

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

5 U.S.C. § 552 (b)(6) & (b)(7)(C)

Safi Grocery,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0204051

FINAL AGENCY DECISION

It is the decision of the U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS) that a Transfer of Ownership Civil Money Penalty (TOCMP) in the amount of **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** was properly imposed by the Retailer Operations Division against **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**, former owner of Safi Grocery (hereinafter “Appellant”), for selling or transferring ownership of a store that was permanently disqualified from the Supplemental Nutrition Assistance Program (SNAP).

ISSUE

The issue accepted for review is whether or not the Retailer Operations Division took appropriate action, consistent with 7 CFR § 278.6(f)(2) and 7 CFR § 278.6(g) in its administration of SNAP when it assessed a TOCMP in the amount of **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** against the Appellant.

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

In a letter dated June 18, 2015, FNS’s Retailer Operations Division charged Safi Grocery, under the ownership of **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**, with **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** of trafficking in SNAP benefits. The record shows that a determination letter was sent to the firm on August 11, 2015. As a result of these actions, Safi Grocery was permanently disqualified from SNAP effective August 12, 2015. The Appellant, through counsel, appealed the sanction

determination by requesting an administrative review, but the penalty was upheld in a final agency decision dated September 24, 2015.

The August 11, 2015, determination letter stated that in the event that the firm's ownership sold or transferred ownership of the store subsequent to its disqualification, it would be subject to and liable for a transfer of ownership civil money penalty as provided by SNAP regulations at 7 CFR § 278.6(f)(2), (3) and (4). The letter noted that the amount of the TOCMP would be calculated based on regulations at 7 CFR § 278.6(g).

Documentation in the case record shows that on October 25, 2017, a SNAP application was submitted to FNS for a new store at the same location where Safi Grocery had previously operated. According to the application, this new store, 5 U.S.C. § 552 (b)(6) & (b)(7)(C), was owned by 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

Upon discovering that a new application had been submitted at a location where SNAP violations had previously occurred, the Retailer Operations Division requested additional documentation from the new store owner to verify that the disqualified owner was not affiliated with the new store in any way and to ascertain whether or not the transfer of ownership from the Appellant to 5 U.S.C. § 552 (b)(6) & (b)(7)(C) was bona fide. In response to this request, 5 U.S.C. § 552 (b)(6) & (b)(7)(C) submitted a number of documents, including a Bill of Sale, a Business Purchase Agreement, a Promissory Note and Sales Agreement, a Lease Agreement, and receipts of payments, verifying that a bona fide change of ownership had occurred.

In a letter dated December 12, 2017, the Retailer Operations Division informed the Appellant that because its store was sold or transferred during its disqualification period, a TOCMP in the amount of 5 U.S.C. § 552 (b)(6) & (b)(7)(C) was being assessed against the former owner of Safi Grocery in accordance with SNAP regulations at 7 CFR § 278.6(f)(2), (3) and (4), and § 278.6(g).

In a letter postmarked December 21, 2017, the Appellant appealed the Retailer Operations Division's assessment of the TOCMP by requesting an administrative review. The request was granted and implementation of the TOCMP has been held in abeyance pending completion of this review.

STANDARD OF REVIEW

In an appeal of adverse action, such as the imposition of a civil money penalty, an appellant bears the burden of proving by a preponderance of the evidence that the administrative action should be reversed. This means that an 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 found in the Food & Nutrition Act of 2008, as amended (7 U.S.C. § 2021), and promulgated through regulation under Title 7 CFR Part 278. In particular,

7 CFR § 278.6(f)(2) and (g) establish the authority upon which a TOCMP may be imposed against a retail food store or wholesale food concern.

7 U.S.C. § 2021(e)(1) states:

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. If the retail food store or wholesale food concern 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. The disqualification period imposed under subsection (b) shall continue in effect as to the person or persons who sell or otherwise transfer ownership of the retail food store or wholesale food concern notwithstanding the imposition of a civil penalty under this subsection.

