

**U.S. Department of Agriculture
Food and Nutrition Service
Administrative Review
Alexandria, VA 22302**

Pleasant Grocery Store Inc.,)	
)	
Appellant,)	
)	
v.)	Case Number: C0188657
)	
Retailer Operations Division,)	
)	
Respondent.)	
<hr style="width:45%; margin-left:0;"/>		

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 the decision to impose a Transfer of Ownership Civil Money Penalty (TOCMP) in the amount of \$22,000.000 against Christiam Euripides Rivera, the former owner of Pleasant Grocery Store Inc. (hereinafter “Pleasant Grocery”) was properly assessed by the Retailer Operations Division (hereinafter “ROD”).

ISSUE

The issue accepted for review is whether ROD took appropriate action, consistent with 7 CFR § 278.6(f)(2) and 7 CFR § 278.6(g), in its administration of the Supplemental Nutrition Assistance Program (SNAP) when it assessed a TOCMP against Pleasant Grocery on March 17, 2016 for the amount of \$22,000.00.

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 material in the administrative file indicates that Pleasant Grocery was initially notified of the decision to permanently¹ disqualify the store in a letter dated July 22, 2015 from the Retailer Operations Division and received by the firm on July 23, 2015. From that time forward, Pleasant Grocery was subject to the provisions of 7 CFR § 278.6(f)(2). Pleasant Grocery was advised on

¹The permanent disqualification was imposed by the Operations Division for trafficking.

page 2 of this letter of disqualification that the owner would be subject to a civil money penalty should he sell or otherwise transfer the retail food business during the period of disqualification.

Pleasant Grocery did not request an administrative review based on the July 22, 2015 action. The Retailer Operations Division's original determination to permanently disqualify Pleasant Grocery from the SNAP was, therefore, sustained by the Retailer Operations Division. The disqualification was effective on July 23, 2015.

The record reflects that upon Pleasant Grocery being permanently disqualified from participation in the SNAP, the firm was subsequently sold, as documented by the following documents that were located in the Retailer Operations Division's case file:

- A [notarized] Bill of Sale, effective July 29, 2015 by the Seller: Christiam Rivera (Owner of Pleasant Grocery Store Inc.) to Transferor: 7 U.S.C. 2018 (b)(6) & (b)(7)(c) (owner of Pleasant Market and Deli). Location Address: 420 Pleasant Street, Worcester, MA 01609;
- A letter dated February 3, 2016 from 7 U.S.C. 2018 (b)(6) & (b)(7)(c), owner/landlord stating that he has rented the commercial space located at 420 Pleasant Street, Worcester, MA 01609 to 7 U.S.C. 2018 (b)(6) & (b)(7)(c), dba Pleasant Market & Deli, previously used by Christiam E. Rivera (Pleasant Grocery Store). The previous lease was canceled and a new lease was made under the name of the new owner;
- Lease Agreement, dated August 1, 2015 between 7 U.S.C. 2018 (b)(6) & (b)(7)(c) of Lunenburg, Massachusetts, "Landlord", and Pleasant Market & Deli located at 420 Pleasant Street, Worcester, MA, "Tenant". The commercial store space located at 420 Pleasant Street, Worcester, MA along with all fixtures of said premises at the commencement of this Lease Agreement. Lease commencing on August 1, 2015 and terminating on July 31, 2020. Signed by 7 U.S.C. 2018 (b)(6) & (b)(7)(c), Landlord, and 7 U.S.C. 2018 (b)(6) & (b)(7)(c), Pleasant Market & Deli Tenant on August 1, 2015;
- A [notarized] Affidavit, signed by 7 U.S.C. 2018 (b)(6) & (b)(7)(c) on November 17, 2015, stating "NO" to the following questions:
 1. One or more owners or managers of this firm has been involved in prior SNAP or WIC violations;
 2. One or more owners or managers of this firm has had ownership in or was a manager of a business that is or has been disqualified from the SNAP or WIC;
 3. Persons who were owners, managers, or employees of any firm that is or has been disqualified from the SNAP or WIC are working in this store (in any capacity);
 4. Persons who were owners or managers of any store that has been permanently disqualified from the SNAP or WIC are financially involved or have other operational interest in this store;
 5. Persons who committed an intentional program violation as a SNAP or WIC recipient are working in this store (in any capacity); and
 6. One or more owners or managers of this firm are related by birth or marriage to an owner or manager of a firm that is or has been disqualified from the SNAP or WIC.
- Department of the Treasury, Internal Revenue Service Employer Identification Number assigned for Pleasant Market & Deli owned by 7 U.S.C. 2018 (b)(6) & (b)(7)(c). Date of Notice:

