

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

New Finest Deli Corp,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0252488

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 a finding that a Transfer of Ownership Civil Money Penalty (TOCMP) in the amount of \$22,000.00 was properly assessed against the former owner of New Finest Deli Corp (hereinafter “New Finest Deli Corp” or “Appellant”), for selling or transferring a store that has 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) in its administration of the SNAP, when it assessed a TOCMP in the amount of \$22,000.00 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 documents that FNS permanently disqualified New Finest Deli Corp, under the ownership of the Appellant, from the SNAP effective March 16, 2021 for trafficking in SNAP benefits. The permanent disqualification letter dated March 15, 2021 stated that if the Appellant/owner 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). As noted in the letter, the amount of the TOCMP is calculated based on the SNAP regulations at 7 CFR § 278.6(g).

According to the Bill of Sale on record, on or about March 18, 2021, the Appellant sold or transferred ownership of New Finest Deli Corp located at 5 U.S.C. § 552 (b)(6) & (b)(7)(C) to a new store owner(s) as agreed upon by both the Transferor and the Transferee(s) for 5 U.S.C. § 552 (b)(6) & (b)(7)(C) including stock in trade, fixtures, equipment, accounts receivable, contract rights, lease, good will, licenses, rights under any contract for telephone service or other rental, maintenance or use of equipment, machinery and fixtures at said premises. When the new store owner was authorized to participate in the SNAP on August 5, 2021, the Retailer Operations Division discovered that New Finest Deli Corp had been sold or otherwise transferred by the former owner/Appellant.

As a result of the sale or transfer of ownership, the Retailer Operations Division notified the Appellant, in a letter dated May 31, 2022, that it 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), (4) and § 278.6(g) for the sale or transfer of the firm during a period of disqualification.

In a letter postmarked June 12, 2022, the Appellant, through counsel, requested an administrative review of the assessment of the TOCMP. FNS granted the Appellant's request for administrative review by letter dated June 14, 2022 and the assessment of the TOCMP was held in abeyance pending completion of this review.

STANDARD OF REVIEW

In appeals of adverse actions, the Appellant bears the burden of proving by a preponderance of the evidence, that the administrative actions 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 matter asserted is more likely to be true than not true.

CONTROLLING STATUTE AND REGULATIONS

The controlling statute in this matter is contained in the Food and Nutrition Act of 2008, as amended, 7 U.S.C. § 2021 and 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) which provides the steps for calculating the TOCMP, 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 [average monthly redemption times 10 percent] by the number of months for which the firm would have been disqualified . . .

Notwithstanding the above, there is an agency limit of \$22,000.00 per violation as the maximum TOCMP amount.

APPELLANT'S CONTENTIONS

The following may represent only a brief summary of the Appellant's contentions presented in this matter. However, in reaching a decision, full attention and consideration have been given to all contentions presented, including any not fully recapitulated or specifically referenced herein.

In the request for administrative review, the Appellant, through counsel, stated the following summarized contentions, in relevant part:

- On or about March 15, 2021, 5 U.S.C. § 552 (b)(6) & (b)(7)(C) transferred ownership of New Finest Deli Corp located at 5 U.S.C. § 552 (b)(6) & (b)(7)(C) to 5 U.S.C. § 552 (b)(6) & (b)(7)(C), owner of 5 U.S.C. § 552 (b)(6) & (b)(7)(C).
- The submitted Contract for Sale of Business indicates that the sale concluded on March 15, 2021.
- As of March 15, 2021, 5 U.S.C. § 552 (b)(6) & (b)(7)(C) was no longer owner of New Finest Deli Corp and as a result, is not subject to the imposed TOCMP.
- The TOCMP of \$22,000.00 was assessed in error and is unconscionable and unjust.
- At the time that the determination letter was issued on or about March 16, 2021, the former owner's participation in the SNAP was terminated upon the transfer and sale of the firm.
- As such, the TOCMP should be vacated.