7 CFR § 278.6(f)(2) reads, in part,

In the event any retail food store or wholesale food concern 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 in an amount to reflect that portion of the disqualification period that has not expired, to be calculated using the method found at § 278.6(g). If the retail food store...has been permanently disqualified, the civil money penalty shall be double the penalty for a ten year disqualification period...

7 CFR § 278.6(g) outlines the steps for calculating the TOCMP amount, in relevant part:

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.

Multiply the average monthly redemption figure by 10 percent.

Multiply the product arrived at in paragraph (g)(2) by the number of months for which the firm would have been disqualified....The civil money penalty may not exceed an amount specified in § 3.91(b)(3)(i) for each violation.

5 U.S.C. § 552 (b)(7)(E). It is also important to note that in Step 3 of § 278.6(g), above, 240 is the number of months used to calculate the civil money penalty for permanent disqualifications. This is in accordance with 7 U.S.C. § 2021(e)(1) and SNAP regulations at 7 CFR § 278.6(f)(2).

APPELLANT'S CONTENTIONS

The Appellant made the following summarized contentions in its request for administrative review, in relevant part:

- After the firm was permanently disqualified in 2015, the Appellant continued to do business for almost two years. However, the loss of SNAP destroyed the firm's income, as many customers did not have cash to pay for groceries and went elsewhere.
- Appellant tried to make the business work, but was unable to.

- On June 1, 2017, Appellant sold the business for 5 U.S.C. § 552 (b)(6) & (b)(7)(C), but that amount barely paid the Appellant’s debts.
- Appellant wishes for a review of the TOCMP determination because it has no ability to pay any kind of fine. Appellant owner is currently unemployed and living off savings and rental income from the building in which the store is located.
- Appellant owner has worked in grocery stores for 22 years. Finding a job at his age is much more difficult than it was when he was in his twenties.
- Appellant owner is in heavy debt and is having difficulty paying bills, and cannot survive with the minimal income he is receiving.

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

- Copy of a Business Purchase Agreement, dated June 1, 2017, and signed by both the Appellant and 5 U.S.C. § 552 (b)(6) & (b)(7)(C). The Agreement shows a purchase price of 5 U.S.C. § 552 (b)(6) & (b)(7)(C).
- 2016 U.S. Individual Income Tax Return for 5 U.S.C. § 552 (b)(6) & (b)(7)(C), showing an adjusted gross income of 5 U.S.C. § 552 (b)(6) & (b)(7)(C).
- 5 U.S.C. § 552 (b)(6) & (b)(7)(C)
- 5 U.S.C. § 552 (b)(6) & (b)(7)(C)
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- 5 U.S.C. § 552 (b)(6) & (b)(7)(C)

The preceding may represent only a brief summary of the Appellant’s contentions presented in this matter. However, in reaching a decision, full attention was given to all contentions presented, including any not specifically summarized or explicitly referenced herein.

ANALYSIS AND FINDINGS

The primary issue for review in this case is whether or not it was lawful for the Retailer Operations Division to impose a 5 U.S.C. § 552 (b)(6) & (b)(7)(C) transfer of ownership civil money penalty against the Appellant firm. To this regard, statute at 7 U.S.C. § 2021 and SNAP regulations at 7 CFR § 278.6(f)(2) are clear that a TOCMP **shall be** assessed if a store which has been disqualified is subsequently sold or the ownership of the firm is transferred prior to the end of the disqualification period. This review has no authority to dismiss or modify the penalty for any reason except in those cases where it is shown that a transfer of ownership did not occur; a monetary penalty was assessed in a manner not in accordance with regulation; or when there was an error in calculating the TOCMP amount.

Based on a review of the evidence provided by the Appellant as well as documentation in the case record, it is the finding of this review that a sale or transfer of the business did, in fact, occur on June 1, 2017, between the Appellant and 5 U.S.C. § 552 (b)(6) & (b)(7)(C). All documentation of new ownership appears to be legitimate and proof of a bona fide sale. Furthermore, there does not appear to be any dispute from the Appellant that a sale of the store took place subsequent to the firm’s permanent disqualification from SNAP. Therefore, it is the determination of this review that the assessment of a TOCMP against Safi Grocery, under the ownership of

5 U.S.C. § 552 (b)(6) & (b)(7)(C), is wholly appropriate and was imposed in accordance with established statute and regulation.

