

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

**5 U.S.C. § 552 (b)(6) & (b)(7)(C), owners
of Ganesh Corner Store,**

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0202437

FINAL AGENCY DECISION

It is the decision of the U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS) that a Transfer of Ownership Civil Money Penalty (TOCMP) in the amount of **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** was improperly imposed by the Retailer Operations Division against **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** and **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**, owners of Ganesh Corner Store (hereinafter “Appellant”). The determination by the Retailer Operations Division to impose a TOCMP against the Appellant is hereby reversed.

ISSUE

The issue accepted for review is whether or not the Retailer Operations Division took appropriate action, consistent with 7 CFR § 278.6(f)(2) and 7 CFR § 278.6(g) in its administration of the Supplemental Nutrition Assistance Program (SNAP) when it assessed a TOCMP in the amount of **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** against the Appellant.

AUTHORITY

7 U.S.C. § 2023 and its 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 case file indicates that in a letter dated October 12, 2016, FNS’s Retailer Operations Division charged Ganesh Corner Store with two violations of trafficking in SNAP benefits. The record further shows that a determination letter was sent to the firm on November 9, 2016. As a result of these actions, Ganesh Corner Store was permanently disqualified from SNAP effective November 14, 2016.

The agency's determination letter stated that if the firm sold or transferred ownership of the store after the imposition of the disqualification, it would be subject to and liable for a TOCMP as provided by SNAP regulations at 7 CFR § 278.6(f)(2), (3) and (4). The letter also noted that the amount of the TOCMP would be calculated based on regulations at 7 CFR § 278.6(g).

Documentation in the case record shows that on June 6, 2017, a SNAP application was submitted to FNS for a new store at the same location where Ganesh Corner Store had previously operated. According to the application, this new store, 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

Upon discovering that a new application had been submitted at a location where SNAP violations had previously occurred, the Retailer Operations Division requested additional documentation from the new store owner to verify that the disqualified owner was not affiliated with the new store in any way and to ascertain whether or not the transfer of ownership from the Appellant to 5 U.S.C. § 552 (b)(6) & (b)(7)(C) was bona fide. On September 1, 2017, 5 U.S.C. § 552 (b)(6) & (b)(7)(C)'s SNAP application was denied because the Retailer Operations Division determined that a bona fide sale of the store had not taken place.

In a letter dated October 26, 2017, the Retailer Operations Division informed the Appellant that because the store was sold during its disqualification period, a TOCMP in the amount of 5 U.S.C. § 552 (b)(6) & (b)(7)(C) was being assessed against the owners of Ganesh Corner Store in accordance with SNAP regulations at 7 CFR § 278.6(f)(2), (3) and (4), and § 278.6(g).

In a letter postmarked November 3, 2017, the Appellant, through counsel, appealed the Retailer Operations Division's imposition of a TOCMP by requesting an administrative review. The request was granted and implementation of the TOCMP has been held in abeyance pending completion of this review. It should be noted that on December 6, 2017, the Appellant, through counsel, requested case file information in a request made under the Freedom of Information Act (FOIA). FNS's FOIA response was completed on January 30, 2018, and the Appellant submitted additional contentions and documentation on February 21, 2018.

STANDARD OF REVIEW

In an appeal of adverse action, such as the imposition of a civil money penalty, an appellant bears the burden of proving by a preponderance of the evidence that the administrative action should be reversed. This means that an 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 law in this matter is found in the Food & Nutrition Act of 2008, as amended (7 U.S.C. § 2021), and promulgated through regulation under Title 7 CFR Part 278. In particular, 7 CFR § 278.6(f)(2) and (g) establish the authority upon which a TOCMP may be imposed against a retail food store or wholesale food concern.

7 U.S.C. § 2021(e)(1) states:

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. If the retail food store or wholesale food concern 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. The disqualification period imposed under subsection (b) shall continue in effect as to the person or persons who sell or otherwise transfer ownership of the retail food store or wholesale food concern notwithstanding the imposition of a civil penalty under this subsection.

7 CFR § 278.6(f)(2) reads, in part,

In the event any retail food store or wholesale food concern 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 in an amount to reflect that portion of the disqualification period that has not expired, to be calculated using the method found at § 278.6(g). If the retail food store...has been permanently disqualified, the civil money penalty shall be double the penalty for a ten year disqualification period...

7 CFR § 278.6(g) outlines the steps for calculating the TOCMP amount, in relevant part: Determine the firm's average monthly redemptions...for the 12-month period ending with the month immediately preceding that month during which the firm was charged with violations. Multiply the average monthly redemption figure by 10 percent. Multiply the product arrived at in paragraph (g)(2) by the number of months for which the firm would have been disqualified....The civil money penalty may not exceed an amount specified in § 3.91(b)(3)(i) for each violation.