7/29/2015;

- A letter dated January 27, 2016 from Commerce Bank in Worcester, MA stating that Pleasant Market & Deli has an active account with the subject bank and 7 U.S.C. 2018 (b)(6) & (b)(7)(c) is the authorized signer for the store's account;
- A Business Certificate from the City of Worcester, MA, dated November 27, 2015 which declares that a business is conducted under the title of Pleasant Market & Deli at the address 420 Pleasant Street and the sole proprietor is 7 U.S.C. 2018 (b)(6) & (b)(7)(c). The Certificate expires on 11/27/2019;
- Massachusetts Department of Revenue, Customer Service Bureau Sales and Use Tax Registration for 7 U.S.C. 2018 (b)(6) & (b)(7)(c), Pleasant Market & Deli. The vendor herein is registered to sell tangible personal property at retail or for resale. Issue Date: 9/1/2015;
- Massachusetts State Lottery Sales Agent License issued to Pleasant Market & Deli; Expires December 31, 2016; and
- Massachusetts Department of Revenue Cigarette Excise Unit, Retailer License for Sale of Cigarettes for 7 U.S.C. 2018 (b)(6) & (b)(7)(c), Pleasant Market & Deli. Date of Issue: 9/29/2015.

Since the business was sold subsequent to the receipt of the July 22, 2015 letter of disqualification, the Retailer Operations Division informed Pleasant Grocery, in a letter dated March 17, 2016, that a TOCMP for \$22,000.00 was being assessed against Christiam Euripides Rivera as the former owner of Pleasant Grocery. This action was done in accordance with the SNAP regulations at 7 CFR § 278.6(f)(2), (3) and (4).

In a letter postmarked March 30, 2016, Pleasant Grocery, through counsel, then submitted a request for this administrative review. The request for this review was granted. The basis for the firm's review is discussed in the Analysis and Findings section below.

STANDARD OF REVIEW

In appeals of adverse actions, an Appellant (i.e., Pleasant Grocery) bears the burden of proving by a preponderance of the evidence, that the administrative actions should be reversed. That means an Appellant (i.e., Pleasant Grocery) bears 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

The controlling statute in this matter is contained in the Food and Nutrition Act of 2008, as amended, 7 U.S.C. 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 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 . . .".

The following steps, based on the regulations at 7 CFR § 278.6(g), are used to calculate the amount of this TOCMP:

Step 1: Determine the cumulative redemptions for the 12-month period immediately preceding the issuance of the RETAILER OPERATIONS DIVISION 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 answer is the amount of the TOCMP.

7 USC 2018 (b)(7)(e) and Agency and Departmental regulations at 7 CFR § 278.6(g) and 3.91(b)(3)(i), established an \$11,000.00 per violation limit on the maximum amount for the TOCMP. For Pleasant Grocery, this results in a \$22,000 limit (\$11,000.00 times 2) that can be assessed in a TOCMP against the firm. This is based on that fact that there were two separate trafficking violations noted in the original Retailer Operations Division letter of charges, dated July 8, 2015.

APPELLANT'S CONTENTIONS

What follows may represent only a brief summary of the 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 and in the request for administrative review, the former store owner of Pleasant Grocery, through counsel, contends that:

- The violative SNAP transactions that occurred at Pleasant Grocery were committed by store employees without the Appellant's involvement, knowledge, or approval;
- The Appellant was not aware of his opportunity to appeal and request a civil money penalty in lieu of a permanent SNAP disqualification of Pleasant Grocery;
- The Appellant would have most likely been eligible for a CMP in lieu of a permanent SNAP disqualification as he had an effective training program in place prior to the occurrence of the violative SNAP transactions;
- The Appellant did not realize that he was required to pay a TOCMP if he sold Pleasant Grocery after the store was permanently disqualified from the SNAP for trafficking;
- The Appellant does not have the available funds with which to pay the \$22,000.00 civil money penalty assessment as he sold Pleasant Grocery for less than market value; and
- The Appellant is requesting that FNS reduce the amount of the TOCMP imposed and also allow him to pay the TOCMP in an installment plan.

