

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

Avenue P Grocery Inc,

Appellant,

v.

**Office of Retailer Operations and
Compliance,**

Respondent.

Case Number: C0233668

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 levy a Transfer of Ownership Civil Money Penalty of \$33,000 against the former ownership of Avenue P Grocery Inc. (“Appellant”) for having sold a store during a period of disqualification from the Supplemental Nutrition Assistance Program (SNAP).

ISSUE

The purpose of this review is to determine whether the Office of Retailer Operations and Compliance took appropriate action, consistent with Title 7 of the Code of Federal Regulations (CFR) § 278.6(f)(2), when it levied a Transfer of Ownership Civil Money Penalty (TOCMP) against Appellant on August 18, 2020.

AUTHORITY

According to 7 U.S.C. § 2023 and its 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

In a letter received by the former owner on September 25, 2014, Appellant was notified that it was permanently disqualified as a SNAP-authorized retailer. A purchase agreement dated August 26, 2019 established Appellant sold Avenue P Grocery Inc. In the Office of Retailer Operations and Compliance’s letter dated August 18, 2020, Appellant was assessed a lump sum Transfer of

Ownership Civil Money Penalty (TOCMP) of \$33,000 in accordance with 7 CFR § 278.6(f)(2) for the sale or transfer of ownership of Avenue P Grocery Inc. during a period of disqualification.

On August 27, 2020, Appellant appealed the Office of Retailer Operations and Compliance's assessment and requested an administrative review of this action. The appeal was granted and implementation of the sanction has been on hold pending completion of this review.

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 § 278.6(f)(2) establishes the authority upon which a civil money penalty 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 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

APPELLANT'S CONTENTIONS

Appellant's responses regarding this matter are essentially as follows:

- FNS did not accept Appellant's explanation for the suspicious activity and permanently disqualified Appellant. Appellant provided four pages of documents.
- Appellant accepted the permanent disqualification, but was never notified about the possibility of a TOCMP.
- The firm was not transferred. The business failed and the remaining merchandise was sold.

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

ANALYSIS AND FINDINGS

The former owner contends that FNS did not accept Appellant's explanation for the suspicious activity and permanently disqualified Appellant. This appears to be an attempt to demonstrate that the earlier permanent disqualification imposed on the firm may have been improper. In this regard, no findings or conclusions on the merits of the specific arguments presented will be made. Appellant was permanently disqualified from participation in SNAP based on trafficking violations in a previous determination letter. Those matters dealing with the firm's permanent disqualification are not subject to this particular administrative review process but are included in other review processes of which Appellant was made aware and which were pursued.

The matter of the permanent disqualification imposed cannot properly be re-addressed in this context. The issue in this review is solely 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 \$33,000 Transfer of Ownership Civil Money Penalty against Appellant.

Appellant Notified of TOCMP

Appellant contends that it was not previously notified about a Transfer of Ownership Civil Money Penalty (TOCMP) assessment if the store were sold. The administrative record documents that in a letter dated September 10, 2014, the Office of Retailer Operations and Compliance informed Appellant that it was being considered for permanent disqualification from participation in SNAP, or the imposition of a civil money penalty in lieu of disqualification. This letter was received on September 11, 2014. Appellant was subsequently informed by letter on September 24, 2014 that the firm was denied a trafficking civil money penalty and was being permanently disqualified from participation as a retail store in SNAP. This letter was received on September 25, 2014. The letter ordered the firm to cease accepting SNAP benefits, and from that time forward Appellant was subject to the provisions of 7 CFR § 278.6(f). The pertinent part of both letters stated as follows:

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

Notice of the imposition of a TOCMP for the sale or transfer of a store is also contained in the regulations at 7 CFR § 278.6(f)(2). Therefore, being unaware of the assessment of the TOCMP if the store was sold does not provide a valid basis for mitigating or dismissing the TOCMP assessed by the Office of Retailer Operations and Compliance.

Evidence of Transfer of Firm

Appellant contends that this transaction does not constitute a transfer of ownership; The business failed and the remaining merchandise was sold. The aforementioned Bill of Sale and other documentation in the Office of Retailer Operations and Compliance file verify that the retail food business was transferred on August 26, 2019.

The retail food business at 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. As such, there is enough evidence to support the Office of Retailer Operations and Compliance's contention 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):

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 or persons who sell or otherwise transfer ownership of the retail food store or wholesale food concern shall be subjected to a civil penalty...

The language taken from the Act above makes no accommodation to insulate any individual acting in the role of officer in a corporation from being assessed a TOCMP. This is especially true if that individual is the sole officer in a privately-owned corporation and was directly involved in the sale of the store's assets and inventory. Accordingly, this contention is not a valid basis for a waiver or the reduction of the TOCMP under review.

Summary

Based on a review of the evidence, Avenue P Grocery Inc. was, indeed, sold following its disqualification from SNAP on September 25, 2014. Therefore, 7 CFR § 278.6(f)(2) of the SNAP regulations is applicable in this case as it pertains to a civil money penalty for the sale or transfer of a disqualified firm.

CONCLUSION

Based on the discussion above, the determination by the Office of Retailer Operations and Compliance to levy a Transfer of Ownership Civil Money Penalty of \$33,000 against Appellant for selling Avenue P Grocery Inc. during a period of disqualification from SNAP is sustained.

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 Appellant desires a judicial review, 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.

RICH PROULX
ADMINISTRATIVE REVIEW OFFICER

October 13, 2020