Operations Division,**

**Respondent.**

**FINAL AGENCY DECISION**

The U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS) finds that there is sufficient evidence to support the determination by the Retailer Operations Division to levy a Transfer of Ownership Civil Money Penalty of \$22,000 against the former ownership of Ocoena Deli Grocery Corp. (“Appellant”) for having sold a store during a period of disqualification from the Supplemental Nutrition Assistance Program (SNAP).

**ISSUE**

The purpose of this review is to determine whether the Retailer Operations Division took appropriate action, consistent with Title 7 of the Code of Federal Regulations (CFR) § 278.6(f)(2), when it levied a Transfer of Ownership Civil Money Penalty (TOCMP) against Appellant on February 7, 2019.

**AUTHORITY**

According to 7 U.S.C. § 2023 and its implementing regulations at 7 CFR § 279.1, “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**

In a letter received by the former owner on April 27, 2017, Appellant was notified that it was permanently disqualified as a SNAP-authorized retailer. A purchase agreement dated May 15, 2017 established Appellant sold Ocoena Deli Grocery Corp. In the Retailer Operations Division’s letter dated February 7, 2019, Appellant was assessed a lump sum Transfer of

Ownership Civil Money Penalty (TOCMP) of \$22,000 in accordance with 7 CFR § 278.6(f)(2) for the sale or transfer of ownership of Ocoena Deli Grocery Corp. during a period of disqualification.

On February 20, 2019, Appellant appealed the Retailer Operations Division’s assessment and requested an administrative review of this action. The appeal was granted and implementation of the sanction has been on hold pending completion of this review.

### **STANDARD OF REVIEW**

In an appeal of an adverse action, Appellant bears the burden of proving by a preponderance of evidence that the administrative action should be reversed. That means Appellant has the burden of providing relevant evidence that a reasonable mind, considering the record as a whole, would accept as sufficient to support a conclusion that the argument asserted is more likely to be true than untrue.

### **CONTROLLING LAW**

The controlling law in this matter is contained in the Food and Nutrition Act of 2008, as amended (7 U.S.C. § 2021), and implemented through regulation under Title 7 CFR Part 278. In particular, 7 CFR § 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 . . . .

### **APPELLANT’S CONTENTIONS**

Appellant’s responses regarding this matter are essentially as follows:

- Appellant was trying to sell the firm prior to the permanent disqualification. Appellant had a “For Sale” sign posted for quite a while due to staffing and health issues. Appellant provided three pages of its contract of sale.
- Appellant requests a second reconsideration of the permanent disqualification. Permanent disqualification will pose a hardship to the former owner.
- Appellant requests the penalty be waived or reduced.

These explanations may represent only a brief summary of Appellant's contentions. However, in reaching a decision, full consideration has been given to all contentions presented, including any others that have not been specifically listed here.

## **ANALYSIS AND FINDINGS**

The former owner requests a second reconsideration of the permanent disqualification and states permanent disqualification will pose a hardship to the former owner. This appears to be an attempt to demonstrate that the earlier permanent disqualification imposed on the firm may have been improper. In this regard, no findings or conclusions on the merits of the specific arguments presented will be made. Appellant was permanently disqualified from participation in SNAP based on trafficking violations in a previous determination letter. Those matters dealing with the firm's permanent disqualification are not subject to this particular administrative review process but are included in other review processes of which Appellant was made aware.

The matter of the permanent disqualification imposed cannot properly be re-addressed in this context. The issue in this review is solely whether the Retailer Operations Division took appropriate action, consistent with 7 CFR § 278.6(f)(2) of the SNAP regulations, when it assessed a \$22,000 Transfer of Ownership Civil Money Penalty against Appellant.

### **Appellant subject to TOCMP**

The former owner argued that he was trying to sell the firm prior to the permanent disqualification and requests the penalty be waived or reduced. Regarding the assessment of a \$22,000 civil money penalty, 7 CFR § 278.6(f)(2) is quite specific in its directive that:

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 . . .

The civil money penalty is calculated strictly on the basis of the SNAP redemption volume of the store over the 12 months prior to the firm's notification of the violations that led to the store's disqualification. That the former owner was attempting to sell the firm prior permanent disqualification is not a basis for waiving or reducing the penalty.

### **Basis of Amount of TOCMP**

Appellant requests the penalty be waived or reduced. The calculation of the amount of a CMP is based on regulations that delineate the exact formula to be used when calculating a CMP. These regulations at 7 CFR § 278.6(g) state, in relevant part:

FNS shall determine the amount of the civil money penalty as follows:

- (1) Determine the firm's average monthly redemptions of coupons 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 under paragraph (e) of this section. The civil money penalty may not exceed an amount specified in §3.91(b)(3)(i) of this title for each violation.

#### TOCMP Calculation

#### 5 U.S.C. § 552 (b)(6) & (b)(7)(C)

As stated above, the formula for the calculating the CMP is specific per 7 CFR § 278.6(g) and does not allow for any reductions. However, the regulations do provide the option of an installment plan for paying the CMP over the period of disqualification. The regulations at 7 CFR § 278.6(h), state the following:

A firm has 15 days from the date the FNS regional office notifies the firm in writing in which to pay the civil money penalty or to notify the regional office in writing of its intent to pay in installments as specified by the regional office. The civil money penalty must be paid in full by the end of the period for which the firm would have been disqualified.

Appellant can contact Financial Management at 703-305-2830 to discuss payment of this penalty in installment payments or online in one lump sum.

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 calculated civil money penalty for transferring ownership of Appellant did exceed the agency limit, which is \$11,000 per violation. Each of the two violations reported, involving patterns of SNAP transactions indicative of the exchange of SNAP benefits for cash (trafficking), is considered a single violation. Therefore, the transfer of ownership civil money penalty warranted in this matter has been assessed at \$22,000, the agency limit.

#### Summary

Based on a review of the evidence, Ocoena Deli Grocery Corp. was, indeed, sold following its disqualification from SNAP on April 27, 2017. Therefore, 7 CFR § 278.6(f)(2) of the SNAP regulations is applicable in this case as it pertains to a civil money penalty for the sale or transfer of a disqualified firm.

#### CONCLUSION

Based on the discussion above, the determination by the Retailer Operations Division to levy a Transfer of Ownership Civil Money Penalty of \$22,000 against Appellant for selling Ocoena Deli Grocery Corp. during a period of disqualification from SNAP is sustained.

### **RIGHTS AND REMEDIES**

Applicable rights to a judicial review of this decision are set forth in 7 U.S.C. § 2023 and 7 CFR § 279.7. If Appellant desires a judicial review, the complaint must be filed in the U.S. District Court for the district in which Appellant's owner resides, is engaged in business, or in any court of record of the State having competent jurisdiction. This complaint, naming the United States as the defendant, 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.

RICH PROULX  
Administrative Review Officer

April 8, 2019