The Appellant contends that the violative SNAP transactions that occurred at Pleasant Grocery were committed by store employees without his involvement, knowledge, or approval. This contention cannot be accepted as a valid basis for dismissing any of the charges, or for mitigating the impact of those charges. As owner of the store, the Appellant is liable for all violative transactions that occur at Pleasant Grocery. Regardless of whom the ownership of a store may utilize to handle store business (i.e., regardless of whether a store owner, store manager, store clerk, or family member was involved in the violative transactions), ownership is accountable for the proper handling of SNAP benefit transactions. Prior to becoming authorized to participate in the SNAP on April 7, 2014, the Appellant completed and submitted a SNAP Application for Retail Stores. The SNAP Application contained a section indicating that the person signing the Application understood and agreed to ensure that store employees follow the SNAP rules and regulations and that the person accepts responsibility for any SNAP violations that may occur at the store that were committed by any of the store's employees---paid, unpaid, new, temporary, full-time, part-time, etc. The SNAP Application also included a section that contained a statement which acknowledged that the person signing the Application was aware that violations of program rules could result in fines, legal sanctions, withdrawal, or disqualification of the store. In addition, the Appellant was provided with program training and reference materials which reinforced the statements included in the SNAP Application.

The regulations establish that an authorized food store may be disqualified from participating in the program when the store fails to comply with the Act or regulations because of the wrongful conduct of an owner, manager, or someone acting on their behalf. Trafficking is defined in 7 CFR § 271.2 of the SNAP regulations which states that trafficking means the “buying, selling, stealing, or otherwise effecting an exchange of SNAP benefits issued and accessed via Electronic Benefit Transfer (EBT) cards, card numbers and personal identification numbers (PINs), or by manual voucher and signature, for cash or consideration other than eligible food, either directly, indirectly, in complicity or collusion with others, or acting alone...”. The Food and Nutrition Act of 2008, at § 2021, does not allow for discretion in determining sanctions for trafficking and is specific in its requirement that “Disqualification ... shall be permanent upon ... the first occasion of a disqualification based on ... trafficking ... by a retail food store”. In keeping with this legislative mandate, 7 CFR § 278.6(e)(1)(i) of the SNAP regulations states that FNS shall disqualify a firm permanently if personnel of the firm have trafficked. The Appellant's implied contention that he was not involved in the violative SNAP transactions and that he did not know or approve of any violations of program regulations at the store cannot be accepted as a valid basis for diminishing the penalty. To allow store ownership to disclaim accountability for the acts of persons whom the ownership chooses to utilize to handle store business would render virtually meaningless the enforcement provisions of the Food and Nutrition Act and the enforcement efforts of the USDA.

The Appellant contends that he was not aware of his opportunity to appeal and request a civil money penalty in lieu of a permanent SNAP disqualification of Pleasant Grocery. The Appellant would have most likely been eligible for a CMP in lieu of a permanent SNAP disqualification as he had an effective training program in place prior to the occurrence of the trafficking violations. It is important to note that in the July 8, 2015 Charge Letter from FNS, the Appellant was informed that he was charged with trafficking as defined in Section 271.2 of the SNAP regulations and that the sanction for the trafficking violations noted in the RIB Investigation is

permanent disqualification. The Charge Letter also stated that the SNAP regulations also provide that, under certain conditions, FNS may impose a civil money penalty (CMP) of up to \$59,000.00 in lieu of permanent disqualification of a firm for trafficking. The SNAP regulations, Section 278.6(i), list the criteria that the Appellant must meet in order to be considered for a CMP. If the Appellant requests a CMP, he must meet each of the four criteria listed and provide the documentation as specified within 10 calendar days of the Appellant's receipt of the Charge Letter. The Appellant's request and all documentation must be postmarked by midnight of the 10th calendar day after he receives the Charge Letter in order to be considered timely. No extension of time can be granted for making a request for a CMP or for providing the required documentation. The Appellant was informed in the Determination Letter dated July 22, 2015, that FNS had considered his eligibility for a trafficking CMP according to the terms of Section 278.6(i) of the SNAP regulations. FNS determined that the Appellant was not eligible for a CMP in lieu of permanent SNAP disqualification because he failed to submit sufficient evidence to demonstrate that Pleasant Grocery had established and implemented an effective compliance policy and program to prevent violations of the SNAP. Therefore, Pleasant Grocery shall be permanently disqualified from the SNAP effective upon receipt of the Charge Letter. This is in accordance with Section 278.6(c) and 278.6(e)(1) of the SNAP regulations. Per the UPS delivery confirmation, the Charge Letter of July 8, 2015 was addressed to the Appellant at the mailing address provided on the Appellant's retailer application and was delivered thereto and signed for by an employee of the firm on July 9, 2015. In addition, per UPS delivery confirmation, the Determination Letter of July 22, 2015 was addressed to the Appellant at the mailing address provided on the Appellant's retailer application and was delivered thereto and signed for by the Appellant on July 23, 2015. As such, the Appellant's contention that he was not aware of his opportunity to appeal and request a CMP in lieu of a permanent SNAP disqualification is unsubstantiated.

