

**U.S. Department of Agriculture
Food and Nutrition Service
Administrative Review Branch
Alexandria, Virginia 22302**

Modern Food Store 1,)	
)	
Appellant)	
)	
v.)	Case Number: C0189489
)	
ROD Office,)	
)	
Respondent)	
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FINAL AGENCY DECISION

It is the decision of the U.S. Department of Agriculture, Food and Nutrition Service (FNS) that, with respect to the Supplemental Nutrition Assistance Program (SNAP), the transfer-of-ownership-civil-money-penalty (TOCMP) in the amount of \$22,000.00 imposed upon the former owners of Modern Food Store 1 (hereinafter “Appellant”) by the ROD Office (Retailer Operations Division, Investigations and Analysis Branch, hereinafter “ROD Office”), is hereby sustained.

ISSUE

The issue accepted for review is whether the ROD Office took appropriate action, consistent with 7 U.S.C. § 2021, 7 CFR § 278.6(a), 7 CFR § 278.6(f), 7 CFR § 278.6(g) and 7 CFR § 278.6(h) in its administration of the SNAP when it imposed a TOCMP upon Appellant.

AUTHORITY

7 U.S.C. § 2023 and the implementing regulations at 7 C.F.R. § 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

By a letter dated May 3, 2016, Appellant was informed that it was ordered to pay a TOCMP in the amount of \$44,000.00. On May 12, 2016, Appellant requested an administrative review of the ROD Office’s decision; the request was granted. A letter also dated May 3, 2016 was issued on June 22, 2016 correcting an error in the calculated amount and effectively reduced the TOCMP to \$22,000.00. Appellant received this corrected amount on June 23, 2016.

STANDARD OF REVIEW

In appeals of adverse actions an appellant bears the burden of demonstrating by a preponderance of the evidence that the administrative actions should be reversed. That means 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 statute in this matter is contained in the Food & Nutrition Act of 2008, as amended, at 7 U.S.C. § 2021 and in Part 278 of Title 7 of the Code of Federal Regulations (CFR). 7 U.S.C. § 2021, Part 278.6(a) and Part 278.6 (f), (g) and (h) of the Regulations establish the authority upon which a firm that has been disqualified, and subsequently transfers ownership but has not yet fully served that disqualification period, may be assessed a civil money penalty to reflect the unexpired portion of that disqualification. 7
USC 2018 (b)(7)(e).

7 U.S.C. § 2021(e)(1) states, *inter alia*:

(e)(1) 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 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 sub-section.

7 CFR § 278.6(a) states, *inter alia*:

FNS may disqualify any authorized retail food store ... if the firm fails to comply with the Food & Nutrition Act of 2008, as amended, or this part. Such disqualification shall result from a finding of a violation on the basis of evidence that may include facts established through on-site investigations, inconsistent redemption data, *evidence obtained through a transaction report under an electronic benefit transfer system...* (Emphasis added.) FNS may, in lieu of a disqualification, subject a firm to a civil money penalty of up to an amount specified in §3.91(b)(3)(i) of this title for each violation if FNS determines that a disqualification would cause hardship to participating households. FNS may impose a civil money penalty of up to an amount specified in §3.91(b)(3)(ii) of this title for each violation in lieu of a permanent disqualification for trafficking, as defined in §271.2 of this chapter, in accordance with the provisions of paragraphs (i) and (j) of this section.

7 CFR §278.6(f)(2) states:

In the event any retail food store or wholesale food concern 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 or wholesale food concern 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 or wholesale food concern has been permanently disqualified, the civil money penalty shall be double the penalty for a ten year disqualification period. The disqualification shall continue in effect at the disqualified location for the person or other legal entity who transfers ownership of the retail food store or wholesale food concern notwithstanding the imposition of a civil money penalty under this paragraph.

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. A buyer or transferee (other than a bona fide buyer or transferee) may not be authorized to accept or redeem coupons and may not accept or redeem coupons until the Secretary receives full payment of any penalty imposed on such store or concern.

