

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

Rodriguez Groceries,

Appellant,

v.

Case Number: C0201568

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 a finding that a Transfer of Ownership Civil Money Penalty (TOCMP) in the amount of \$33,000.00 was properly levied by the Retailer Operations Division against the former owner of Rodriguez Groceries (hereinafter Appellant) for selling and/or transferring a store that had 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)-(4) and 7 CFR § 278.6(g), in its administration of the SNAP when it assessed a TOCMP in the amount of \$33,000.00 against Appellant by letter dated September 7, 2017.

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

The administrative record documents that the firm and ownership were permanently disqualified from participation as a SNAP retailer on December 1, 2016, for trafficking in SNAP benefits. The permanent disqualification letter dated November 30, 2016, stated that if ownership sold or transferred the firm subsequent to the disqualification, it would be subject to and liable for a TOCMP as provided by the SNAP regulations 7 CFR § 278.6(f)(2),(3), and (4). As noted in the letter, the amount of the TOCMP is calculated based on the SNAP regulations at 7 CFR § 278.6(g).

The case record documents that the former owner sold Rodriguez Groceries located at 200 West Wishart Street, Philadelphia, Pennsylvania to a new owner on January 2, 2017. These documents were provided to FNS when the new store owner applied to operate as an authorized SNAP retailer at this location. The Retailer Operations Division, in a letter dated September 7, 2017, informed the former owner that the USDA had assessed a TOCMP in the amount of \$33,000.00 in accordance with the SNAP regulations at 7 CFR § 278.6(f)(2),(3), and (4) for the sale or transfer of the firm during a period of disqualification.

By letter dated September 14, 2017, Appellant appealed the Retailer Operations Division assessment of the TOCMP and requested an administrative review of this action. The appeal was granted and implementation of the sanction has been held in abeyance pending completion of this review. No subsequent correspondence was received from Appellant.

STANDARD OF REVIEW

In appeals of adverse actions, Appellant bears the burden of proving by a preponderance of the evidence, that the administrative actions should be reversed. That means 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 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 Part 278.6(f)(2) establishes the authority upon which a TOCMP 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 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.”

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”

7 CFR §278.6(f)(3) reads, in part, “. . . the Food and Consumer Service may request the Attorney General institute a civil action to collect the penalty from the person or persons subject to the penalty in a district court of the United States. . . .”

7 CFR §278.6(f)(4) reads, in part, “A bona fide transferee of a retail food store shall not be required to pay a civil money penalty imposed on the firm prior to its transfer.”

The following steps, based on the regulations at 7 CFR § 278.6(g), are used to calculate the amount of a 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 result is the amount of the TOCMP. The civil money penalty may not exceed an amount specified in §3.91(b)(3)(i) of this title for each violation.

7 CFR § 278.6(g), 3.91(b)(3)(i) establishes an \$11,000.00 per violation limit as the maximum amount for a TOCMP. The Act, at Section 12, on the subject of transfer of ownership, supports the responsibility of ownership of the firm to the penalty as follows: Section 12 (5) Hearing – In the event any retail food store or wholesale food concern that has been disqualified under subsection (a) is sold or the ownership thereof is otherwise transferred to a purchaser or transferee, the person who sells or otherwise transfers 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. If the retailer food store has been disqualified permanently, the civil penalty

shall be double the penalty for a ten-year disqualification period, as calculated under regulations issued by the Secretary.

APPELLANT'S CONTENTIONS

In the request for administrative review, Appellant stated as its position in the matter the following:

- The owner did not know there was a penalty for selling his store after he was disqualified from SNAP;
- He is now 63 years old and ran the grocery store for 21 years. When he wasn't approved, he took it as a sign to retire and sell his store to someone who wanted to open a grocery store; and,
- As long as he has been here he has not caused any trouble and has not done anything illegal. He is requesting the fine be lowered as he does not have that kind of money. If it can be lowered, he can make a payment arrangement to pay it.

Appellant submitted no evidence or other rationales in support of these contentions.

The preceding may represent a summary of Appellant's contentions in this matter, however, in reaching a decision, full attention and consideration has been given to all contentions presented, including any not specifically recapitulated or specifically referenced herein.

