

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

Reynolds Mini Mart,

Appellant,

v.

Case Number: C0210563

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 \$33,000 against the former ownership of Reynolds Mini Mart (“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 August 6, 2018.

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 dated April 20, 2016, Appellant was notified that it was permanently disqualified as a SNAP-authorized retailer. A purchase agreement dated November 29, 2017 established Appellant sold Reynolds Mini Mart. In the Retailer Operations Division’s letter dated August 6, 2018, Appellant was assessed a lump sum Transfer of Ownership Civil Money Penalty

(TOCMP) of \$33,000 in accordance with 7 CFR § 278.6(f)(2) for the sale or transfer of ownership of Reynolds Mini Mart during a period of disqualification. Appellant stated this letter was sent to the former owner's brother, not the former owner.

On August 16, 2018, 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:

- Almost the entire amount of the sale price of the firm was paid to the Ohio Dept. of Taxation, with the remainder devoted to paying liens. Appellant cannot afford to pay the TOCMP.
- Appellant had no choice but to sell the firm to pay off debts.
- The TOCMP violates Appellant's Fifth Amendment due process rights.
- The TOCMP is arbitrary and unreasonable as it applies regardless of the reason for the sale of the business.
- The fine is punitive, without a public health, safety, moral or general welfare reasoning.

- Appellant was already permanently disqualified for trafficking, and should not receive a further penalty.

In support of its contentions, Appellant provided the following documentation:

- A notarized letter signed by the former owner;
- A seven-page asset purchase agreement; and,
- The three-page charge letter dated March 18, 2016.

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

Appellant subject to TOCMP

Appellant contends it was already permanently disqualified for trafficking, and should not receive a further penalty. Regarding the assessment of a \$33,000 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.

Evidence of Transfer of Firm

Appellant contends it had no choice but to sell the firm to pay off debts; almost the entire amount of the sale price of the firm was paid to the Ohio Dept. of Taxation, with the remainder devoted to paying liens. While Appellant may have made little or no profit from the transfer, the Asset Purchase Agreement indicates that this is still a legitimate business transfer subject to a TOCMP. Neither the Food and Nutrition Act of 2008 nor its implementing regulations allow for factoring in the reasons for the sale when determining whether a TOCMP is warranted. The aforementioned Asset Purchase Agreement and other documentation in the Retailer Operations Division file verify the business's transfer on November 29, 2017. This evidence supports Retailer Operations Division's determination that a transfer of a business occurred, making Appellant subject to the TOCMP as outlined in the regulations at 7 CFR § 278.6(f)(2).

No Undue Hardship to Appellant

Appellant contends that Appellant does not have the money to pay for the TOCMP. While the former owner's financial situation may be worthy of sympathy, the transfer of ownership civil money penalty cannot be reduced based on Appellant's personal circumstances.

Economic hardship is a likely consequence whenever a store is permanently disqualified from SNAP participation and is assessed a transfer of ownership civil money penalty in the amount levied in this case. However, there is no provision in the SNAP regulations for reducing an administrative penalty on the basis of possible economic hardship to the firm resulting from imposition of such penalty. To excuse Appellant from an assessed administrative penalty based on purported economic hardship to the firm would render the enforcement provisions of the Food and Nutrition Act of 2008 and the enforcement efforts of the USDA virtually meaningless.

Moreover, giving special consideration to the firm for economic hardship would forsake fairness and equity, not only to competing stores and other participating retailers who are complying fully with program regulations, and also to those retailers who have been disqualified from the program in the past for similar violations and also assessed civil money penalties. Therefore, Appellant's contention that it will incur economic hardship based on the assessment of an administrative penalty does not provide any valid basis for dismissing the charges or for mitigating the imposed penalty.

Constitutionality

Appellant contends that the regulations do not meet the requirements of the United States Constitution. Appellant also contends the Transfer of Ownership Civil Money Penalty provisions are punitive, arbitrary, and unreasonable. In reference to these contentions, no findings or conclusions are rendered. The administrative review process does not include an assessment of the constitutionality of the laws, regulations and policies under which the agency imposed adverse actions, but rather whether the agency actions undertaken were proper pursuant to those laws, regulations and policies and sustainable by a preponderance of evidence. As such, this office does not have the authority to assess whether the United States Congress, in its enactment of legislation, or the United States Department of Agriculture, in its promulgation of implementing regulations, have conformed to Constitutional mandates.

Summary

Based on a review of the evidence, Reynolds Mini Mart was, indeed, sold following its disqualification from SNAP on April 20, 2016. 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 \$33,000 against Appellant for selling Reynolds Mini Mart 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

November 5, 2018