

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

BK Food Mart,

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0213875

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) of \$55,000.00 was properly levied by the Retailer Operations Division against the former owner of BK Food Mart, (hereinafter Appellant) for selling and/or transferring a store that was permanently disqualified from participation in the Supplemental Nutrition Assistance Program (SNAP).

ISSUE

The issue accepted for review is whether Retailer Operations Division took appropriate action, consistent with 7 CFR § 278.6(f)(2), (3), (4) and § 278.6(g), in its administration of the SNAP when it assessed a TOCMP in the amount of \$55,000.00 against Appellant by letter dated November 20, 2018.

AUTHORITY

7 USC § 2023 and the 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 administrative record documents that the firm and ownership were permanently disqualified from participation in the SNAP effective February 17, 2017. Ownership was informed in correspondence dated February 16, 2017, that in the event the firm was sold or transferred subsequent to disqualification, ownership would be subject to and liable for a civil money penalty as provided by the SNAP regulations pursuant to Section 278.6(f)(2),(3), and (4). The case file contains documents that shows effective August 16, 2018, ownership sold or transferred

the store named BK Food Mart located at 5 U.S.C. § 552 (b)(6) & (b)(7)(C), Atlanta, GA 30303, reflecting the sale of the business inventories and equipment for 5 U.S.C. § 552 (b)(6) & (b)(7)(C), as is, as fully described and enumerated in the Bill of Sale as well as a Property Lease Agreement effective June 15, 2018. These documents were provided to FNS when the new store owner applied to operate as an authorized SNAP retailer at this location.

Retailer Operations Division informed Appellant by letter dated November 20, 2018, that a TOCMP in the amount of \$55,000.00 was being assessed against it 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.

By letter dated November 29, 2018, Appellant, through counsel, appealed Retailer Operations Division's 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.

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 LAW

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). Part 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 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 to a purchaser or transferee, 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) and § 3.91(b)(3)(i) and internal agency policy establish an \$11,000.00 per violation limit as the maximum amount for a TOCMP. The Act, at Section 12(e)(1), states: "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."

FOIA Request

Counsel was contacted on June 10, 2019, to inquire if there was an actual FOIA request with the initial request for review dated November 29, 2018, as Counsel did not provide the Letter of Representation until December 16, 2018. Counsel consulted with his client and on June 13, 2019, indicated that they wished to file the FOIA request. A FOIA request was submitted on June 13, 2019 and counsel received all requested documentation on July 1, 2019.

APPELLANT'S CONTENTIONS

The Appellant made the following summarized contentions in its response to Retailer Operations Division' determination and in the request for administrative review, in relevant part:

1. The firm had been administratively dissolved by the Georgia Secretary of State some time ago and the business was closed this year as the result of financial hardship experienced following the permanent disqualification.
2. 5 U.S.C. § 552 (b)(6) & (b)(7)(C) sold some equipment and inventory for the sum of 5 U.S.C. § 552 (b)(6) & (b)(7)(C) to the new owner however the firm was not sold or transferred.

In subsequent correspondence dated July 22, 2019, Appellant through counsel provided an affidavit from the new owner in support of its proposition that the firm was not sold or transferred within the meaning and contemplation of the definition of “firm” in 7 CFR Section 271.2, and copies of the new owners Tax Registration Certificate and Georgia Lottery COAM Certificate of Registration for Coin Operated Amusement Machines as examples of new, non-related ownership. The preceding may represent only a brief summary of ownership’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.

ANALYSIS AND FINDINGS

The Appellant was informed of the permanent disqualification of BK Food Mart, as a SNAP retailer by letter dated February 16, 2017, and ownership was informed that in the event the firm was sold or transferred subsequent to its disqualification, ownership would be subject to and liable for a civil money penalty as provided by SNAP regulations. The business inventories and equipment was sold for 5 U.S.C. § 552 (b)(6) & (b)(7)(C) as outlined in the Bill of Sale provided and the record reflects that a Property Lease Agreement, for the property located at 5 U.S.C. § 552 (b)(6) & (b)(7)(C), Atlanta, GA 30303, was initiated effective June 15, 2018. These documents represent a bona fide sale and/or transfer of ownership, therefore, the sole issue in this review is whether Retailer Operations Division took appropriate action, consistent with 7 CFR § 278.6(f)(2) of the SNAP regulations, when it assessed a \$55,000.00 TOCMP against the Appellant.

TOCMP Calculation

The case record documents that, under 7 CFR § 278.6(g), 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 agency 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)(6) & (b)(7)(C). However, the Retailer Operations Division determined that the initial calculated TOCMP is above the agency limit, which is \$11,000 per violation. The January 24, 2017, trafficking charge letter identified five (5) patterns of unusual, irregular, and inexplicable activity. 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 patterns (\$11,000.00 x 5 trafficking patterns).

Summary

It is important to note that the purpose of this review is limited to determining whether Retailer Operations Division's decision to assess a TOCMP against the Appellant was appropriate. The regulations at 7 CFR § 278.6(f)(2) require FNS to assess a TOCMP against the owner of a disqualified retail food store that has been sold or the ownership is otherwise transferred. Moreover, the regulations at 7 CFR § 278.6(g) outline how to calculate the amount of this TOCMP utilizing the aforementioned formula. As such, there is no discretion in the calculation or abatement of the TOCMP amount. The record demonstrates that a bona fide legal sale/transfer of BK Food Mart did occur.

CONCLUSION

A review of the evidence in this case indicates that BK Food Mart was sold and/or transferred effective August 16, 2018. Therefore, 7 CFR § 278.6(f) of the SNAP regulations is applicable, and the assessment of a TOCMP is correct. A review of the calculations per 7 CFR § 278.6(g) indicates that the amount of the TOCMP assessed by Retailer Operations Division is also correct. Thus, the action by Retailer Operations Division is sustained.

RIGHTS AND REMEDIES

Your attention is called to Section 14 of the Food and Nutrition Act of 2008, as amended, (7 U.S.C. § 2023) and to Title 7, Code of Federal Regulations, Part 279.7 (7 CFR § 279.7) with respect to 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.

Under the Freedom of Information Act (FOIA), 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.

Monique Brooks
ADMINISTRATIVE REVIEW OFFICER

July 31, 2019