

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

**Former Owner of Sistrunk Meat Market,**

**Appellant,**

**v.**

**Case Number: C0212182**

**Retailer Operations Division,**

**Respondent.**

**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 \$44,000.00 was properly assessed against **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**, the former owner of Sistrunk Meat 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 \$44,000.00 against Sistrunk Meat Market on September 13, 2018.

**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 Sistrunk Meat Market, under the ownership of the Appellant, from the SNAP effective February 9, 2018 for trafficking in SNAP benefits. The permanent Disqualification Letter dated February 8, 2018 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 April 3, 2018, the Appellant sold Sistrunk Meat Market to a new store owner as agreed upon by both the Seller and the Buyer as documented by a Bill of Sale and a Commercial Lease in the case record. The case record also includes copies of cashier's checks which the new owner made payable to the former store owner/Appellant for the purchase of the subject firm. When the new store owner was authorized to participate in the SNAP on August 24, 2018, the Retailer Operations Division discovered that Sistrunk Meat Market had been sold or otherwise transferred by the former owner/Appellant. As a result, the Retailer Operations Division, in a letter dated September 13, 2018, notified the Appellant that it had assessed a TOCMP in the amount of \$44,000.00 in accordance with the SNAP regulations.

In a letter postmarked September 24, 2018, the Appellant, through counsel, requested an administrative review of the assessment of the TOCMP. FNS granted the Appellant's request for administrative review by letter dated October 4, 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) Multiply 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 and in a subsequent correspondence to FNS, the Appellant, through counsel, argued that:

- The imposed civil money penalty is not only unfair and unreasonable but is violative of laws and constitutes a wrongful taking of property. Assets legally owned by the Appellant were lawfully sold to an independent party at arm's length. The imposed civil money penalty is an unconstitutional taking of property. For USDA to insist that the assets owned by the Appellant cannot be transferred would deprive the owner of all reasonable use of property, all the more so in light of the SNAP disqualification. Moreover, regulatory oversight of the SNAP is not properly extended to prevent a former SNAP retailer from subsequently and lawfully disposing of assets to a legitimate third party. The position taken in the September 13, 2018 letter—that assets should be discarded—is an inverse condemnation that violates due process.
- USDA's decision to impose a civil money penalty is an attempt to severely penalize the Appellant and is arbitrary and capricious within the meaning of Federal law including the Administrative Procedures Act, as well as a violation of the Due Process Clause of the United States Constitution which prohibits takings without just compensation. It is also contrary to sound public policy and the goals of USDA which are intended to support the communities in need through the SNAP. USDA purported to prohibit the owner from selling the assets he/she owned. This action constitutes a regulatory taking. The Appellant cited case law in support of its contentions.
- Denied the ability to participate in the SNAP, the owner had no economically feasible use of the assets of the grocery store except to sell those assets to a legitimate and independent third party.
- The Appellant, and now the newly authorized SNAP firm, serves a minority community which has long relied upon the goods, products and food sold by this grocery store. The decision to impose a civil money penalty would be harmful to the community that other

benefits from the Appellant's operation of a grocery store, with a license that FNS approved.

- The permanent disqualification of Sistrunk Meat Market was unjust and constituted an excessive penalty.
- The Appellant requests that the fine be withdrawn.
- To the extent that a proposed civil money penalty effectively constitutes the taking of property, the Appellant would seek a jury trial of any issues so triable.

In support of these contentions, the following documents were submitted to FNS:

- Declaration of 5 U.S.C. § 552 (b)(6) & (b)(7)(C); and
- A copy of Sistrunk Market's SNAP permit.

### ANALYSIS AND FINDINGS

Sistrunk Meat Market, under the ownership of the Appellant, was permanently disqualified from the SNAP effective February 9, 2018. 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 April 3, 2018, and that this was the basis of the Retailer Operations Division's assessment of a \$44,000.00 TOCMP.

#### **Fairness of Imposed Penalty**

The Appellant contends that the imposed civil money penalty is not only unfair and unreasonable but is violative of laws and constitutes a wrongful taking of property. Assets legally owned by the Appellant were lawfully sold to an independent party at arm's length. The imposed civil money penalty is an unconstitutional taking of property. For USDA to insist that the assets owned by the Appellant cannot be transferred would deprive the owner of all reasonable use of property, all the more so in light of the SNAP disqualification. Moreover, regulatory oversight of the SNAP is not properly extended to prevent a former SNAP retailer from subsequently and lawfully disposing of assets to a legitimate third party. The position taken in the September 13, 2018 letter—that assets should be discarded—is an inverse condemnation that violates due process.

With regard to the Appellant's contentions, 7 CFR §278.6(f)(2) authorizes FNS to assess a TOCMP against the owner of a disqualified retail food store that has been sold or the ownership is otherwise transferred, stating as follows:

“In the event any retail food store or wholesale food concern which has been disqualified is sold or the ownership thereof is otherwise transferred to a purchaser or transferee, the person or other legal entity who sells or otherwise transfers ownership of the retail food store or wholesale food concern 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). . .” As such, FNS is required to impose a TOCMP against the owner of a retail food store in the event that the retail food store that has been disqualified is sold or the ownership thereof is otherwise transferred to a purchaser or transferee.

