

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

Former Owner of La Estrella Market,

Appellant,

v.

Case Number: C0228644

Retailer Operations Division,

Respondent.

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 \$22,000.00 was properly assessed against **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** (Appellant), the former owner of La Estrella Market, for selling or transferring a store that has been permanently disqualified 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) in its administration of the SNAP, when it assessed a TOCMP in the amount of \$22,000.00 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 record documents that FNS permanently disqualified La Estrella Market, under the ownership of the Appellant, from the SNAP effective March 29, 2019 for trafficking in SNAP benefits. The permanent disqualification letter dated March 28, 2019 stated that if the Appellant/owner sold or transferred the store after its disqualification, it would be subject to and liable for a TOCMP as provided by SNAP regulations at 7 CFR § 278.6(f)(2). As noted in the letter, the amount of the TOCMP is calculated based on the SNAP regulations at 7 CFR § 278.6(g).

On or about January 1, 2020, the Appellant sold and transferred La Estrella Market (the business property, assets and name) to a new store owner as agreed upon by both the Seller and the Buyer for a zero price, taking over the remaining years in the lease agreement at the location and including all equipment and fixtures, as documented by the Business Bill of Sale in the case record. When the new store owner was authorized to participate in the SNAP on April 6, 2020, the Retailer Operations Division discovered that La Estrella Market had been sold or otherwise transferred by the former owner/Appellant. As a result, the Retailer Operations Division, in a letter dated May 28, 2020, notified the Appellant that it had assessed a TOCMP in the amount of \$22,000.00 in accordance with the SNAP regulations.

In a letter postmarked June 3, 2020, the Appellant, through counsel, requested an administrative review of the assessment of the TOCMP. FNS granted the Appellant's request for administrative review by letter dated June 22, 2020 and the assessment of the TOCMP was held in abeyance pending completion of this review. In an email correspondence dated July 24, 2020, the Appellant's counsel submitted a signed letter of representation to FNS.

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 STATUTE AND REGULATIONS

The controlling statute in this matter is contained in the Food and Nutrition Act of 2008, as amended, 7 U.S.C. § 2021 and Section 278 of Title 7 of the Code of Federal Regulations (CFR).

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 . . . the person or other legal entity who sells or otherwise transfers ownership . . . shall be subjected to and liable for a civil money penalty . . . If the retail food store or wholesale food concern has been permanently disqualified, the civil money penalty shall be double the penalty for a ten year disqualification period.

7 CFR § 278.6(g) which provides the steps for calculating the TOCMP, states, in part:

- (1) 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.
- (2) Multiply the average monthly redemption figure by 10 percent.
- (3) Multiply the [average monthly redemption times 10 percent] by the number of months for which the firm would have been disqualified . . .

Notwithstanding the above, there is an agency limit of \$11,000.00 per violation as the maximum TOCMP amount.

APPELLANT'S CONTENTIONS

The following may represent only a brief summary of the Appellant's contentions presented in this matter. However, in reaching a decision, full attention and consideration have been given to all contentions presented, including any not fully recapitulated or specifically referenced herein.

In response to the Retailer Operations Division's determination via a request for administrative review and in a subsequent correspondence to FNS, the Appellant, through counsel, stated the following summarized contentions, in relevant part:

- In late 2018, the Appellant was back home in his native country of Yemen. While the Appellant was in Yemen, one of his coworkers at La Estrella Market, without the Appellant's knowledge or permission, illegally accepted SNAP benefits from an undercover agent in exchange for cash from the store's cash register. Due to the employee's unauthorized and illegal actions, La Estrella Market was permanently disqualified from the SNAP. Upon his return from Yemen and finding out what the employee had done, the Appellant terminated the employee. Despite his lack of knowledge or permission of improper conduct, the Appellant was held responsible for the employee's wrongdoing as his business was disqualified from the SNAP.
- At the end of 2019, business at La Estrella Market was extremely slow and the Appellant was having difficulty making ends meet. Of particular concern was the fact that La Estrella Market was in a ten-year lease with the property landlord and still had seven years left on the lease. Due to a loss of revenue, the Appellant could not afford to pay the rent each month. Yet, La Estrella Market was still required to pay the rent and remain in its ten-year lease.
- The loss of revenue was due in part to the loss of all government aid programs and La Estrella Market had no ability to replenish its inventory. As such, the Appellant had no choice but to enter into an agreement with 5 U.S.C. § 552 (b)(6) & (b)(7)(C) to take over La Estrella Market. Contrary to USDA's contention that the Appellant "sold" his firm, the submitted Business Bill of Sale demonstrates that the Appellant transferred Las Estrella Market to 5 U.S.C. § 552 (b)(6) & (b)(7)(C) for "a Zero Price," as 5 U.S.C. § 552 (b)(6) & (b)(7)(C) agreed to take over the remaining years in the ten-year lease agreement at the location.