ANALYSIS AND FINDINGS

The purpose of this proceeding is limited to determining whether the Retailer Operations Division's decision to assess a TOCMP against the Appellant was the appropriate course of action. The regulations at 7 CFR § 278.6(f) authorize FNS to assess a TOCMP against the owner(s) of a disqualified retail food store that has been sold or the ownership is otherwise transferred. The record shows that the SNAP permanent disqualification determination letter dated November 30, 2016, and received by store ownership on December 1, 2016, included notification to ownership 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 CMP as provided by SNAP regulations Sections 278.6(f)(2), (3), and (4). The amount of this sale or transfer CMP will be calculated based on SNAP regulations at 278.6(g)." Accordingly, Appellant received proper legal notice that a TOCMP could be imposed if the Appellant business was sold after the date of disqualification. The Retailer Operations Division determined that a legal sale of the Appellant business did occur on or about January 2, 2017, and this is supported by documents in the case record. Appellant was properly informed of the TOCMP by letter dated September 7, 2017. The sole issue in this review is whether the Retailer Operations

Division took appropriate action, consistent with 7 CFR § 278.6(f)(2) of the SNAP regulations, when it assessed a \$33,000.00 TOCMP against Appellant. Any contentions pertaining to the original disqualification action by the Retailer Operations Division are not subject to review. Appellant's contentions do not give any legal grounds for vacating or reducing the TOCMP. Appellant requests to reduce the \$33,000.00 penalty as he does not have that kind of money. If it can be lowered, he can make a payment arrangement to pay it.

As noted, there is clear indication in the record that the Appellant firm was in fact sold during its period of disqualification, which, in this case was a permanent disqualification. The fact that the retail food business at the stated address is now owned and operated by another entity and that there is a new owner at the same location indicates that this is a legitimate business transfer subject to a TOCMP under SNAP regulations. There is no indication in the record that the new owner was involved in any of the violative activity which formed the basis of the firm's previous disqualification, that the new owner is in any way related to the former owner or that the sale is illegitimate in any relevant respect. As such, there is sufficient evidence to support the Retailer Operations Division's determination that a TOCMP as outlined in SNAP regulations at 7 CFR § 278.6(f)(2) was correctly and appropriately imposed. Accordingly, the statute and Federal regulations afford no latitude to take any action (including failure to act) other than to impose the sanction at issue. Likewise, this Review Officer is afforded no latitude to reverse or modify a correct and appropriate administrative sanction. Additionally, the record reflects that the new owner is authorized as a SNAP retailer and the business is accepting SNAP sales. The record also reflects that the former owner received sufficient funds from the sale of the business to cover the majority of the TOCMP.

Regarding the assessment of the TOCMP, the provisions at 7 CFR § 278.6(f)(2) are 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 TOCMP is calculated on the basis of the SNAP redemption volume of the store during the 12 months prior to the firm being charged with the violations that led to the store's disqualification. A charge letter was issued to Appellant on October 6, 2016. The calculation of the TOCMP amount is as follows:

5 U.S.C. § 552 (b)(7)(E)

In this case, the calculated TOCMP exceeds the sanction limit, which is \$11,000.00 per violation. There were three EBT trafficking patterns identified in the October 6, 2016, charge letter and this counts as three violations according to SNAP regulations at 7 CFR § 278.6(e)(8). SNAP regulations state the TOCMP penalty shall be the lesser of the calculated amount or the current maximum limit which is

\$11,000 per violation. Therefore, the TOCMP warranted in this matter was correctly assessed at \$33,000.00 (three violations times \$11,000.00). SNAP regulations at 7 CFR § 278.6(g) outline how to calculate the amount of the TOCMP, as described above, and do not provide any authority to waive or reduce the assessed TOCMP. As such, there is no discretion in the calculation of the TOCMP amount. Modifications to the TOCMP may occur only when there is an error in calculation, or the TOCMP exceeds the statutory limit.

CONCLUSION

A review of the evidence in this case indicates that the Appellant business was in fact sold and this is not contested by the former owner. Therefore, 7 CFR § 278.6(f)(2) of the SNAP regulations is applicable, and the assessment of a TOCMP is correct. A review of the calculations indicates that the amount of the TOCMP assessed by Retailer Operations is also correct. SNAP regulations are explicit in the requirement for a TOCMP in the event a disqualified business is subsequently sold or transferred and there is no Agency discretion in waiving or reducing the TOCMP amount. Thus, the action by the Retailer Operations Division is sustained. In accordance with the Food and Nutrition Act of 2008, as amended, and the regulations there under, this penalty shall become effective thirty (30) days after receipt of this letter. Appellant may contact the USDA-FNS Financial Management Accounting Division at (703) 605-0483 to discuss a monthly payment plan.

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 a judicial review is desired, 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.

ROBERT T. DEEGAN
Administrative Review Officer

December 11, 2017