Hardship to Appellant

The Appellant owner contends that he is deep in debt and is unable to pay any kind of civil money penalty. To support his claim that the TOCMP is too burdensome, the Appellant owner provided a large amount of documentation, including 5 U.S.C. § 552 (b)(6) & (b)(7)(C) to demonstrate that his financial obligations are too severe to handle an additional penalty from USDA.

With regard to this contention, it is recognized that some degree of economic hardship is a likely consequence whenever a store is disqualified from participation in SNAP or when a civil money penalty is imposed. However, there is no provision in statute or in SNAP regulations for waiver or reduction of an administrative penalty on the basis of possible economic hardship to either the ownership personally or to the firm itself resulting from the imposition of such a penalty.

To allow store ownership to be excused from administrative penalties based on a purported financial hardship to the Appellant or firm would render virtually meaningless the provisions of the Food and Nutrition Act of 2008 and the enforcement efforts of the USDA. Moreover, giving special consideration to economic hardship to the Appellant would forsake fairness and equity, not only to competing stores and other participating retailers who are complying fully with Program regulations, but also to those retailers who have incurred monetary penalties in the past for similar violations. Therefore, the Appellant's contention that it will incur financial hardship based on the assessment of a TOCMP does not provide a valid basis for dismissing the charges or for mitigating the penalty imposed.

As noted earlier, this review has no authority to dismiss or modify a TOCMP amount for any reason except in those cases where it is shown that a transfer of ownership did not occur; a monetary penalty was assessed in a manner not in accordance with regulation; or when there was an error in calculating the TOCMP amount. Such circumstances do not exist in this case. Accordingly, a reduction of the TOCMP amount or a dismissal of the case altogether cannot be granted. It should be noted that in accordance with 7 CFR § 278.6(h), a TOCMP may be paid in installments.

TOCMP Calculation

As noted earlier, regulations at 7 CFR § 278.6(g) outline the steps for calculating the TOCMP amount. The TOCMP is derived from the firm's SNAP redemption volume during the 12 months immediately prior to being charged with the violations that led to the store's disqualification. Modifications to a TOCMP may occur only when there is an error in calculation or when the TOCMP exceeds the statutory limit. This review has no authority to modify a TOCMP amount for any other reason. The calculation of the TOCMP in this case is as follows:

5 U.S.C. § 552 (b)(6) & (b)(7)(C)

5 U.S.C. § 552 (b)(6) & (b)(7)(C)

CONCLUSION

The permanent disqualification of Safi Grocery took effect on August 12, 2015. A review of the evidence in this case clearly indicates that the store was sold to a buyer on June 1, 2017. Therefore, 7 CFR § 278.6(f)(2) of the SNAP regulations is applicable, and the assessment of a TOCMP is required. A review of the calculation indicates that the amount of the TOCMP as assessed by the Retailer Operations Division is proper. Thus, the decision by the Retailer Operations Division to impose a 5 U.S.C. § 552 (b)(6) & (b)(7)(C) civil money penalty against 5 U.S.C. § 552 (b)(6) & (b)(7)(C), former owner of Safi Grocery, is sustained.

To arrange payment, the Appellant must contact FNS's Financial Management Accounting Division at (703) 605-0483 within 30 days of receipt of this decision.

RIGHTS AND REMEDIES

Applicable rights to a judicial review of this decision are set forth in Section 14 of the Food and Nutrition Act of 2008 (7 U.S.C. § 2023) and in Section 279.7 of the SNAP regulations. 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 owner resides or is engaged in business, or in any court of record of the State having competent jurisdiction. If a complaint is filed, it must be filed within 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.

JON YORGASON
Administrative Review Officer

June 27, 2018