In support of these contentions, the Appellant, through counsel, submitted a W-82 Contract for Sale of Business dated March 15, 2021.

ANALYSIS AND FINDINGS

The purpose of this proceeding is limited to determining whether the Retailer Operations Division's decision to assess a TOCMP against the former owner was the appropriate course of action. 7 USC § 2021 and 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 prior to the end of its disqualification period. This review has no authority to dismiss or modify a TOCMP 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.

The record shows that the Appellant was permanently disqualified from the SNAP effective March 16, 2021. Documents in the case file show that the Appellant sold and/or transferred the permanently disqualified store to a new owner on or about March 18, 2021, and that this was the basis of the Retailer Operations Division's assessment of a \$22,000.00 TOCMP. The Appellant contends that as of March 15, 2021, 5 U.S.C. § 552 (b)(6) & (b)(7)(C) was no longer owner of New Finest Deli Corp and as a result, is not subject to the imposed TOCMP. However, while the W-82 Contract for Sale of Business on record and submitted by the Appellant is dated March 15, 2021, the W-81 Bill of Sale of Business with Affidavit on record indicates that the Appellant sold or transferred ownership of New Finest Deli Corp located at 5 U.S.C. § 552 (b)(6) & (b)(7)(C) to a new store owner(s) on March 18, 2021.

The SNAP permanent disqualification determination letter dated March 15, 2021, and received by the former store owner on March 16, 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 documentation that was submitted when the new store owner applied for SNAP retailer authorization at this location verifies that the retail food business was transferred on or about March 18, 2021. The retail food business at the Appellant's former address is now owned and operated by another entity; the fact that there is a new owner at the same location also supports that this is a legitimate business transfer subject to a TOCMP under the SNAP rules. The Bill of Sale on record states that on March 18, 2021, the Appellant sold or transferred ownership of New Finest Deli Corp located at 5 U.S.C. § 552 (b)(6) & (b)(7)(C) to a new store owner(s) as agreed upon by both the Transferor and the Transferee (s) for 5 U.S.C. § 552 (b)(6) & (b)(7)(C) including stock in trade, fixtures, equipment, accounts receivable, contract rights, lease, good will, licenses, rights under any contract for telephone service or other rental, maintenance or use of equipment, machinery and fixtures at said premises. As such, there is enough evidence to support the Retailer Operations Division's determination that this does constitute a transfer of a store, making Appellant subject to the TOCMP as outlined in the Federal regulations at 7 CFR § 278.6(f)(2).

TOCMP Calculation

The case record documents that, under 7 CFR § 278.6(g), the Retailer Operations Division 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 Retailer Operations Division correctly determined that, using the methodology described in 7 CFR § 278.6(g), the initial calculated amount of the TOCMP was 5 U.S.C. § 552 (b)(7)(E). This amount is more than the agency limit of \$11,000 per violation and therefore, the Retailer Operations Division correctly assessed the final TOCMP at \$22,000.00 (\$11,000.00 X 2 violations). The formula for computing the TOCMP does not provide for discretion and is directly related to the amount of SNAP violations, redemptions and the length of time in the disqualification. Therefore, this amount cannot be reduced.

CONCLUSION

A review of the evidence in this case indicates that the Appellant business was in fact sold in a bona fide sale as stated by the 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 (\$22,000.00) assessed by the Retailer Operations Division is also correct. The 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 Retailer Operations Division 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. The Appellant may contact the FNS Financial Management Accounting Division at 1-703-605-0483 to discuss payment options or follow the instructions in the Retailer Operations Division's letter dated May 31, 2022 regarding online or check payment options.

RIGHTS AND REMEDIES

Section 14 of the Food and Nutrition Act of 2008 (7 U.S.C. § 2023) and Title 7, Code of 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 the Appellant resides 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.

Under the Freedom of Information Act (FOIA), 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.

LORIE L. CONNEEN
ADMINISTRATIVE REVIEW OFFICER

August 11, 2022