

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

**5 U.S.C. § 552 (b)(6) & (b)(7)(C), Former
Owners, South Main Grocery,**

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0208983

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 that a Transfer of Ownership Civil Money Penalty (TOCMP) of \$33,000 was properly assessed against **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**, the former owners of South Main Grocery, 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 \$33,000 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

The Retailer Operations Division permanently disqualified South Main Grocery, under the ownership of **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**, from the SNAP effective November 17, 2016 for trafficking in SNAP benefits. The permanent disqualification letter dated November 16, 2016, stated that if the owner(s) 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)(3) and (4). As noted in that letter, the amount of the TOCMP is calculated based on the SNAP regulations at 7 CFR § 278.6(g).

After the store had been permanently disqualified, the former owner(s) sold the store inventory of South Main Grocery to a new ownership group as documented in the case record by a notarized contract of sale dated January 27, 2017. When the new owners applied for the SNAP, the Retailer Operations Division discovered that the store had been sold or otherwise transferred by the former owner(s). As a result, the Retailer Operations Division, in a letter dated May 29, 2018, notified 5 U.S.C. § 552 (b)(6) & (b)(7)(C) that it had assessed a TOCMP in the amount of \$33,000 in accordance with the SNAP regulations.

In a letter postmarked June 8, 2018, the Appellant, through counsel, requested an administrative review of the assessment of the TOCMP. The administrative review was granted and the assessment of the TOCMP was held in abeyance pending completion of this review.

STANDARD OF REVIEW

In appeals of adverse actions, an appellant bears the burden of proving by a preponderance of the evidence, that the administrative action should be reversed. That means an appellant has 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 AND REGULATIONS

The controlling law in this matter is contained in the Food and Nutrition Act of 2008, as amended, 7 U.S.C. § 2021 and the SNAP regulations at 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.** [Emphasis added.]

7 CFR § 278.6(g) provides the steps for calculating the TOCMP and 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 product arrived at in paragraph (g)(2) by the number of months for which the firm would have been disqualified

Notwithstanding the above, there is an agency limit of \$11,000 per violation as the maximum TOCMP amount.

APPELLANT'S CONTENTIONS

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

- The former owners were struggling to keep the business operational and it was running at a loss which they could not afford.
- The owners tried to find a buyer but could not and had to shut the business down in late 2016. The owners did not sell the firm. They abandoned the store and returned the keys to the landlord.
- The owners cannot afford to pay a \$33,000 penalty.
- Under these circumstances it is unjust, unfair and unreasonable to assess a \$33,000 penalty.

The preceding may represent only a brief summary of the Appellant's contentions presented in this matter. Please be assured, however, in reaching a decision, full attention was given to all contentions presented, including any not specifically recapitulated or specifically referenced herein.

ANALYSIS AND FINDINGS

The SNAP regulations at 7 CFR § 278.6(f)(2) **require** FNS to assess a TOCMP against the owner of a disqualified store that has been sold or otherwise transferred to a new owner. The regulations do not provide for any exceptions relating to the motive for the sale or transfer, the adequacy of the sale price, the store's profitability or the former owner's ability to pay. In addition, the regulations at 7 CFR § 278.6(g) outline how to calculate the amount of the TOCMP and allows **no discretion** in the calculation of the TOCMP amount. Therefore, the reasons why the Appellant sold the store or the Appellant's current financial status are not relevant to this review.

Sales Documents

The case record documents that the Appellant sold the store inventory to a new owner for **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** on January 27, 2017. This sale of inventory constitutes a sale or transfer of ownership within the meaning of 7 CFR § 278.6(f)(2). This and other documents

in the case record document a bona fide transfer of ownership from the permanently disqualified owners to the new store owners who were subsequently authorized for the SNAP. This transfer of ownership occurred after the store was permanently disqualified for trafficking in SNAP benefits effective November 17, 2016.

Proper Notice Given

The permanent disqualification letter dated November 16, 2016, stated that if the 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), (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 permanent disqualification letter was delivered to the Appellant, through counsel, on November 17, 2016 as documented by a UPS delivery notice in the casefile. Therefore, the Appellant was given proper notice that a TOCMP would be assessed if South Main Grocery was sold or otherwise transferred after it was permanently disqualified from the SNAP.

TOCMP Calculation

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 twelve (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.

The Retailer Operations Division correctly determined, using the methodology described in 7 CFR § 278.6(g) that the initial calculated amount of the TOCMP was 5 U.S.C. § 552 (b)(6) & (b)(7)(C). However, the Retailer Operations Division properly determined that the initial calculated TOCMP of 5 U.S.C. § 552 (b)(6) & (b)(7)(C) is above the agency limit, which is \$11,000 per violation. The October 27, 2016 trafficking charge letter identified three (3) patterns of trafficking based on irregular SNAP transaction data. Therefore, the Retailer Operations Division correctly assessed the final TOCMP at \$33,000.00 which is the agency limit per violation multiplied by the number of trafficking patterns (\$11,000.00 x 3 trafficking patterns).

Summary

The regulations at 7 CFR § 278.6(f)(2) **require** FNS to assess a TOCMP against the former owner(s) 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.** This administrative review does not have the authority to negotiate a reduced payment or abatement.

CONCLUSION

A review of the evidence in this case indicates by a preponderance of the evidence that South Main Grocery, formerly owned by 5 U.S.C. § 552 (b)(6) & (b)(7)(C), was sold or otherwise transferred to a new owner, after it had been permanently disqualified effective November 17, 2016. Therefore, the SNAP regulation 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 Operation 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 Federal 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 you reside 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, 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.

RONALD C. GWINN
Administrative Review Officer

August 13, 2018