Although regulations at 7 CFR § 3.91(b)(3)(i) provide for a maximum civil penalty of \$100,000 for each violation, FNS has established an \$11,000 limit per violation. It is also important to note that in Step 3 of § 278.6(g), above, 240 is the number of months used to calculate the civil money penalty for permanent disqualifications. This is in accordance with 7 U.S.C. § 2021(e)(1) and SNAP regulations at 7 CFR § 278.6(f)(2).

APPELLANT'S CONTENTIONS

The Appellant, through counsel, made the following summarized contentions in its request for administrative review, in relevant part:

- FNS has offered no evidence to support its position that the Appellant sold the store.
- The Appellant closed the business and sold the following:
5 U.S.C. § 552 (b)(6) & (b)(7)(C).
- TOCMPs are allowed by statute and regulation when the store is "sold or the ownership thereof transferred to a purchaser or transferee." However, the statute is silent with respect to stores simply closing and going out of business.

- Courts have traditionally held that the sale and disposal of company assets, as well as wrapping up of the business organization indicate that the store was not “transferred,” but rather that the store owner has gone out of business. Under such circumstances, FNS should not issue a TOCMP.
- The owners in this case have sold only its assets. The Bill of Sale and Asset Purchase Agreement confirms this.
- There is no language in any of the documents that would indicate that the sale was for the purchase of the store, or that the store as an entity had transferred from one person to the next.
- In FNS’s FOIA response, the Appellant did not see the application for the store owner that presently operates the store. As such, the Appellant does not know if the new owner has indicated to FNS that he started his own store or bought the Appellant’s store.
- What has legally occurred in this situation is the conclusion of the original store, and a new tenancy for the new store.
- Just because a sale of the assets occurs, it does not mean that the previous owner has sold or transferred his store or business.
- The only items sold were inventory and equipment. The business never changed hands. The old store closed, and a new lease was instituted with the new store owner. New licenses were procured by the new owner, and new tax filings and tax IDs were used. There is no actual evidence that the store was sold or transferred.

In support of these contentions, the Appellant submitted 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

The preceding may represent only a brief summary of the Appellant’s contentions presented in this matter. However, in reaching a decision, full attention was given to all contentions presented, including any not specifically summarized or explicitly referenced herein.

ANALYSIS AND FINDINGS

The primary issue for review in this case is whether or not it was lawful for the Retailer Operations Division to impose a transfer of ownership civil money penalty against the Appellant firm. To this regard, statute at 7 U.S.C. § 2021 and SNAP regulations at 7 CFR § 278.6(f)(2) are clear that a TOCMP **shall be** assessed if a store which has been disqualified is subsequently sold or the ownership of the firm is transferred prior to the end of the disqualification period. This review has no authority to dismiss or modify the penalty for any reason except in those cases where it is shown that a transfer of ownership did not occur; a monetary penalty was assessed in a manner not in accordance with regulation; or there was an error in calculating the TOCMP amount.

Based on a review of the facts in this case, it is the determination of this review that the assessment of a TOCMP was improper. According to agency records, the application for 5 U.S.C. § 552 (b)(6) & (b)(7)(C) was denied on September 1, 2017, because the Retailer Operations Division determined that the previously disqualified store owners were affiliated with the new store. As such, it was determined that a bona fide sale had not occurred. This denial action was sustained in administrative review in a Final Agency Decision dated November 21, 2017.

Because FNS has determined that a bona fide transfer of ownership did not occur between the owners of Ganesh Corner Store and 5 U.S.C. § 552 (b)(6) & (b)(7)(C), a TOCMP against the owners of Ganesh Corner Store is not warranted.

CONCLUSION

A review of the evidence in this case clearly indicates that prior to the imposition of a TOCMP against Ganesh Corner Store, the Retailer Operations Division had already determined that a bona fide sale of the store had not occurred. If a transfer of ownership does not exist, a TOCMP is improper. Therefore, the decision by the Retailer Operations Division to impose a 5 U.S.C. § 552 (b)(6) & (b)(7)(C) civil money penalty against 5 U.S.C. § 552 (b)(6) & (b)(7)(C) and 5 U.S.C. § 552 (b)(6) & (b)(7)(C), owners of Ganesh Corner Store, is reversed.

RELEASE OF INFORMATION

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.

JON YORGASON
Administrative Review Officer

May 18, 2018