

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

**Former Store Owners, Lexus Food Mart,**

**Appellant,**

**v.**

**Retailer Operations Division,**

**Respondent.**

**Case Number: C0220253**

**FINAL AGENCY DECISION**

The U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS), finds that there is sufficient evidence that a transfer of ownership Civil Money Penalty (CMP) was properly levied in the amount of \$33,000.00 by the Retailer Operations Division (Retailer Operations) against the former owners of Lexus Food Mart (Appellant) for selling and/or transferring a store that was disqualified for a period of three years from participation in the Supplemental Nutrition Assistance Program (SNAP).

**ISSUE**

The issue accepted for review is whether Retailer Operations took appropriate action, consistent with 7 CFR § 278.6(f)(2), (3), and (4) and 7 CFR § 278.6(f)(2) and (g), in its administration of the SNAP when it assessed a transfer of ownership civil money penalty against the former store owners.

**CASE CHRONOLOGY**

The record supports that the USDA notified the owners' previous counsel by letter dated October 30, 2018, that Appellant was disqualified from participation in SNAP as an authorized retail food store for three years due to the WIC disqualification action against the firm by the State of Wisconsin, Department of Health Services. The October 2018 Determination letter states that in the event the owners sold or transferred ownership of the store subsequent to the disqualification, they would be subject to and liable for a transfer of ownership civil money penalty pursuant to the SNAP regulations at Sections 278.6(f)(2), (3), and (4).

Retailer Operations informed the former store owners by letter dated September 11,

2019, that a transfer of ownership CMP in the amount of \$33,000.00, calculated in accordance with 7 CFR § 278.6(f)(2) and (g), was being assessed against them for the sale or transfer of the firm during a period of disqualification. By letter dated September 16, 2019, an attorney, requested review. The appeal was granted by letter dated November 14, 2019.

One owner emailed this office to ask if the attorney had submitted a letter of representation. This office replied in the negative by email dated December 5, 2019. The owner also asked for an extension. The owner was asked by the same email to provide more information relative to that request before an extension could be granted. No letter of representation or other information from the owners were provided. By email dated December 12, 2019, this office noticed the one owner by email that the review would proceed.

### **STANDARD OF REVIEW**

In an appeal of an adverse action, the Appellant bears the burden of proving by a preponderance of the evidence that the administrative action should be reversed. That means the Appellant has the burden of providing credible, relevant evidence which 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 not true.

### **CONTROLLING LAW AND REGULATIONS**

7 U.S.C. § 2023 and the implementing regulations at 7 CFR § 279.1 provide that a food retailer 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.

The controlling statute in this matter is contained in the Food and Nutrition Act of 2008, as amended, 7 USC § 2021 and § 278 of Title 7 of the Code of Federal Regulations (CFR). Section 278.6(f)(2) establishes the authority upon which a civil money penalty may be imposed against a SNAP 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) states: “In the event any retail food store which has been disqualified is sold or the ownership thereof is otherwise transferred to a purchaser or transferee, the person or other legal entity who sells or otherwise transfers ownership of the retail food store 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).”

7 CFR § 278.6(f)(3) states: “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) states: “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.”

The regulations at 7 CFR § 278.6(g) describes how to calculate the amount of a transfer of ownership CMP: Step 1: Determine the cumulative redemptions for the 12-month period immediately preceding the issuance of Retailer Operations’ Charge letter; Step 2: Determine the firm’s average monthly redemptions (AMR) by dividing the amount derived in Step 1 by 12. (Round this amount to the nearest dollar); Step 3: Multiply the AMR (as determined in Step 2) by .10. (Round this amount to the nearest dollar); and Step 4: Multiply the amount derived in Step 3 by the number of months for which the firm would have been disqualified under paragraphs (e) of this section.

7 CFR § 278.6(g) and § 3.91(b) (3)(i) establish an \$11,000.00 per violation limit as the maximum amount for a transfer of ownership CMP. 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**

All contentions have been considered prior to rendering a decision. No contentions were advanced.

### **ANALYSIS AND FINDINGS**

This review is to determine whether Retailer Operations’ decision to assess a transfer of ownership CMP against the former owners of a previously term disqualified firm was in accordance with applicable regulations. The reciprocal SNAP disqualification of Appellant due to documented WIC violations is not under review. Appellant was already afforded the opportunity to appeal that determination, and the review officer rendered a decision to sustain the sanction by Final Agency Decision dated June 4, 2019.

The SNAP regulations at 7 CFR § 278.6(f) authorize FNS to assess a transfer of ownership CMP against the owner(s), or other legal entity, who sells or otherwise transfers ownership of a disqualified retail food store in an amount to reflect that portion

of the disqualification period that has not expired. Using the methodology described in 7 CFR § 278.6(g), Retailer Operations properly computed the CMP amount. Among other documents, the record contains a Bill of Sale dated June 24, 2019, signed by one former store owner to a buyer during Appellant's period of permanent disqualification. Appellant is therefore subject to a CMP under the SNAP regulations cited herein. Retailer Operations took appropriate action, consistent with 7 CFR § 278.6(f)(2), (3), and (4) and 7 CFR § 278.6(f)(2) and (g), in its administration of the SNAP when it assessed a CMP against Appellant.

## **CONCLUSION**

This review finds that by a preponderance of the evidence, a bona fide sale of a term disqualified retail food store occurred. The evidence thus supports by a preponderance that Retailer Operations' determination to assess a transfer of ownership CMP in the amount of \$33,000.00 was proper. The effective date of this decision is 30 days after receipt by the former store owners.

## **RIGHTS AND REMEDIES**

Attention is called to Section 14 of the Food and Nutrition Act of 2008 and to 7 CFR Section 279.7 of the regulations with respect to your applicable rights to a judicial review of this determination. 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's former owners reside 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, 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.

M. Viens  
ADMINISTRATIVE REVIEW OFFICER

December 19, 2019