

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

68th Street Gourmet Deli Corp,

Appellant,

v.

**Office of Retailer Operations and
Compliance,**

Respondent.

Case Number: C0251890

FINAL AGENCY DECISION

The U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS), finds that there is sufficient evidence to support the determination by the Office of Retailer Operations and Compliance to impose a Transfer of Ownership Civil Money Penalty (TOCMP) in the amount of \$22,000.00 against the former owner of 68th Street Gourmet Deli Corp for selling and/or transferring a store that was serving a period of disqualification from the Supplemental Nutrition Assistance Program (SNAP).

ISSUE

The issue accepted for review is whether the Office of Retailer Operations and Compliance took appropriate action, consistent with 7 CFR § 278.6(f)(2)-(4) and 7 CFR § 278.6(g), in its administration of the SNAP when it assessed a TOCMP in the amount of \$22,000.00 against Appellant.

AUTHORITY

According to 7 U.S.C. § 2023 and the implementing regulations at 7 CFR § 279.1, “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 administrative record documents that the firm and ownership were permanently disqualified from participation in the SNAP effective March 8, 2021, for trafficking. The SNAP disqualification letter dated March 3, 2021, stated that if ownership sold or transferred the firm subsequent to the disqualification, it would be subject to and liable for a TOCMP as provided by the SNAP regulations 7 CFR § 278.6(f)(2),(3), and (4). As noted in the letter, the amount of the

TOCMP is calculated based on the SNAP regulations at 7 CFR § 278.6(g). This disqualification letter was received by the former store owner on March 8, 2021.

The case record documents that the former store owner entered into an agreement to transfer full rights and ownership of the business (68th Street Gourmet Deli Corp) located at 6803 3rd Avenue, Brooklyn, New York to a new owner on July 7, 2021, for \$35,000.00 as evidenced by the Contract for Sale of Business signed by the former owner. This document and others were provided to FNS when the new owner applied to operate as an authorized SNAP retailer at this location. The Office of Retailer Operations and Compliance, in a letter dated January 31, 2022, informed the former owner that the USDA had assessed a TOCMP in the amount of \$22,000.00 in accordance with the SNAP regulations at 7 CFR § 278.6(f)(2),(3), and (4) for the sale or transfer of the firm during a period of disqualification.

By letter postmarked February 11, 2022, Appellant, through counsel, appealed the Office of Retailer Operations and Compliance assessment of the TOCMP and requested an administrative review of this action. The appeal was granted and implementation of the sanction has been held in abeyance pending completion of this review. Subsequent correspondence was received.

STANDARD OF REVIEW

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

CONTROLLING LAW

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

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.”

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.”

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(f)(4) reads, in part, “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.”

7 CFR § 278.6(g), provides for the amount of civil money penalties for hardship and transfer of ownership. It reads, “FNS shall determine the amount of the civil money penalty as follows:

- (1) Determine the firm’s average monthly redemptions of coupons 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 under paragraph (e) of this section. The civil money penalty may not exceed an amount specified in § 3.91(b)(3)(i) of this title for each violation.”

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 ten-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:

- The Appellant, through counsel, submitted arguments and evidence related solely to the permanent disqualification, but offered no evidence or rationales regarding the sale of the business.

ANALYSIS AND FINDINGS

The purpose of this proceeding is limited to determining whether the Office of Retailer Operations and Compliance’s decision to assess a TOCMP against the former owners was the appropriate course of action. The regulations at 7 CFR § 278.6(f) authorize FNS to assess a TOCMP against the owner(s) of a disqualified retail food store that has been sold or the

ownership is otherwise transferred. The record shows that the SNAP permanent disqualification determination letter dated March 3, 2021, and received by the former store owner on March 8, 2021, included notification to the effect 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).” Accordingly, the former owner received proper legal notice that a TOCMP could be imposed if the business was sold after the date of disqualification. The Office of Retailer Operations and Compliance determined that a legal sale of the business did occur and this is supported by documents in the case record. The former owner was properly informed of the TOCMP by letter dated January 31, 2022. The sole issue in this review is whether the Office of Retailer Operations and Compliance took appropriate action, consistent with 7 CFR § 278.6(f)(2) of the SNAP regulations, when it assessed a \$22,000.00 TOCMP against the former owner. Any contentions pertaining to the original disqualification action by the Office of Retailer Operations and Compliance are not subject to review.

SNAP regulations at 7 CFR §278.6(f)(2) do not specify any timeframe in which a store must be sold or transferred following its disqualification for a CMP to be imposed nor do they include a requirement as to the basis for the sale or transfer of a previously disqualified store.

As noted, there is clear indication in the record that the Appellant firm, or what remained of it, was in fact sold and/or transferred during its period of disqualification. The fact that the retail food business at the stated address is now owned and operated by another entity and that there is a new owner at the same location indicates that this is a legitimate business transfer subject to a TOCMP under SNAP regulations. As such, there is sufficient evidence to support the Office of Retailer Operations and Compliance’s determination that a TOCMP as outlined in SNAP regulations at 7 CFR § 278.6(f)(2) was correctly and appropriately imposed against the individual who owned the business at the time of the investigation and the permanent disqualification. There is no indication in the record that the new owner(s) was involved in any of the violative activity which formed the basis of the firm’s previous permanent disqualification, that the new owner(s) is in any way related to the former owner, or that the sale is illegitimate in any relevant respect. Accordingly, the statute and Federal regulations afford no latitude to take any action (including failure to act) other than to impose the sanction at issue. Likewise, this Review Officer is afforded no latitude to reverse or modify a correct and appropriate administrative sanction.

The case record documents that, under 7 CFR § 278.6(g), the Office of Retailer Operations and Compliance correctly calculated the amount of the TOCMP. That regulation states that the TOCMP is to be calculated on a formula which includes the SNAP redemption volume of the store during the 12 months prior to the firm being notified of 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 statutory limit. The Office of Retailer Operations and Compliance correctly determined that, using the methodology described in 7 CFR § 278.6(g), the initial calculated amount of the TOCMP was \$53,280.00. This amount is more than the agency limit of \$11,000 per violation and therefore, the Office of Retailer Operations and Compliance correctly assessed the final TOCMP at \$22,000.00.

CONCLUSION

A review of the evidence in this case indicates that the Appellant business was in fact sold in a bona fide sale as confirmed by Appellant. Therefore, 7 CFR § 278.6(f)(2) of the SNAP regulations is applicable, and the assessment of a TOCMP is correct. A review of the calculations indicates that the amount of the TOCMP assessed by the Office of Retailer Operations and Compliance is also correct. SNAP regulations are explicit in the requirement for a TOCMP in the event a disqualified business is subsequently sold and/or transferred and there is no Agency discretion in waiving or reducing the TOCMP amount. Thus, the action by the Office of Retailer Operations and Compliance is sustained. In accordance with the Food and Nutrition Act of 2008, as amended, and the regulations there under, this penalty shall become effective thirty (30) days after receipt of this letter. Appellant may contact the USDA-FNS Financial Management Accounting Division at (703) 605-0483 to discuss a monthly payment plan, or follow the instructions in the Office of Retailer Operations and Compliance's letter dated January 31, 2022, regarding online or check payment options.

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 must be filed in the U.S. District Court for the district in which Appellant's owner resides, is engaged in business, or in any court of record of the State having competent jurisdiction. This complaint, naming the United States as the defendant, 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.

ROBERT T. DEEGAN
ADMINISTRATIVE REVIEW OFFICER

August 4, 2022