

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

**5 U.S.C. 2018 (b)(6) & (b)(7)(c), former
owner of United Deli and Grill Corp. I,**

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0233433

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. 2018 (b)(6) & (b)(7)(c)** was properly imposed by the Retailer Operations Division against **5 U.S.C. 2018 (b)(6) & (b)(7)(c)**, former owner of United Deli & Grill Corp. I (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. 2018 (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

The case record indicates that in a letter dated June 18, 2019, FNS’s Retailer Operations Division charged United Deli & Grill Corp. I, under the ownership of **5 U.S.C. 2018 (b)(6) & (b)(7)(c)**, with **5 U.S.C. 2018 (b)(6) & (b)(7)(c)** violations of trafficking in SNAP benefits. FNS sent a determination letter to the firm on August 20, 2019, informing the owner that FNS found that the violations cited in the charge letter occurred. As a result, United Deli & Grill Corp. I

was permanently disqualified from SNAP effective August 22, 2019. The determination letter also notified the Appellant of the right to seek administrative review of the decision.

Appellant, through counsel, sought administrative review of the trafficking determination. However, on November 4, 2019, the trafficking determination was sustained in a Final Agency Decision. Agency records show that the Final Agency Decision was delivered to Appellant's counsel's office on November 6, 2019, with a required signature obtained on delivery. The case record indicated the firm did not seek judicial review of the decision. Accordingly, FNS closed its case effective December 11, 2019.

Both the charge and determination letters stated that in the event that ownership of the store was sold or transferred after the store's 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). The determination letter also 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 March 4, 2020, a SNAP application was submitted to FNS for a new store at the same location where United Deli & Grill Corp. I had previously operated. According to the application, this new store, 5 U.S.C. 2018 (b)(6) & (b)(7)(c), owned by 5 U.S.C. 2018 (b)(6) & (b)(7)(c), began its operations effective September 10, 2019.

Upon discovering that a new application had been submitted at a location where SNAP violations had previously occurred, the Retailer Operations Division requested 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. 2018 (b)(6) & (b)(7)(c) was bona fide. In response to this request, the new store owner submitted a number of documents, including the following:

- Bill of Sale, signed by both parties on September 8, 2019
- Contract of Sale, signed by both parties on September 10, 2019
- Lease Agreement, signed by the new owner and by a realty company on September 10, 2019
- Certificate of Incorporation

In a letter dated August 20, 2020, the Retailer Operations Division informed the Appellant that because the store was sold or transferred during its disqualification period, a TOCMP in the amount of 5 U.S.C. 2018 (b)(6) & (b)(7)(c) was being assessed against the former owner of United Deli & Grill Corp. I in accordance with SNAP regulations at 7 CFR § 278.6(f)(2), (3) and (4), and § 278.6(g).

In a letter postmarked September 3, 2020, the Appellant, through counsel, 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 an adverse action, the appellant bears the burden of proving by a preponderance of the evidence that the administrative action should be reversed. This 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 LAW AND REGULATIONS

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:

- 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....The civil money penalty may not exceed an amount specified in § 3.91(b)(3)(i) for each violation.

Although regulations at 7 CFR § 3.91(b)(3)(i) provide for a maximum civil penalty of \$100,000 for each violation, FNS has established an \$11,000 limit per violation. 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, through counsel, made the following summarized contentions as part of its request for administrative review, in relevant part:

- Appellant has not received the Final Agency Decision from its administrative review of the trafficking determination, and so there can be no “Transfer of Ownership Civil Money Penalty,” as there has been no Final Decision from the agency which would permanently disqualify this owner and firm.
- The Department of Agriculture, based on transaction reports for 5 U.S.C. 2018 (b)(6) & (b)(7)(c) has wrongfully concluded that this firm has engaged in accepting SNAP benefits in exchange for ineligible common non-food items. Appellant vehemently denies such activities.
- The Department of Agriculture has wrongfully concluded that this firm has engaged in accepting SNAP benefits in exchange for cash. Appellant vehemently denies such activities.
- The store owner has continuously trained and tested his four full-time employees concerning SNAP regulations and requirements relating to prohibitions against sales of ineligible items and exchanging cash for SNAP benefits. The owner has established and implemented an effective compliance policy and program to prevent SNAP violations, which was in effect at the time of the alleged charges.
- Appellant has maintained an exemplary record, and this is the first occasion that he became aware of conduct of any violations by the firm. The unblemished record is evidence of his continued compliance with the law and the training and supervision of employees.
- The training program consists of two weeks of intensive, hands on classes, overseen by the owner of the store. Employees receive handouts and other printed materials to study prior to full employment in the store. At the end of the two weeks training, employees must take a test to ensure compliance with SNAP regulations. Any employee that fails the test or that fails to comply with store policies is immediately terminated.
- The store is a medium sized deli/convenience store that is well stocked with staple food inventory designed to accommodate low-income customers who regularly purchase items with SNAP benefits. It sells Halal foods and fresh sandwiches and salads which are not available elsewhere. The vast majority of customers use this store as their primary food shopping location.
- The owner provides necessary items to the community, which is comprised of numerous large multi-family apartment houses and buildings within a two-block radius. There are numerous schools, churches, and family shelters in the immediate area which brings parents of school aged children to the store to buy foods daily. There is a bus stop in front of the store and a subway stop one block away, and other businesses which bring

employees to patronize the store. There are no other similar SNAP providers in the immediate area, and so disqualification would result in hardship to the community.

