

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

**5 U.S.C. § 552 (b)(6) & (b)(7)(C), Former
Owners,
Corner Food Mart,**

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0245132

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 \$55,000 was properly assessed against 5 U.S.C. § 552 (b)(6) & (b)(7)(C), the former owners of Corner Food Mart, for selling or transferring a store that had 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), when it assessed a TOCMP in the amount of \$55,000 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 Corner Food Mart, located at 3247 Truxillo St, Houston, Texas 77004, under the ownership of 5 U.S.C. § 552 (b)(6) & (b)(7)(C), from the SNAP effective September 14, 2017 for trafficking in SNAP benefits. The permanent disqualification letter dated September 13, 2017, stated that if the owner(s) sold or transferred the store after its disqualification, they 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 owners sold the business to a new owner for \$30,887.00 as documented in the case record by a Bill of Sale dated November 30, 2020. When the new owner applied for the SNAP at the same store location, the Retailer Operations Division discovered that the permanently disqualified store had been sold or otherwise transferred by the former owners. As a result, the Retailer Operations Division, in a letter dated April 12, 2021, notified 5 U.S.C. § 552 (b)(6) & (b)(7)(C) that it had assessed a TOCMP in the amount of \$55,000 in accordance with the SNAP regulations.

In a letter postmarked April 16, 2021, the Appellant, through counsel, requested an administrative review of the assessment of the TOCMP. The administrative review was granted and the assessment of the \$55,000 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.

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 the request for administrative review, in relevant part:

- The Appellants did not transfer the business as defined or contemplated by the regulation. Instead, the Appellants entered into an agreement solely for the sale of a portion of the assets, primarily comprised of the merchandise inventory maintained at the property located at 3247 Truxillo St., Houston, TX 77004. Rather than being transferred or sold, Corner Food Mart has been legally closed and dissolved in accordance with the laws of Texas.
- Courts have traditionally held that the sale and disposal of company assets, as well as the wrapping up of the business organization indicates that the store was not "transferred," but rather that the store owner had gone out of business. Where a retailer sells inventory plus the going concern of the business, such as the name of the business, the goodwill of the business and a covenant not to compete – then there is an argument that the business has transferred.
- There was no sale or transfer of the disqualified firm, Corner Food Mart, but rather Corner Food Mart was closed down and dissolved, and the merchandise inventory maintained at 3247 Truxillo St., Houston, TX 77004 was sold to a third party.
- The language of the Bill of Sale says that the sale is in consideration of the stock, inventory, and fixtures, not the business. There was no transfer of licensure, tax identification, goodwill, the business' name, know-how, bank accounts, liabilities, or any of the other know-how of the business or its owners. Furthermore, there was no non-compete agreement as would be expected if it were a sale of the business. There was not a real estate transfer either.
- The business continued under the Appellant's ownership and obligation after the sale of the inventory, as is evidenced by a payment on the business' obligations (by way of the business' credit line) three weeks after the close of the inventory sale.

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 Appellant store under its former owners was permanently disqualified for trafficking in SNAP benefits as documented by a permanent disqualification letter dated September 13, 2017. That letter stated:

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).

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, the former owner's ability to pay or the buyer's intentions regarding the property. 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.

Bill of Sale

The case record confirms that the business was sold to a new owner in a Bill of Sale signed and dated November 30, 2020. The Bill of Sale states, in part:

Through this Bill of Sale, Seller agreed to sell and convey to the Buyer the inventory merchandises and fixtures of the business known as Corner Food Mart located at 3247 Truxillo Street, Houston Texas 77004

IT IS THEREFORE AGREED that the Seller assign to Buyer **all of its interest of business**, including the inventory in stock and all the furniture and fixtures. [Emphasis added.]

The sale of "all of its interest of business" by the former owner as described above is a transfer of ownership within the meaning of 7 CFR § 278.6(f)(2). This transfer of ownership occurred after the store was permanently disqualified for trafficking in SNAP benefits effective September 14, 2017. The buyer in the Bill of Sale was subsequently authorized for the SNAP at 3247 Truxillo Street, Houston, Texas 77004, on March 9, 2021.

Proper Notice Given

Both the original charge letter dated March 30, 2017 and the permanent disqualification letter dated September 13, 2017 stated that if the owners 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 letters, the amount of the TOCMP is calculated based on the SNAP regulations at 7 CFR § 278.6(g). Therefore, the Appellant was

given proper notice that a TOCMP would be assessed if Corner Food Mart 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 followed agency regulations and guidelines in calculating 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 charged with 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 administrative review officer in this case does not have the authority to negotiate a reduced TOCMP amount.

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 this initial calculated TOCMP was **above the agency limit**, which is \$11,000 per violation. The March 23, 2017 charge letter identified five (5) trafficking violations. Therefore, the Retailer Operations Division correctly assessed the final TOCMP at \$55,000.00 which is the agency limit per violation multiplied by the number of trafficking violation (\$11,000.00 x 5 trafficking violations). That calculation is shown below:

5 U.S.C. § 552 (b)(6) & (b)(7)(C)

Summary

The regulations at 7 CFR § 278.6(f)(2) **require** FNS to assess a TOCMP against the former owner 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.

CONCLUSION

A review of the evidence in this case indicates by a preponderance of the evidence that a permanently disqualified store, Corner Food Mart, 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 September 13, 2017. 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. Please note that the judicial filing timeframe is specified in the Act, and this office cannot grant an extension.

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

September 14, 2021