

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

D & A LLC,

Appellant,

v.

Case Number: C0214708

Retailer Operations Division,

Respondent.

FINAL AGENCY DECISION

The U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS), finds that there is insufficient evidence to support the determination by the Retailer Operations Division to impose a Transfer of Ownership Civil Money Penalty (TOCMP) in the amount of \$55,000.00 against the former owners of D & A LLC 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 Retailer Operations Division 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 \$55,000.00 against Appellant by letter dated February 27, 2019.

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 June 3, 2015, for trafficking. The SNAP disqualification letter dated June 1, 2015, 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 owners on June 3, 2015.

The case record documents that the business located at 5 U.S.C. § 552 (b)(6) & (b)(7)(C), Albuquerque, New Mexico was sold or transferred to a new owner on June 5, 2018, for the sum of 5 U.S.C. § 552 (b)(6) & (b)(7)(C) as evidenced by the Firm Offer for Sales Agreement and Acceptance signed by the new owner and by the former owner. This document was provided to FNS when the new owner applied to operate as an authorized SNAP retailer at this location. The Retailer Operations Division, in a letter dated February 27, 2019, informed the former owners that the USDA had assessed a TOCMP in the amount of \$55,000.00 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 March 8, 2019, Appellant appealed the Retailer Operations Division 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. Appellant's letter also included a Freedom of Information Act (FOIA) request. USDA FNS responded to this request in a letter dated April 10, 2019, that was received by Appellant on April 11, 2019. Only subsequent correspondence dated April 10, 2019, 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 two owners of D & A LLC opened their store in 2013 and in 2015 the firm was permanently disqualified from SNAP. The LLC was dissolved in 2015 as shown in documents from the State Department of Taxation & Revenue. Separate Taxation & Revenue documents show the formation of 5 U.S.C. § 552 (b)(6) & (b)(7)(C) on July 1, 2015, under the sole proprietorship of 5 U.S.C. § 552 (b)(6) & (b)(7)(C) and the firm’s closure on August 31, 2016;
- 5 U.S.C. § 552 (b)(6) & (b)(7)(C) was not sold, but the next tenant was 5 U.S.C. § 552 (b)(6) & (b)(7)(C). The former owner had no equity in this firm;
- On September 25, 2018, the former owner was told by the seller of 5 U.S.C. § 552 (b)(6) & (b)(7)(C) that USDA was requiring the former owner to sign the

Bill of Sale for the sale of 5 U.S.C. § 552 (b)(6) & (b)(7)(C) or USDA would not accept the Bill of Sale and would not process the new owner's SNAP application. The USDA agent was told numerous times that the former owner had no ownership in 5 U.S.C. § 552 (b)(6) & (b)(7)(C); and,

- The February 27, 2019, letter from USDA states that D & A LLC was sold/transferred which never happened. D & A LLC was closed in 2015 and never reopened.

Appellant submitted a copy of the USDA February 27, 2019, TOCMP assessment letter; documents from the State Department of Taxation & Revenue; 2016 tax returns for 5 U.S.C. § 552 (b)(6) & (b)(7)(C) and for the former owner; 2015 tax returns for D & A LLC; the Firm Offer for Sales Agreement and Acceptance for the Sale of 5 U.S.C. § 552 (b)(6) & (b)(7)(C); the First Amendment to Asset Purchase Agreement for the sale of 5 U.S.C. § 552 (b)(6) & (b)(7)(C); a copy of the USDA September 25, 2018, letter to the purchaser of 5 U.S.C. § 552 (b)(6) & (b)(7)(C); two different signed statements from the property landlord; and a signed statement from the new owner in support of these contentions.

ANALYSIS AND FINDINGS

After a review of all the pertinent documentation, the decision by the Retailer Operations Division to impose a TOCMP in the amount of \$55,000.00 is reversed. The evidence in the matter under review does not show that is more likely to be true than untrue that 5 U.S.C. § 552 (b)(6) & (b)(7)(C) retained ownership in 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Therefore, the assessment of a TOCMP by the Retailer Operations Division based on the June 5, 2018, sale of 5 U.S.C. § 552 (b)(6) & (b)(7)(C) cannot be sustained.

CONCLUSION

Based on a review of all of the evidence in this matter, the determination by the Retailer Operations Division to impose a TOCMP penalty based on the sale of 5 U.S.C. § 552 (b)(6) & (b)(7)(C) is reversed. This decision does not preclude the Retailer Operations Division from taking other actions as may be appropriate and as authorized by applicable SNAP regulations.

ROBERT T. DEEGAN
ADMINISTRATIVE REVIEW OFFICER

July 9, 2019