

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

Former Owner of Luna Grocery & Deli,

Appellant,

v.

Case Number: C0234345

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 \$33,000.00 was properly assessed against **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**, the former owner of Luna Grocery & Deli (hereinafter “Luna Grocery & Deli” or “Appellant”), 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 \$33,000.00 against Luna Grocery & Deli.

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 Luna Grocery & Deli, under the ownership of the Appellant, from the SNAP effective September 27, 2018 for trafficking in SNAP benefits. The permanent disqualification letter dated September 26, 2018 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 August 20, 2019, the Appellant sold Luna Grocery & Deli to a new store owner as agreed upon by both the Seller and the Buyer 5 U.S.C. § 552 (b)(6) & (b)(7)(C) (with a down payment 5 U.S.C. § 552 (b)(6) & (b)(7)(C)), including goodwill and inventory, as documented in the Bill of Sale in the case record. When the new store owner was authorized to participate in the SNAP on August 31, 2020, the Retailer Operations Division discovered that Luna Grocery & Deli had been sold or otherwise transferred by the former owner/Appellant. As a result, the Retailer Operations Division, in a letter dated October 8, 2020, notified the Appellant that it had assessed a TOCMP in the amount of \$33,000.00 in accordance with the SNAP regulations.

In a letter postmarked October 15, 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 November 3, 2020 and the assessment of the TOCMP was held in abeyance pending completion of this review. In an email correspondence of November 24, 2020, the Appellant, through counsel, submitted additional information in support of the request for administrative review.

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 the request for administrative review and in subsequent correspondence, the Appellant, through counsel, stated the following summarized contentions, in relevant part:

- Transfer of Ownership Civil Money Penalties are authorized by 7 U.S.C. § 2021(e) and by 7 CFR § 278.6, in the event that the disqualified and/or suspended retail food store "is sold or the ownership thereof transferred to a purchaser or transferee". However, the statute is silent with respect to a retail firm that had closed down and gone out of business. More specifically, Courts have traditionally held that the sale and disposal of company assets, as well as the wrapping up of the business organization indicates that the store was not "transferred," but rather that the store owner had gone out of business. See *Huggins v. U.S.*, 858 F. Supp. 2d 694, 705 (N.D. Miss. 2012). Accordingly, under such circumstances, the Department should not issue a transfer civil money penalty.
- Courts continuously have found that in situations where the store that was disqualified from SNAP is specifically mentioned in the sales documents, a transfer or sale of ownership of a disqualified store took place, thus warranting a civil money penalty under the SNAP regulations. See *Kassab v. United States*, No. 17-CV-0399 DMS (BLM), 2019 WL 2635596, at *3 (S.D. Cal. Apr. 4, 2019), reconsideration denied, No. 17-CV-0399 DMS (BLM), 2019 WL 3852497 (S.D. Cal. June 28, 2019) (finding that the plaintiff "executed an Assignment of Asset Purchase Agreement 'for the sale of the business commonly known as Mr. D's Liquor & Deli'." Said business was disqualified from SNAP prior to the sale and thus, a civil money penalty was warranted.); See also *Saleh v. U.S., Dep't of Agric. Food & Nutrition Servs.*, No. 13-CV-4095 ERK RLM, 2014 WL 4905456, at *5 (E.D.N.Y. Sept. 30, 2014) (stating "it is hard to imagine better evidence of the transfer of the Deli [i.e. the disqualified retail food store] than a bill of sale, signed by the plaintiff, transferring the Deli business.").
- Thus, the issues of law to be decided herein are: (1) whether the Appellant's sale of the merchandise inventory maintained at the property located at 5 U.S.C. § 552 (b)(6) &

(b)(7)(C) equates to the sale or transfer or ownership of a disqualified firm as set forth in 7 C.F.R. §278.6, thus warranting the issuance of a Transfer of Ownership Civil Money Penalty. This must be answered in the negative.