- In lieu of disqualification, it is requested that FNS should offer this owner a civil money penalty per Section 278.6(a).
- The Report of Positive Investigation, Exhibits “A” through “F,” and the letter of charges to which they are annexed reveal a number of inadequacies, inaccuracies, and insufficiencies.
- The owner’s livelihood relies substantially upon this retail deli/grocery store, and so redemptions of SNAP Benefits should not be disqualified.

Appellant did not submit any new evidence in support of these contentions on administrative review.

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. 2018 (b)(6) & (b)(7)(c) transfer of ownership civil money penalty against the Appellant firm. Applicable law, at 7 U.S.C. § 2021, and SNAP regulations, at 7 CFR § 278.6(f)(2), specify 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 sales documents in this case it is the determination of this review that a sale or transfer of the business did, in fact, occur. Evidence provided by the owner of 5 U.S.C. 2018 (b)(6) & (b)(7)(c) clearly shows that a transfer of ownership occurred on September 8, 2019, which is after United Deli & Grill Corp. I was permanently disqualified from SNAP participation.

Specifically, the Bill of Sale, which was signed by Appellant and former owner, 5 U.S.C. 2018 (b)(6) & (b)(7)(c), as “Seller & Owner” and by the new owner, 5 U.S.C. 2018 (b)(6) & (b)(7)(c), as “Purchaser” states the following: “[Sellers] do hereby grant, sell transfer and assign unto U5 U.S.C. 2018 (b)(6) & (b)(7)(c), President . . . all right, title and interest of Sellers in and to the assets of the business known as: United Deli & Grill Corp. I.” The Bill of Sale says the agreement was made as of September 8, 2019. The Contract of Sale, reflecting the same sales information, was signed by both Appellant and the new owner on September 10, 2019. The lease agreement, which commenced on September 10, 2019 and was signed by the new owner, 5 U.S.C. 2018 (b)(6) & (b)(7)(c), supports the finding that a sale or transfer of the business did occur.

All documentation of new ownership appears to be legitimate and proof of a bona fide sale. Furthermore, Appellant has not provided any evidence to contradict 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 United Deli & Grill Corp. I, under the ownership of 5 U.S.C. 2018 (b)(6) & (b)(7)(c), is wholly appropriate and was imposed in accordance with established law.

Contentions Regarding Original Trafficking Allegations

In the request for administrative review, Appellant's contentions, made through counsel, were almost exclusively focused on the firm's permanent disqualification from trafficking and requesting a civil money penalty in lieu of such disqualification, with no contentions addressing the sale of the firm.

It is critical to note that this review cannot reevaluate the decision to permanently disqualify United Deli & Grill Corp. I from SNAP participation. At this point, the Appellant has exhausted all avenues of appeal in that case. The permanent disqualification took effect on August 22, 2019. The same attorney representing Appellant in this case filed for administrative review of the permanent disqualification after receiving the August 20, 2019, determination letter. Although counsel now claims the Appellant never received a Final Agency Decision in that administrative review, agency records show that the Final Agency Decision was signed for and received by counsel on November 6, 2019, as delivered by the United Parcel Service (UPS). Although counsel may have failed to inform his client of the Final Agency Decision and may not have provided his client a copy, failure of counsel to communicate with his client is no basis for this administrative review to reevaluate the permanent disqualification of Appellant. Because the window of time for reviewing the merits of the disqualification has passed, the permanent disqualification decision is final and this review has no authority to revisit it.

The sole issue for review in this case is whether or not the Retailer Operations Division appropriately imposed a 5 U.S.C. 2018 (b)(6) & (b)(7)(c) transfer of ownership civil money penalty.

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. 2018 (b)(6) & (b)(7)(c)

In this case, the calculated TOCMP of 5 U.S.C. 2018 (b)(6) & (b)(7)(c) exceeds the agency sanction limit of \$11,000 per violation. Each trafficking pattern identified in the June 18, 2019, charge letter is considered a single violation of the SNAP regulations. Therefore, the TOCMP was assessed using 5 U.S.C. 2018 (b)(6) & (b)(7)(c) violations, at a maximum amount of \$11,000 each. Based on regulations cited at 7 CFR § 278.6(g), it is the determination of this review that a TOCMP in the amount of 5 U.S.C. 2018 (b)(6) & (b)(7)(c) was properly assessed in this matter.

CONCLUSION

The permanent disqualification of United Deli & Grill Corp. I took effect on August 22, 2019. A review of the evidence in this case clearly indicates that the store was sold to a buyer on September 8, 2019. 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 as noted in the analysis above. Thus, the decision by the Retailer Operations Division to impose a 5 U.S.C. 2018 (b)(6) & (b)(7)(c) civil money penalty against 5 U.S.C. 2018 (b)(6) & (b)(7)(c), former owner of United Deli & Grill Corp. I, 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.

MICHELLE WATERS
Administrative Review Officer

January 27, 2021