

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

**Former Owners of Paulino Mini Market
LLC,**

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0207658

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 \$33,000.00 was properly assessed against you, the former owners of Paulino Mini Market LLC (hereinafter “Paulino Market”), 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 \$33,000.00 against the Appellant as the former owner of Paulino Market.

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 Paulino Market, under the ownership of the Appellant, from the SNAP effective June 14, 2017 for trafficking in SNAP benefits. The permanent Disqualification Letter dated June 13, 2017 stated that if the Appellant/owner 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 February 23, 2018, the Appellant sold Paulino Market to a new store owner for 5 U.S.C. § 552 (b)(6) & (b)(7)(C) including the equipment, inventory, etc. and agreed upon by both the Seller and the Buyer as documented by a Warranty Bill of Sale, Closing Statement, a Secured Promissory Note, and a Lease Agreement in the case record. The new owner made a deposit payment for the purchase via bank certified checks to the former store owners/Appellant and both the new store owner and the Appellant signed a Secured Promissory Note stating that the new store owner agreed to pay the remaining purchase amount for the entire purchase amount to the former store owners/Appellant by monthly installments commencing on April 1, 2018 through September 1, 2019. When the new store owner was authorized to participate in the SNAP on March 30, 2018, the Retailer Operations Division discovered that Paulino Market had been sold or otherwise transferred by the former owners/Appellant. As a result, the Retailer Operations Division, in a letter dated April 3, 2018, notified the Appellant that it had assessed a TOCMP in the amount of \$33,000.00 in accordance with the SNAP regulations.

In a letter postmarked April 12, 2018, the Appellant requested an administrative review of the assessment of the TOCMP. FNS granted the Appellant's request for administrative review by letter dated April 26, 2018 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 postmarked April 12, 2018, and in a subsequent letter postmarked May 19, 2018, the former owners of Paulino Market stated that:

- The trafficking of SNAP benefits did not take place at Paulino Market. Most of the store's customers live close by and it was very convenient for them to buy products more than one time per day. The unusual number of transactions that ended in 9 were the result of most of Paulino Market's merchandise having prices that ended in 9. For example, \$0.89, \$0.99, \$1.99, \$2.99, and \$3.99. Also, the store is located in a low income neighborhood and many customers bought large quantities of the same product. For example, \$0.25 cakes or small candies and mints that cost \$0.05. Many times these products were purchased together with a can of soda. This is the reason for the unusual number of transactions that ended in 5.
- The Appellant did not make a profit when selling Paulino Market and only broke even. In addition, the Appellant was forced to sell the store quickly due to medical issues.
- The Appellant cannot afford to pay a \$33,000.00 TOCMP.
- The Appellant requests that FNS reduce the amount of the imposed TOCMP.

In support of the Appellant's contentions, the following documents were submitted to FNS:

- A letter dated February 5, 2017 from a physician at the New York Presbyterian/Lawrence Hospital stating that 5 U.S.C. § 552 (b)(6) & (b)(7)(C) had rotator cuff surgery on her right shoulder with subsequent vomiting; and
- A Hospitalization Summary (After Visit Summary) from Greenwich Hospital stating that 5 U.S.C. § 552 (b)(6) & (b)(7)(C) had a tonsillectomy and was discharged on May 4, 2018.

ANALYSIS AND FINDINGS

Paulino Market, under the ownership of the Appellant, was permanently disqualified from the SNAP effective June 14, 2017. 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 February 23, 2018, and that this was the basis of the Retailer Operations Division's assessment of a \$33,000.00 TOCMP.

Trafficking Charges

The Appellant contends that the trafficking of SNAP benefits did not take place at Paulino Market. Most of the store's customers live close by and it was very convenient for them to buy products more than one time per day. The unusual number of transactions that ended in 9 were the result of most of Paulino Market's merchandise having prices that ended in 9; for example, \$0.89, \$0.99, \$1.99, \$2.99, and \$3.99. Also, the store is located in a low income neighborhood and many customers bought large quantities of the same product. For example, \$0.25 cakes or small candies and mints that cost \$0.05. Many times these products were purchased together with a can of soda. This is the reason for the unusual number of transactions that ended in 5.

With regard to the Appellant's contention, the record reflects that the Appellant was provided an opportunity to reply to the May 18, 2017 Charge Letter (which the Appellant received on May 19, 2017 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 a phone call and a written letter to the Retailer Operations Division dated May 22, 2017 and May 31, 2017. The Appellant was also offered administrative review rights via the Retailer Operations Division's Determination Letter dated June 13, 2017 and received by the Appellant on June 14, 2017 (per UPS confirmation). The Appellant did not avail itself of the opportunity to request an administrative review and the Retailer Operations Division's original determination to permanently disqualify Paulino Market 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.

Appellant Forced to Sell Store

The Appellant contends that it did not make a profit when selling Paulino Market and only broke even. In addition, the Appellant was forced to sell the store quickly due to medical issues. In support of this contention, the Appellant provided the Administrative Review Officer with a copy of a letter dated February 5, 2017 from a physician at the New York Presbyterian/Lawrence

Hospital stating that 5 U.S.C. § 552 (b)(6) & (b)(7)(C) had rotator cuff surgery on her right shoulder with subsequent vomiting and a Hospitalization Summary (After Visit Summary) from Greenwich Hospital stating that 5 U.S.C. § 552 (b)(6) & (b)(7)(C) had a tonsillectomy and was discharged on May 4, 2018.

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 Paulino Market subject to the TOCMP as outlined in the Federal regulations at 7 CFR §278.6(f)(2).

Appellant Not Financially Stable

The Appellant contends that it cannot afford to pay a \$33,000.00 TOCMP. While FNS is sympathetic to the former owners' situation, the SNAP regulations do not allow for such accommodation when assessing or determining the amount of the TOCMP for this type of action. As such, the Administrative Review Officer has no authority to reduce or eliminate the TOCMP based on the former owners' personal or financial situation.

Request to Reduce Imposed TOCMP

The Appellant requests that FNS reduce the amount of the imposed TOCMP. 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 FNS Financial Management Accounting Division can be contacted at 1-703-605-0483 to discuss payment options or other related topics.

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 \$324,240.00. However, the initial calculated TOCMP of \$324,240.00 is above the agency limit, which is \$11,000.00 per violation. The May 18, 2017 Charge Letter identified three (3) patterns of trafficking based on EBT redemption data. Therefore, the TOCMP was correctly assessed at \$33,000.00 which is the agency limit per violation multiplied by the number of trafficking patterns (\$11,000.00 x 3 trafficking patterns).

Summary

The regulations at 7 CFR § 278.6(f) require FNS to assess a TOCMP against the former owners 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 Paulino Mini Market LLC, formerly owned by the Appellant, was sold on or about February 23, 2018 after it had been permanently disqualified effective June 14, 2017. 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 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 12, 2018