- Based on the facts presented, it simply does not make sense to assess any civil money penalty against the Appellant, let alone in the amount of \$22,000.000. The Appellant has absolutely no part in the conduct that led to the SNAP disqualification. Furthermore, business at La Estrella Market was so slow that he could not afford to stay in business. He transferred his company and received no money in return, making it completely unreasonable to assess him with any CMP, including the assessed penalty of \$22,000.00.
- The Appellant requests that, pursuant to 7 CFR § 279.5(c), the action under review: (1) be reversed; (2) specify a reduced money penalty or fine; or (3) direct that an official warning letter be issued to the Appellant in lieu of the current CMP.

In support of these contentions, the Appellant, through counsel, submitted the following documents to FNS:

- Business Bill of Sale; and
- Written Statement from 5 U.S.C. § 552 (b)(6) & (b)(7)(C).

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 former owner 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 March 28, 2019, and received by the former store owner on March 29, 2019, included notification to the effect 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, the former owner received proper legal notice that a TOCMP could be imposed if the business was sold after the date of disqualification.

The former owner was properly informed of the TOCMP by letter dated May 28, 2020. 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 \$22,000.00 TOCMP against the former owner. Any contentions pertaining to the original disqualification action by the Retailer Operations Division are not subject to review.

The Appellant contends that contrary to USDA's determination that the Appellant "sold" his firm, the Appellant transferred Las Estrella Market to 5 U.S.C. § 552 (b)(6) & (b)(7)(C) for "a Zero Price," as 5 U.S.C. § 552 (b)(6) & (b)(7)(C) agreed to take over the remaining years in the ten-year lease agreement at the location. However, the Retailer Operations Division determined that a legal sale of the business did occur and this is supported by documents in the case record. The Business Bill of Sale on record states that "The business property, assets, and name of [La Estrella Market] are hereby sold and transferred from the named seller to the named buyer. The seller is the legal owner of the business, which is free of liens, warrants, mortgages, debts, and other encumbrances . . . Assets: I, 5 U.S.C. § 552 (b)(6) & (b)(7)(C), transferring my business

located at 5 U.S.C. § 552 (b)(6) & (b)(7)(C) named La Estrella Market to 5 U.S.C. § 552 (b)(6) & (b)(7)(C) for a zero price (taking over the remaining years in the lease agreement at the location). Also, the equipment and fixtures are included. The Business Bill of Sale was signed by both the Seller and the Buyer on January 1, 2020. Per 7 CFR § 278.6(f)(2) . . . 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 . . .

The SNAP regulations at 7 CFR §278.6(f)(2) do not specify any timeframe in which a store must be sold or transferred following its disqualification for a CMP to be imposed nor do they include a requirement as to the basis for the sale or transfer of a previously disqualified store. 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 is a new owner 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 against the individual who owned the business at the time of the investigation and the permanent disqualification. 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.

While FNS is sympathetic to the former store owner's circumstances with regard to economic hardship, neither the Food and Nutrition Act of 2008 nor its implementing regulations allow for factoring in individual circumstances such as profitability or economic hardship when determining whether a TOCMP is warranted because of the sale of a business. There is clear indication in the Retailer Operations Division case file that the Appellant, in fact, sold or transferred ownership of the former business while it was disqualified. As such, it has been determined that there is enough evidence to support the Retailer Operations Division's determination that this does constitute a sale/transfer of ownership of a business making La Estrella Market subject to the TOCMP as outlined in the Federal regulations at 7 CFR §278.6(f)(2).

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 \$217,680.00. 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.

CONCLUSION

A review of the evidence in this case indicates by a preponderance of the evidence that La Estrella Market, formerly owned by the Appellant, was sold/there was a transfer of ownership on or about January 1, 2020 after it had been permanently disqualified effective March 29, 2019. Therefore, the SNAP regulations at 7 CFR § 278.6(f)(2) applies to this transfer of ownership. A review of the calculations shows that the amount of the TOCMP assessed by the Retailer Operations Division was correct and proper and the decision in this case is hereby sustained. In accordance with the Food and Nutrition Act of 2008, and the regulations thereunder, this penalty shall become effective thirty (30) days after receipt of this letter.

The FNS Financial Management Accounting Division can be contacted at 1-703-605-0483 to discuss payment options or other related topics.

RIGHTS AND REMEDIES

Section 14 of the Food and Nutrition Act of 2008 (7 U.S.C. § 2023) and Title 7, Code of Regulations, Part 279.7 (7 CFR § 279.7) addresses 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 the Appellant resides 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), FNS is 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.

LORIE L. CONNEEN
ADMINISTRATIVE REVIEW OFFICER

August 10, 2020