The Appellant contends that he did not realize that he was required to pay a TOCMP if he sold Pleasant Grocery after the store was permanently disqualified from the SNAP for trafficking. As indicated above, the Charge Letter of July 8, 2015 was addressed to the Appellant at the mailing address provided on the Appellant's retailer application and was delivered thereto and signed for by an employee of the firm on July 9, 2015. In addition, the Determination Letter of July 22, 2015 was addressed to the Appellant at the mailing address provided on the Appellant's retailer application and was delivered thereto and signed for by the Appellant on July 23, 2015. In both the Charge Letter dated July 8, 2015 and in the Determination Letter dated July 22, 2015, the Appellant was informed by FNS that "In the event that you sell or transfer ownership of your store subsequent to your disqualification, you will be subject to and liable for a civil money penalty as provided by SNAP regulations Sections 278.6(f)(2), (3), and (4). The amount of this sale or transfer of ownership civil money penalty will be calculated based on SNAP regulations at Section 278.6(g)". Notice of the imposition of a TOCMP for the sale or transfer of a store is also contained in the regulations at 7 CFR § 278.6(f)(2). Therefore, the contention regarding being unaware of the assessment of the TOCMP if the store was sold does not provide a valid basis for mitigating or dismissing the TOCMP assessed by the Retailer Operations Division.

The Appellant contends that he does not have the available funds with which to pay the \$22,000.00 civil money penalty assessment as he sold Pleasant Grocery for less than market value. While FNS is sympathetic to the store owner's 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 his 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 Pleasant Grocery subject to the TOCMP as outlined in the Federal Regulations at 7 CFR § 278.6(f)(2).

The Appellant is requesting that FNS reduce the amount of the TOCMP imposed and also allow him to pay the TOCMP in an installment plan. However, 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 Retailer Repayment Team can be contacted at (703) 605-0483 to discuss payment options or other related topics.

As a matter of course in this review, the amount of the TOCMP was recalculated in accordance with the applicable FNS regulations to ensure that the amount assessed by the Retailer Operations Division is the appropriate amount. As indicated in Table 1 below, the amount of the TOCMP has been recalculated to be \$22,000.00 which is the same as the original amount that was assessed against Pleasant Grocery by the Retailer Operations Division in its March 17, 2016 letter. The formula for computing the TOCMP does not provide for discretion and is directly related to the amount of SNAP violations, redemptions and the length of time in the disqualification period. Therefore, this amount cannot be reduced.

7 USC 2018 (b)(7)(e)

In this case, the calculated TOCMP of 7 USC 2018 (b)(7)(e) exceeded the Agency applied violation limit, which is \$11,000.00 per violation. Two charged incidence of SNAP violations (i.e., two separate trafficking violations) are considered separate violations of the SNAP regulations at Section 278.6(g). Therefore, the TOCMP warranted in this matter has been assessed at \$22,000.00, the Agency limit by the number of violations (\$11,000.00 times 2 violations).

The above calculation conforms to the regulations at 7 CFR § 278.6(g) and 7 USC 2018 (b)(7)(e) and, accordingly, is affirmed as correct and appropriate. It is noted for the record that the Retailer

Operations Division has no latitude to calculate TOCMPs by any method other than that described at 7 CFR § 278.6(g). The constitutionality of the sanction has been discussed in the foregoing.

CONCLUSION

Based on the discussion above, the determination of the Retailer Operations Division to assess a TOCMP for \$22,000.00 against Pleasant Grocery Store Inc. is sustained.

RIGHTS AND REMEDIES

In accordance with the Food and Nutrition Act of 2008 and the regulations there under, this penalty shall become effective thirty (30) days after receipt of this letter. Your attention is called to Section 14 of the Food and Nutrition Act of 2008 (7 U.S.C. 2023) and to the regulations at 7 CFR § 279.7 with respect to the Appellant's 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), it may be necessary to release this document and related correspondence and records upon request. If USDA receives such a request, it will seek to protect, to the extent provided by law, personal information that if released, could constitute an unwarranted invasion of privacy.

LORIE L. CONNEEN
ADMINISTRATIVE REVIEW OFFICER

February 22, 2017
DATE