

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

**Former Store Owner,
1165 Beach Channel Corp.,**

Appellant,

v.

Retailer Operations Division,

Respondent.

Case C0228610

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 (CMP) in the amount of \$33,000.00 was properly levied by the Retailer Operations Division (Retailer Operations) against the former owner of 1165 Beach Channel Corp. (Appellant) for selling and/or transferring a store that was permanently disqualified from participation as a retail food store in the Supplemental Nutrition Assistance Program (SNAP).

ISSUE

The issue accepted for review is whether Retailer Operations took appropriate action, consistent with 7 CFR § 278.6(f)(2), (3), and (4) and 7 CFR § 278.6(f)(2) and (g), in its administration of the SNAP when it assessed a CMP against Appellant.

CASE CHRONOLOGY

The record supports that by letter dated December 12, 2019, the USDA notified counsel and the owner that Appellant was permanently disqualified from participation as an authorized retail food store due to violations detailed by three data Attachment patterns provided with a Charge letter dated October 27, 2017. The Determination letter states 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 Sections 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).”

Retailer Operations informed the former store owner by letter dated May 4, 2020, that a transfer of ownership CMP in the amount of \$33,000.00, calculated in accordance with 7 CFR § 278.6(f)(2) and (g), was being assessed against him for the sale or transfer of the firm during a period of disqualification. By letter dated May 11, 2020, counsel requested review of the imposed sanction. The appeal was granted by letter dated May 21, 2020. Counsel requested a

FOIA in the appeal letter dated May 11, 2020. FOIA replied to the request. By email dated December 3, 2021, this office noticed counsel to provide any further information by December 14, 2021. As of this date, no information has been received.

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. 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 argument asserted is more likely to be true than not true.

CONTROLLING LAW AND REGULATIONS

7 U.S.C. § 2023 and its implementing regulations at 7 CFR § 279.1 provide that 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.

The controlling statute in this matter is contained in the Food and Nutrition Act of 2008, as amended, 7 USC § 2021 and § 278 of Title 7 of the Code of Federal Regulations (CFR). Section 278.6(f)(2) establishes the authority upon which a civil money penalty may be imposed against a SNAP disqualified retail food store or wholesale food concern in the event that it has been sold or the ownership is otherwise transferred.

7 CFR § 278.6(f)(2) states: “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 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).”

7 CFR § 278.6(f)(3) states: “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(f)(4) states: “A bona fide transferee of a retail food store shall not be required to pay a civil money penalty imposed on the firm prior to its transfer.”

The regulations at 7 CFR § 278.6(g) describes how to calculate the amount of a transfer of ownership CMP: Step 1: Determine the cumulative redemptions for the 12-month period immediately preceding the issuance of Retailer Operations’ Charge letter; Step 2: Determine the firm’s average monthly redemptions (AMR) by dividing the amount derived in Step 1 by 12. (Round this amount to the nearest dollar); Step 3: Multiply the AMR (as determined in Step 2) by .10. (Round this amount to the nearest dollar); and Step 4: Multiply the amount derived in Step 3 by 240. (The number 240 is used for permanent disqualifications in accordance with the Act and the regulations.)

7 CFR § 278.6(g) and § 3.91(b) (3)(i) establish an \$11,000.00 per violation limit as the maximum amount for a transfer of ownership CMP. 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 ten year disqualification period, as calculated under regulations issued by the Secretary.

APPELLANT'S CONTENTIONS

All contentions as presented, listed herein or not, have been considered prior to rendering a decision.

- Any transfer of ownership occurred prior to his final agency decision on the disqualification and that any sale or transfer occurred prior to such final decision.
- Upon receipt of letter dated December 13, 2019, this owner submitted a request for review on or about December 17, 2019. As of that date no final determination as to the permanent disqualification has become effective. As of this date no final agency decision has been rendered and as such, no final determination as the permanent disqualification has become effective.
- Any decision to permanently disqualify this retailer was stayed by the filing of a timely request for review awaiting final agency decision.
- The owner requests a reduced money penalty or an official warning letter in lieu of a CMP, or the action be reversed.

ANALYSIS AND FINDINGS

This review is to determine whether Retailer Operations' decision to assess a Transfer of Ownership CMP (TOCMP) against the former owner of a previously permanently disqualified firm was in accordance with the applicable regulations. The SNAP regulations at 7 CFR § 278.6(f) authorize FNS to assess a CMP against the owner, or other legal entity, who sells or otherwise transfers ownership of a disqualified retail food store in an amount to reflect that portion of the disqualification period that has not expired. Using the methodology described in 7 CFR § 278.6(g), Retailer Operations determined that the initial calculated amount of the Transfer of Ownership CMP was above the agency limit. Therefore, the CMP was assessed at \$33,000.00, which is the agency limit per violation.

In reaching a decision, full attention and consideration has been given to all contentions presented, including any not specifically recapitulated herein. The December 12, 2019 permanent disqualification of Appellant and the former store owner, is not under review. That determination was afforded administrative review, and it was sustained by final agency decision dated February 20, 2020. While a retailer is not subject to a TOCMP if the store is sold prior to

receipt of the determination letter, that is not the case in this matter. The store was sold after the Determination letter was sent and received. This letter clearly states that the store owner was subject to a TOCMP.

The review seeks to determine if a sale/transfer is bona fide, and that conditions of the sales contract or transfer were fully satisfied. The record shows that Retailer Operations assembled documents related to the transfer/sale of the business that included the signatures of both the buyer and seller. The record contains a Bill of Sale executed by the former store owner and dated January 14, 2020, that states the grocery was sold as is. The record also includes a commercial lease signed January 30, 2020 by the landlord and former store owner.

The Bill of Sale establishes that Appellant was sold by the former store owner to a buyer. There is documentation in the record that Appellant was sold during its period of permanent disqualification. The evidence under review supports that a retail food business at the same address as Appellant is now owned and operated by another owner. Once it is determined that a legitimate sale has taken place, if the old owner is currently disqualified, a transfer of ownership CMP is assessed.

A review of the amount of the CMP reveals that it was properly computed. Retailer Operations, using the methodology described in 7 CFR § 278.6(g), correctly determined that the initial calculated amount of the transfer of ownership CMP was above the agency limit which is \$11,000 per violation. The Charge letter identified three trafficking occurrences based on an onsite investigation. Therefore, the CMP was assessed at \$33,000.00, which is the agency limit per violation multiplied by the number of trafficking patterns.

Based on the entirety of record, the preponderance of the evidence supports that Appellant is subject to a CMP under the SNAP regulations cited herein. Retailer Operations took appropriate action, consistent with 7 CFR § 278.6(f)(2), (3), and (4) and 7 CFR § 278.6(f)(2) and (g), in its administration of the SNAP when it assessed a Transfer of Ownership CMP against Appellant. A review of the amount of the CMP supports that it was properly computed.

CONCLUSION

This review finds that by a preponderance of the evidence, a bona fide sale of a permanently disqualified retail food store occurred. The evidence is sufficient to support Retailer Operations' determination to assess a Transfer of Ownership CMP against Appellant.

RIGHTS AND REMEDIES

Attention is called to Section 14 of the Food and Nutrition Act of 2008 and to 7 CFR Section 279.7 of the regulations with respect to applicable rights to a judicial review of this determination. 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's former owner resides or is 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, 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.

M. Viens
ADMINISTRATIVE REVIEW OFFICER

December 17, 2021