

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

D & D Grocery,

Appellant,

v.

Case Number: C0203067

Retailer Operations Division,

Respondent.

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 Retailer Operations Division to levy a Transfer of Ownership Civil Money Penalty of \$55,000 against the former ownership of D & D Grocery (“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 Retailer Operations Division 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 November 6, 2017.

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 dated May 27, 2015, Appellant was notified that it was permanently disqualified as a SNAP-authorized retailer. A purchase agreement dated February 19, 2016 established Appellant sold D & D Grocery. In the Retailer Operations Division’s letter dated November 6, 2017, Appellant was assessed a lump sum Transfer of Ownership Civil Money Penalty (TOCMP) of

\$55,000 in accordance with 7 CFR § 278.6(f)(2) for the sale or transfer of ownership of D & D Grocery during a period of disqualification.

On November 10, 2017, Appellant appealed the Retailer Operations Division'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:

- Appellant was not sold, it simply dissolved operations shortly after it was permanently disqualified;
- The bill of sale does not support that the firm was sold. The owner owns many businesses. Appellant submitted four pages of corporate documents, a two-page bill of sale and a two-page promissory note; and,
- There is another firm located in the space previously leased to Appellant, but there is no evidence that the new firm purchased the former business. Appellant provided three pages of documents regarding the new firm and four pages of information from Google maps.

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

Evidence of Transfer of Firm

Appellant contends that this transaction does not constitute a transfer of ownership; the firm dissolved operations shortly after it was permanently disqualified and another firm happened to lease the space previously leased to Appellant.

The aforementioned Bill of Sale and other documentation in the Retailer Operations Division file verify that the retail food business was transferred on February 19, 2016. Items included in this sale include "goodwill" and "inventory."

Appellant argues that 5 U.S.C. § 552 (b)(6) & (b)(7)(C). is simply one of many businesses with the same owner, and does not have any relationship to D & D Grocery. Appellant's application to be a SNAP retailer stated that D & D Grocery was opened on February 15, 2013 and was part of the privately held corporation 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

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 ROD'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...

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, D & D Grocery was, indeed, sold following its disqualification from SNAP on May 27, 2015. 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 Retailer Operations Division to levy a Transfer of Ownership Civil Money Penalty of \$55,000 against Appellant for selling D & D Grocery 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

January 23, 2018