## **Constitutionality of Imposed Fine**

The Appellant contends that USDA's decision to impose a civil money penalty is an attempt to severely penalize the Appellant and is arbitrary and capricious within the meaning of Federal law including the Administrative Procedures Act, as well as a violation of the Due Process Clause of the United States Constitution which prohibits takings without just compensation. It is also contrary to sound public policy and the goals of USDA which are intended to support the communities in need through the SNAP. USDA purported to prohibit the owner from selling the assets he/she owned. This action constitutes a regulatory taking. The Appellant cited case law in support of its contentions.

With regard to the Appellant's contentions, Constitutional challenges or considerations of legal precedent through case law are beyond the scope of this review. This administrative review is limited to whether the Retailer Operations Division appropriately followed the Food and Nutrition Act of 2008, as amended, and the regulations promulgated under the Act, and whether the action taken is sustainable by a preponderance of the evidence. Therefore, any Constitutional challenges or application of a supposed judicial precedent would best be addressed in a judicial review in a court of law. Accordingly, no further findings or conclusions are rendered in this regard.

## **Economic Effect on Appellant**

The Appellant contends that denied the ability to participate in the SNAP, the owner had no economically feasible use of the assets of the grocery store except to sell those assets to a legitimate and independent third party. 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 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 Sistrunk Meat Market subject to the TOCMP as outlined in the Federal regulations at 7 CFR §278.6(f)(2).

## **Hardship on SNAP Customers**

The Appellant contends that it, and now the newly authorized SNAP firm, serves a minority community which has long relied upon the goods, products and food sold by this grocery store. The decision to impose a civil money penalty would be harmful to the community that other benefits from the Appellant's operation of a grocery store, with a license that FNS approved.

With regard to the Appellant's contentions, the imposed TOCMP will not have an effect on area SNAP customers as Sistrunk Market, located at the same physical location/address as the Appellant firm, was authorized to participate on the SNAP on August 24, 2018. In addition, there are 27 SNAP authorized retail stores, including

Sistrunk Market, located within a one mile radius of the Appellant firm. As such, there is no hardship imposed on area SNAP customers based on the imposed civil money penalty.

### **Permanent SNAP Disqualification**

The Appellant contends that the permanent disqualification of Sistrunk Meat Market was unjust and constituted an excessive penalty.

With regard to the Appellant's contentions, the record reflects that the Appellant was provided an opportunity to reply to the December 20, 2017 Charge Letter (which the Appellant received on December 21, 2017 per UPS confirmation) issued by the Section Chief of the Retailer Operations Division. The Appellant, through counsel, responded to the violations outlined in the Charge Letter via written letters to the Retailer Operations Division dated December 28, 2017 and January 12, 2018. The Appellant was also offered administrative review rights via the Retailer Operations Division's Determination Letter dated February 8, 2018 and received by the Appellant on February 9, 2018 (per UPS confirmation). The Appellant, through counsel, availed itself of the opportunity to request an administrative review by letter postmarked February 14, 2018. A request for administrative review was conducted and completed by FNS and the Retailer Operations Division's original determination to permanently disqualify Sistrunk Meat 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.

### **Withdrawal of Imposed Fine**

The Appellant requests that the fine be withdrawn. However, 7 CFR §278.6(f)(2) authorizes FNS to assess a TOCMP against the owner of a disqualified retail food store that has been sold or the ownership is otherwise transferred, stating as follows:

“In the event any retail food store or wholesale food concern which has been disqualified is sold or the ownership thereof is otherwise transferred to a purchaser or transferee, the person or other legal entity who sells or otherwise transfers ownership of the retail food store or wholesale food concern 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). . .” As such, FNS is required to impose a TOCMP against the owner of a retail food store in the event that the retail food store that has been disqualified is sold or the ownership thereof is otherwise transferred to a purchaser or transferee.

### **Trial Hearing**

The Appellant contends that to the extent that a proposed civil money penalty effectively constitutes the taking of property, it would seek a jury trial of any issues so triable. As noted subsequently in the Final Agency Decision, 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 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.

### **TOCMP Amount**

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 \$1,927,440.00. However, the initial calculated TOCMP of \$1,927,440.00 is above the agency limit, which is \$11,000.00 per violation. The December 20, 2017 Charge Letter identified four (4) patterns of trafficking based on EBT redemption data. Therefore, the TOCMP was correctly assessed at \$44,000.00 which is the agency limit per violation multiplied by the number of trafficking patterns (\$11,000.00 x 4 trafficking patterns).

## **Summary**

The regulations at 7 CFR § 278.6(f) require FNS to assess a TOCMP against the former owner 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 Sistrunk Meat Market, formerly owned by the Appellant, was sold on or about April 3, 2018 after it had been permanently disqualified effective February 9, 2018. Therefore, the SNAP regulations 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

March 13, 2019