

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

**Fond du Lac Supermarket,**

**Appellant,**

**v.**

**Case Number: C0210210**

**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 impose a Transfer of Ownership Civil Money Penalty (TOCMP) in the amount of \$20,472.00 against the former owner of Fond du Lac Supermarket 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 \$20,472.00 against Appellant by letter dated August 13, 2018.

**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 disqualified from participation as a SNAP retailer for a period of six years effective August 22, 2017, as the result of a WIC program disqualification. The SNAP disqualification letter dated May 8, 2017, 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 store ownership on May 9, 2017.

The case record documents that the former owner entered into an agreement to transfer 100 percent of the seller's right, title, and interest in the inventory and personal property of the business (Fond du Lac Supermarket) located at 5 U.S.C. § 552 (b)(6) & (b)(7)(C), Milwaukee, Wisconsin to a new owner on February 12, 2018, for the sum of 5 U.S.C. § 552 (b)(6) & (b)(7)(C) as evidenced by the notarized Bill of Sale 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 August 13, 2018, informed the former owner that the USDA had assessed a TOCMP in the amount of \$20,472.00 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 dated August 20, 2018, 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. Subsequent correspondence postmarked October 9, 2018 was also 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 firm was disqualified as a SNAP retailer August 22, 2017, and the owner told that he could not sell the store for six years;
- Store sales declined after the six year disqualification began and the owner was no longer able to pay its expenses. The store was closed most of December 2017;
- The owner did not sell the business, but decided to go out of business and sell the store's inventory as sales had dropped about 50 percent and were not covering bills;
- The decision [letter] states that the owner cannot sell, but can shut down the business. The owner talked to his bookkeeper and the landlord and decided to liquidate the inventory by having a going out of business sale. During this sale, the owner received an offer to buy the inventory at a discounted price with monthly payments and a new lease. He could have sold it to one or several people, but chose to sell it to the person leasing the store as it was easier. All of the store equipment and refrigerators belong to the landlord; and,
- The landlord was willing to release the owner from his lease and signed a lease with the person whom had purchased the store's inventory without the owner's prior knowledge.

Appellant submitted affidavits from the former owner's bookkeeper, landlord, wholesaler's sales manager, and the new store owner as well as state sales and use tax returns showing the drop in sales caused by losing SNAP in support of these contentions.

### **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 Appellant was the appropriate course of action. 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. The record shows that the SNAP permanent disqualification determination letter dated May 8, 2017, and received by the former store owner on May 9, 2017, included notification 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, Appellant received proper legal notice that a TOCMP could be imposed if the Appellant business was sold after the date of disqualification. This fact was acknowledged by the former store owner in his request for administrative review. The Retailer Operations Division determined that a legal sale of the Appellant business did occur and this is supported by documents in the case record. Appellant was properly informed of the TOCMP by letter dated August 13, 2018. The sole issue in this review is whether the Retailer Operations Division took appropriate action, consistent with 7 CFR § 278.6(f)(2) of the SNAP regulations, when it assessed a \$20,472.00 TOCMP against Appellant. Any contentions pertaining to the original disqualification action by the Retailer Operations Division are not subject to review.

That store sales declined following the implementation of the six year SNAP disqualification period and resulted in the firm going out of business are not contested. While SNAP regulations at 278.6(f)(2) do not specifically address whether a retail firm has or has not ceased operations

prior to its sale or transfer, there is no indication in the Act, as amended, or SNAP regulations that makes this a relevant factor in determining whether a TOCMP is required. Common sense and logic would dictate that firms dependent on SNAP revenues may often be forced into ceasing business operations due to the reduced cash flow after a disqualification and that this action could reasonably occur before a buyer might be located.

Appellant contends this transaction does not constitute a sale of the business as the building and fixtures (equipment, refrigerators, etc.) were being leased and only store inventory was sold.

Regarding Appellant's contentions, while a business may cease to exist, as may any value attributable to its name or other intangible assets, the saleable remnants of said business continue to constitute the firm or establishment for the purposes of the SNAP. The record shows that the former owner did, in fact, sell or transfer ownership to a purchaser. Contrary to Appellant's claim, the May 8, 2017, disqualification letter does not state that the former owner cannot sell the firm, it simply states that, "if you sell or transfer ownership of your store subsequent to your disqualification, you will be subject to and liable for a CMP". The disqualification letter also makes no mention of being able to "shut down the business" as claimed by Appellant.

As noted, there is clear indication in the record that the Appellant firm, or what remained of it, was in fact sold and/or transferred during its period of disqualification. The fact that the retail food business at the stated address is now owned and operated by another entity and that there are new owners at the same location indicates that this is a legitimate business transfer subject to a TOCMP under SNAP regulations. As such, there is sufficient evidence to support the Retailer Operations Division's determination that a TOCMP as outlined in SNAP regulations at 7 CFR § 278.6(f)(2) was correctly and appropriately imposed. There is no indication in the record that the new owners were involved in any of the violative activity which formed the basis of the firm's previous term disqualification, that the new owners are in any way related to the former owner, or that the sale is illegitimate in any relevant respect. Accordingly, the statute and Federal regulations afford no latitude to take any action (including failure to act) other than to impose the sanction at issue. Likewise, this Review Officer is afforded no latitude to reverse or modify a correct and appropriate administrative sanction.

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 \$84,678.00. 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. A credit for time served was further applied thereby reducing the final TOCMP to \$20,472.00.

## **CONCLUSION**

A review of the evidence in this case indicates that the Appellant business was in fact sold. 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 assessed by the Retailer Operations Division is also correct. 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. Appellant may contact the USDA-FNS Financial Management Accounting Division at (703) 605-0483 to discuss a monthly payment plan, or follow the instructions in the Retailer Operations Division's letter dated August 13, 2018, regarding online or check payment options.

### **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 a judicial review is desired, 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.

ROBERT T. DEEGAN  
Administrative Review Officer

February 22, 2019