

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

**5 U.S.C. § 552 (b)(6) & (b)(7)(C), former  
owners of Westside Deli Grocery LLC,**

**Appellant,**

**v.**

**Retailer Operations Division,**

**Respondent.**

**Case Number: C0204501**

**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. § 552 (b)(6) & (b)(7)(C)**, former owners of Westside Deli Grocery LLC (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 March 9, 2015, FNS’s Retailer Operations Division charged Westside Deli Grocery LLC, under the ownership **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**, with **5 U.S.C. 2018 (b)(6) & (b)(7)(c)** violations of trafficking in SNAP benefits. A determination letter was sent to the firm on April 13, 2015. As a result, Westside Deli Grocery LLC was permanently disqualified from SNAP effective April 14, 2015. The Appellant, through counsel,

appealed the sanction determination by requesting an administrative review, but the sanction was upheld in a final agency decision dated June 8, 2015.

The April 13, 2015, determination letter stated that in the event that the firm's ownership sold or transferred ownership of 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). The 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 October 2, 2017, a SNAP application was submitted to FNS for a new store at the same location where Westside Deli Grocery LLC had previously operated. According to the application, this new store, 5 U.S.C. 2018 (b)(6) & (b)(7)(c), began its operations effective October 1, 2017.

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 owners to verify that the disqualified owners were 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 owners submitted a number of documents, including a signed Bill of Sale, dated September 29, 2017, verifying that a bona fide change of ownership had occurred.

In a letter dated March 16, 2018, 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 owners of Westside Deli Grocery LLC in accordance with SNAP regulations at 7 CFR § 278.6(f)(2), (3) and (4), and § 278.6(g).

In a letter postmarked March 22, 2018, 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:

- 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.

**5 U.S.C. 2018 (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:

- The permanent disqualification for trafficking was wrongful because it was based on suspicions, and not concrete evidence against the firm;
- Appellant never received a letter that specified that the firm could not be sold;
- Appellant sold the store because of financial difficulties and did not realize that this was contrary to any rules;

- Appellant never received any status update with regard to the trafficking charge, and so was surprised that any penalty was due; and
- Appellant would like a review of the trafficking charges.

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. 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 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 owners of 5 U.S.C. 2018 (b)(6) & (b)(7)(c) clearly shows that a transfer of ownership occurred on September 29, 2017, which is after Westside Deli Grocery LLC was permanently disqualified from SNAP participation.

Specifically, the Bill of Sale, which was signed by Appellant, 5 U.S.C. § 552 (b)(6) & (b)(7)(C), as “Seller” and by the new owner, 5 U.S.C. 2018 (b)(6) & (b)(7)(c), as “Purchaser” states the following: “The Purchaser and Seller hereby acknowledge that this Agreement is made for the purchase and sale of the following . . . Grocery Store Business.” The property sold is described as, “100% ownership of store formerly known as Westside Deli Grocery, located at 5 U.S.C. 2018 (b)(6) & (b)(7)(c) including all machinery and equipment, furniture and fixtures, leasehold improvements and merchandise inventory as agreed by both Buyers and Seller . . .” The Bill of Sale says the agreement was made as of September 29, 2017.

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 Westside Deli Grocery LLC, 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.

### **Contentions Regarding Original Trafficking Allegations**

In its request for administrative review, the Appellant claimed that the allegations of trafficking were wrongful because they were based on suspicions, and not concrete evidence against the firm.

Further, the Appellant says he never received a status update with regard to the trafficking charges, and seeks review of these charges.

It is critical to note that this review cannot reevaluate the decision to permanently disqualify Westside Deli Grocery LLC from SNAP participation. At this point, the Appellant has exhausted all avenues of appeal in that case. The permanent disqualification took effect on April 14, 2015. In accordance with regulation, the firm had 10 days from the date of receipt of the determination notice to file a request for administrative review. Appellant, through counsel, filed such an appeal, but the permanent disqualification was upheld in a Final Agency Decision, dated June 8, 2015. The Final Agency Decision informed the Appellant of the right to judicial review of the agency's decision within 30 days of receipt of the decision; however, the Appellant did not seek such review. 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.

It also bears repeating that the Appellant was made aware of the penalty for transferring ownership of the store, so his claim that he did not know that he could incur a TOCMP is not believable. The agency's determination letter, dated April 13, 2015, clearly stated that in the event that the firm's ownership sold or transferred ownership of 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). The letter also noted that the amount of the TOCMP would be calculated based on regulations at 7 CFR § 278.6(g).

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)

5 U.S.C. 2018 (b)(6) & (b)(7)(c)

### **CONCLUSION**

The permanent disqualification of Westside Deli Grocery LLC took effect on April 14, 2015. A review of the evidence in this case clearly indicates that the store was sold to a buyer on September 29, 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 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. § 552 (b)(6) & (b)(7)(C), former owners of Westside Deli Grocery LLC, 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

September 4, 2018