

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

Zain Foodmart Inc,

Appellant,

v.

Case Number: C0226667

Retailer Operations Division,

Respondent.

FINAL AGENCY DECISION

The U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS), finds that there is sufficient evidence that a Transfer of Ownership Civil Money Penalty (TOCMP) was properly levied in the amount of \$22,000 by the Retailer Operations Division (Retailer Operation) against the former owner of Zain Foodmart Inc. (Appellant) for selling and/or transferring a retail food store that was disqualified from the Supplemental Nutrition Assistance Program (SNAP).

ISSUE

The issue accepted for review is whether Retailer Operations took appropriate action, consistent with Title 7 of the Code of Federal Regulations (CFR) § 278.6(f)(2)-(4) and 7 CFR § 278.6(g), in its administration of SNAP when it levied a TOCMP against Appellant's former owner.

AUTHORITY

According to 7 U.S.C. § 2023, and the implementing regulations at 7 CFR § 279.1, a food retailer 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 received by the former owner on May 22, 2019, Appellant was notified that it was permanently disqualified as a SNAP-authorized retail food store. A purchase agreement dated October 30, 2019 established Appellant was sold. In Retailer Operations' Determination Letter dated February 19, 2020, Appellant was assessed a lump sum TOCMP of \$22,000 in accordance

with 7 CFR § 278.6(f)(2) for the sale or transfer of ownership of Appellant during a period of disqualification.

By letter dated February 27, 2020, Appellant, through counsel, appealed Retailer Operations' assessment and requested an administrative review of this action. The appeal was granted by letter dated March 13, 2020, and implementation of the TOCMP has been held in abeyance pending completion of this review. Appellant's owner submitted a letter of representation dated March 19, 2020.

STANDARD OF REVIEW

In an appeal of an adverse action, Appellant bears the burden of proving by a preponderance of the evidence that the administrative action should be reversed. That means Appellant has the burden of providing relevant, credible evidence that 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 untrue.

CONTROLLING LAW

The controlling law in this matter is contained in the Food and Nutrition Act of 2008, as amended (7 USC § 2021), and implemented through regulation under Title 7 CFR Part 278. In particular, 7 CFR § 278.6(f)(2) establishes the authority upon which a CMP may be imposed against a disqualified retail food store in the event that it has been sold or the ownership is otherwise transferred.

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 to a purchaser or transferee, the person or other legal entity who sells or otherwise transfers ownership of the retail food store shall be subjected to and liable for a CMP.

7 CFR §278.6(f)(3) reads, in part, The Food and Consumer Service may request the Attorney General institute a civil action to collect the penalty from the person or persons subject to the penalty in a district court of the United States.

7 CFR § 278.6(g), 3.91(b)(3)(i) establishes an \$11,000.00 per violation limit as the maximum amount for a TOCMP. The Act, at Section 12, on the subject of transfer of ownership, supports the responsibility of ownership of the firm to the penalty as follows: Section 12 (5) Hearing – In the event any retail food store or wholesale food concern that has been disqualified under subsection (a) is sold or the ownership thereof is otherwise transferred to a purchaser or transferee, the person who sells or otherwise transfers 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 retailer food store has been disqualified permanently, the civil penalty shall be

double the penalty for a 10-year disqualification period, as calculated under regulations issued by the Secretary.

APPELLANT'S CONTENTIONS

The following may represent a summary of Appellant's contentions in this matter; however, in reaching a decision, full attention and consideration has been given to all contentions presented, including any not specifically recapitulated or specifically referenced herein:

- Unfortunately unforeseen circumstances arose which required ownership to sell the business.
- The business is located in a very troubling neighborhood in Akron, OH. The neighborhood has experienced six murders in less than two years and several shootings. A murder was committed in the doorway of the store and the owner's husband was subpoenaed to testify. Following the testimony the owner, her family, and the employees felt threatened and ownership had no choice but to sell the business
- The business was purchased about three years ago and was sold on October 30, 2019, for a loss, which has caused financial hardship. Ownership's only option was to sell and be free of the remaining lease payments.
- Ownership understands that the SNAP regulations allow for a CMP, but respectfully requests the CMP be waived, or dramatically lowered, as the continued operation of the business could and likely would have been life threatening to the owner, her family, and her employees.