- 5 U.S.C. § 552 (b)(6) & (b)(7)(C) was the owner of Luna Grocery & Deli, a Philadelphia corporation engaged in the operation of a store located at 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Following the September 27, 2018 permanent disqualification of the Appellant from the SNAP as an authorized retailer, on or about August 20, 2019, Luna Grocery & Deli via 5 U.S.C. § 552 (b)(6) & (b)(7)(C) entered into a contract with 5 U.S.C. § 552 (b)(6) & (b)(7)(C) for the sale of the “merchandise inventory” maintained at the property located at 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Since that time, neither 5 U.S.C. § 552 (b)(6) & (b)(7)(C) nor Luna Grocery & Deli have had any involvement with the operation of the retail located at that address. The business was wound down, and no additional operations continued.
- The October 8, 2020 letter from the Retailer Operations Division assessed a TOCMP in the amount of \$33,000.00 in accordance with the SNAP regulations as the Appellant/owner sold or transferred the store after its permanent disqualification. However, the Department offered no evidence in support of its position.
- It is the Appellant’s position that there was no sale or transfer of the disqualified firm, Luna Grocery & Deli, but rather the firm was closed down and dissolved and the merchandise inventory maintained at the firm address was sold to a third party. Instead, on or about August 20, 2019, the Appellant via its principal, 5 U.S.C. § 552 (b)(6) & (b)(7)(C), agreed to enter into a sale with a third party for the sale of merchandise inventory maintained at the property located at 5 U.S.C. § 552 (b)(6) & (b)(7)(C). Blaringly absent from the Sales Agreement is any mention of the inclusion of the business, Luna Grocery & Deli which, if made part of the sale, would have been referenced somewhere therein. In short, the Sales Agreement conclusively shows that no sale or transfer of ownership of the business itself, i.e., Luna Grocery & Deli, took place but rather, the sale that took place was solely for the merchandise inventory maintained at the property located at 5 U.S.C. § 552 (b)(6) & (b)(7)(C).
- Furthermore, upon information and belief, according to the SNAP application from the new owner/tenant of the property, there is absolutely no indication that he/she/it had bought the Appellant’s business, Luna Grocery & Deli, but rather, the applicant indicated that he/she/it had started a new business. Any other type of representation would be patently false as the new tenant does not have any authority over Luna Grocery & Deli. Here, the Appellant has submitted evidentiary proof that no sale or transfer of the disqualified firm, Luna Grocery & Deli, took place as said firm has ceased operations, closed down and that the Sales Agreement was solely for the merchandise inventory maintained at the property located at 5 U.S.C. § 552 (b)(6) & (b)(7)(C).
- USDA has overreached in its authority in its determination that the sale of the merchandise inventory maintained at 5 U.S.C. § 552 (b)(6) & (b)(7)(C) equates to the sale or transfer of ownership of a disqualified firm as set forth in 7 CFR § 278.6. As such, the issuance of a TOCMP against the Appellant was arbitrary and capricious and should therefore be withdrawn.

ANALYSIS AND FINDINGS

The purpose of this review 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. Documents in the case file show that the Appellant sold and/or transferred the disqualified store to a new owner on or about August 20, 2019, and that this was the basis of the Retailer Operations Division's assessment of a \$33,000.00 TOCMP. The disqualification letter dated September 26, 2018, informed the Appellant 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 or transferred ownership after the date of disqualification.

The Appellant denies that it sold or transferred the business, but rather the firm was closed down and dissolved and the merchandise inventory maintained at the firm address was sold to a third party. The Appellant entered into an agreement solely for the sale of merchandise inventory maintained at the property located at 5 U.S.C. § 552 (b)(6) & (b)(7)(C). No supporting documents/evidence was provided by the Appellant in support thereof.

However, the Bill of Sale in the case record verifies that the retail food business/grocery store was transferred on August 20, 2019. The Bill of Sale states that the "Seller [5 U.S.C. § 552 (b)(6) & (b)(7)(C)/Appellant] sold to the Buyer [5 U.S.C. § 552 (b)(6) & (b)(7)(C)], Purchased: Grocery store located at 5 U.S.C. § 552 (b)(6) & (b)(7)(C); Breakdown: Good will--5 U.S.C. § 552 (b)(6) & (b)(7)(C), Inventory--5 U.S.C. § 552 (b)(6) & (b)(7)(C), Down payment--5 U.S.C. § 552 (b)(6) & (b)(7)(C); Monthly payment--5 U.S.C. § 552 (b)(6) & (b)(7)(C) on the 15th of the month; and Payment start date—September 15, 2019". The case record also includes a receipt for a 5 U.S.C. § 552 (b)(6) & (b)(7)(C) payment from 5 U.S.C. § 552 (b)(6) & (b)(7)(C) to 5 U.S.C. § 552 (b)(6) & (b)(7)(C) dated August 20, 2019 as well as eleven (11) receipts for monthly payments (dated September 2019 – July 2020) of 5 U.S.C. § 552 (b)(6) & (b)(7)(C) each from 5 U.S.C. § 552 (b)(6) & (b)(7)(C) to 5 U.S.C. § 552 (b)(6) & (b)(7)(C). A list of the inventory (equipment, etc.) sold was also included in the Bill of Sale.

The retail food business at the 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 Retailer Operations Division's contention that this Bill of Sale does constitute a transfer of a store, making the Appellant subject to the TOCMP as outlined in the Federal regulations at 7 CFR § 278.6(f)(2).

With regard to the case laws cited by the Appellant, it is beyond the scope and authority of this review to determine the applicability of same. This review is limited to consideration of whether or not the Retailer Operations Division duly adhered to the Food and Nutrition Act of 2008, as amended, and the implementing regulations, and whether or not the action taken is sustainable by

a preponderance of the evidence. Therefore, the application of any judicial precedent is better addressed via judicial review. Accordingly, no further findings or conclusions are rendered in this regard.

TOCMP Calculation

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 \$133,680.00. This amount is more than the agency limit of \$11,000 per violation. The July 30, 2018 trafficking charge letter identified three (3) charged incidences of trafficking violations. Therefore, the Retailer Operations Division correctly assessed the final TOCMP at \$33,000.00.

CONCLUSION

A review of the evidence in this case indicates that the Appellant business was in fact sold to a buyer on August 20, 2019. Therefore, 7 CFR § 278.6(f)(2) of the SNAP regulations is applicable, and the assessment of a \$33,000.00 TOCMP is correct. A review of the calculations indicates that the amount of the TOCMP assessed by the Retailer Operations Division is also correct. The 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. The 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 October 8, 2020, regarding online or check payment options.

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

January 11, 2021