In support of these contentions, Appellant, through counsel, submitted copies of the following:

- Asset Purchase Agreement executed October 30, 2019.
- Exhibit A: Purchased Assets 5 U.S.C. § 552 (b)(6) & (b)(7)(C).
- Check in the amount 5 U.S.C. § 552 (b)(6) & (b)(7)(C), payable to Appellant's former owner.

The preceding may represent only a brief summary of Appellant's contentions presented. However, in reaching a decision, full consideration has been given to all contentions presented, including any not specifically listed here.

ANALYSIS AND FINDINGS

The purpose of this review is limited to determining whether Retailer Operations' decision to assess a TOCMP against Appellant was appropriate. The regulations at 7 CFR § 278.6(f) authorize FNS to assess a TOCMP against ownership of a disqualified retail food store that has been sold or the ownership is otherwise transferred.

Documents in the case record show that Appellant sold and/or transferred the disqualified store to a new owner on October 30, 2019, and that this was the basis of Retailer Operations'

assessment of a \$22,000 TOCMP. The r SNAP permanent disqualification letter dated May 21, 2019, and received by the former store owner on May 22, 2019, informed Appellant that, “In the event that you sell or transfer ownership of your store subsequent to your disqualification, you will be subject to and liable for a CMP as provided by SNAP regulations § 278.6(f)(2), (3), and (4). The amount of this sale or transfer CMP will be calculated based on SNAP regulations at § 278.6(g).” Accordingly, Appellant received proper legal notice that a TOCMP could be imposed if the business was sold after the date of disqualification.

Appellant, through counsel, contends that unfortunately unforeseen circumstances arose which required ownership to sell the business. Appellant is located in a very troubling neighborhood, having had six murders in less than two years and several shootings. A murder was committed in Appellant’s doorway and the owner’s husband was subpoenaed to testify. This caused the owner, her family, and her employees to feel threatened and left with no choice but to sell the business.

While FNS is sympathetic to the former store owner’s circumstances, neither the Food and Nutrition Act of 2008 nor the implementing regulations allow for factoring in individual circumstances when determining whether a TOCMP is warranted because of the sale of a business.

Appellant, through counsel, also contends that the business was purchased about three years ago and was sold for a loss, which has caused financial hardship. The only option was to sell the business and be free of the remaining lease payments.

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 regulations for a waiver or reduction of an administrative penalty on the basis of possible economic hardship to either the ownership or to the firm.

To allow store ownership to be excused from administrative penalties based on a purported financial hardship 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 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.

Lastly, Appellant, through counsel, contends that ownership understands that the SNAP regulations allow for a CMP, but respectfully requests the CMP be waived, or dramatically lowered, as the continued operation of the business could and likely would have been life threatening to the owner, her family, and her employees.

As noted earlier, this review has no authority to dismiss or modify a TOCMP for any reason except in limited circumstances. Such circumstances do not exist in this case. Accordingly, a reduction of the TOCMP amount or a dismissal of the case altogether cannot be considered. It may be worth noting that a TOCMP may be paid in installments.

CONCLUSION

Based on a review of the evidence, Appellant was, indeed, sold following its disqualification from SNAP on October 30, 2019. Therefore, in accordance with 7 CFR § 278.6(f)(2), Retailer Operations' determination to levy a TOCMP in the amount of \$22,000 against Appellant for selling Appellant during a period of disqualification from SNAP is sustained.

Using the methodology described in 7 CFR § 278.6(g), Retailer Operations properly computed the CMP amount.

RIGHTS AND REMEDIES

Applicable rights to a judicial review of this Decision are set forth in 7 U.S.C. § 2023 and 7 CFR § 279.7. 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 Appellant's former owner resides, 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. Please note that the judicial filing timeframe is mandated in the Act, and this office cannot grant an extension.

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.

Kim Dameron
Administrative Review Officer

December 10, 2020