7 CFR §278.6(g) states:

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(h) states:

A firm has 15 days from the date the FNS regional office notifies the firm in writing in which to pay the civil money penalty, or to notify the regional office in writing of its intent to pay in installments as specified by the agency.

7 USC 2018 (b)(7)(e):

SUMMARY OF CHARGES

The record reflects that the firm formerly owned by Appellant was permanently disqualified from the SNAP effective February 1, 2012 and that the firm was subsequently sold on or about November 1, 2012, as reflected in the documentation referenced in the Analysis and Findings section below. The ROD Office accordingly issued a May 3, 2016 letter imposing a TOCMP in the amount of \$44,000.00. On May 12, 2016 Appellant requested administrative review of the decision, which was granted. The ROD Office issued a corrected May 3, 2016 letter on June 22, 2016 reducing the TOCMP to \$22,000.00. Appellant's review request contained what was interpreted as a Freedom of Information Act request for agency information related to the store under its prior ownership (Sunny Thomas and Mary V. Thomas). The agency responded to the request in a letter dated July 14, 2016 along with 122 pages of documentation pertaining to the store and the case at issue. Appellant was notified that it had an additional three weeks to provide any additional information in support of its review request following its receipt of the agency's FOIA response. Appellant was granted extensions by which to provide said information/documentation, which as subsequently provided on August 22, 2016.

APPELLANT'S CONTENTIONS

In Appellant's written request for review dated May 12, 2016, and in subsequent correspondence, it was argued that:

1. The penalty of \$22,000.00 is excessive and unfair; the violations precipitating the January 31, 2012 permanent disqualification involved four sales of ineligible items totaling \$18.21 (plus two items with no price indicated).
2. The firm met the criteria detailed at 7 CFR § 278.6(i):
 - a. Mr. Thomas took proactive steps toward the prevention of violations. The firm developed an effective compliance policy which is in writing and was in effect at the time the violations occurred. The store displayed in clear view the firm's policy and regulations such as a list of SNAP-eligible items. Appellant provides Exhibit A (photographs of store placards/posters).
 - b. The firm had an effective training program with regard to the acceptance of SNAP and WIC payments; when an employee was hired he/she was personally trained by Mr. Thomas on the eligibility of items sold in the store. The Report of Positive Investigation reflects that the firm refused to engage in SNAP-benefit trafficking on June 21, 2011.
 - c. The firm's ownership was not aware of, involved in or benefitting from the violations. Nor did the clerk benefit from the violations. Posters of eligible items were displayed on the walls proving that Mr. Thomas was doing his best to teach staff to comply with all rules/regulations.
3. The firm was authorized to participate in the SNAP from June 2009 to May 2011, during which no violations were committed.
4. On November 1, 2012 Modern Food Store was sold to 7 U.S.C. 2018 (b)(6) & (b)(7)(c) On January 1, 2013, Mr. Thomas opened a new business, 7 U.S.C. 2018 (b)(6) & (b)(7)(c). This firm also accepts

SNAP benefits and no violations have occurred at this new business. With all the expenses of a new business, it is impossible for Mr. Thomas to pay the fine of \$22,000.00, which will force him to file for bankruptcy or to permanently close his business.

ANALYSIS AND FINDINGS

The following represents the ROD Office's documentation of the sale of the firm after it was permanently disqualified for SNAP-benefit trafficking:

- A copy of a Sale-Purchase Agreement by and between [7 U.S.C. 2018 (b)(6) & (b)(7)(c)] (owned by Sunny Thomas) as Seller and [7 U.S.C. 2018 (b)(6) & (b)(7)(c)]. (owned by [7 U.S.C. 2018 (b)(6) & (b)(7)(c)]) and signed by both on November 1, 2012, acknowledging the sale and transfer of all of the assets associated or used in connection with the operation of a convenience store known as Modern Food Store located at 13360 North Borough, Houston, Texas, 77067; such assets are described as the furniture, fixtures, equipment, goods, inventory, improvements of the business known as Modern Food Store located at 13360 North Borough, Houston, Texas, 77067, all rights, title and interest in any and all tradenames, trade dress, service marks, slogans, logos, goodwill and intellectual property rights associated with the above-described business, including business telephone numbers, advertisements and Seller's interest in service, maintenance, management or other contracts relating to the ownership and operation of said store.
- A copy of a Bill of Sale acknowledging the sale of the furniture, fixtures, equipment, goods, inventory, improvements of the business known as Modern Food Store located at 13360 North Borough, Houston, Texas, 77067, including all rights, title and interest in any and all tradenames, trade dress, service marks, slogans, logos, goodwill and intellectual property rights associated with the above-described business, also including business telephone numbers, advertisements and Seller's interest in service, maintenance, management or other contracts relating to the ownership and operation of said store, and naming [7 U.S.C. 2018 (b)(6) & (b)(7)(c)]. (owned by Sunny Thomas) as Seller and [7 U.S.C. 2018 (b)(6) & (b)(7)(c)] (owned by [7 U.S.C. 2018 (b)(6) & (b)(7)(c)]) as Buyer and signed by both on November 1, 2012 and notarized by Philoan M. Tran on the same day
- A copy of a Commercial Lease Agreement dated and signed November 1, 2012 by [7 U.S.C. 2018 (b)(6) & (b)(7)(c)] as Tenant and Sunny Thomas as Landlord and leasing the property, described as a convenience store, at 13360 North Borough, Houston, Texas, 77067 for the period November 1, 2012 through October 31, 2022. The lease required a security deposit of \$6950.00 and monthly rent payments of an equal amount.
- A copy of a form from Prosperity Bank, Houston, Texas, verifying a bank business account (under the business name Modern Food Store at 13360 North Borough, Houston, Texas, 77067) held with that bank by [7 U.S.C. 2018 (b)(6) & (b)(7)(c)] and signed by [7 U.S.C. 2018 (b)(6) & (b)(7)(c)].
- A copy of a State of Texas Certificate of Filing of [7 U.S.C. 2018 (b)(6) & (b)(7)(c)]. dated and effective September 21, 2012.

- A copy of a Certificate of Formation For Profit Corporation reflecting the formation of [7 U.S.C. 2018 (b)(6) & (b)(7)(c)] solely owned by [7 U.S.C. 2018 (b)(6) & (b)(7)(c)] and dated September 21, 2012.
- A copy of Acceptance of Appointment and Consent to Serve as Registered Agent designating, and signed by, [7 U.S.C. 2018 (b)(6) & (b)(7)(c)] as the Registered Agent of the corporate entity [7 U.S.C. 2018 (b)(6) & (b)(7)(c)] on September 21, 2012.
- A copy of IRS Form SS-4 assigning an Employer Identification Number to the above-named corporation dated September 21, 2012.
- A copy of an IRS Notice of Acceptance as an S Corporation addressed to the above-named corporation dated September 21, 2012.

In regard to contentions 1 and 2 above, the permanent disqualification of the Appellant firm effective on February 1, 2012, and any contentions disputing same, are beyond the scope of the present administrative review; moreover, Appellant was provided an opportunity to reply to the Charges precipitating the disqualification and in fact did so on November 11, 2011, which the record indicates was duly taken into consideration by the ROD Office. Likewise the firm was provided an opportunity to request an administrative review of the disqualification, but did not do so. There is no indication in the record that a judicial review has been undertaken regarding the disqualification; as such the matter is closed for the purposes of this review.

It is noted that Appellant's contention 2 above provides information in support of a request for a trafficking civil money penalty (see 7 C.F.R. § 278.6(i)); however, information in support of such requests are limited to the 10-day timeframe following a firm's receipt of the trafficking charge letter. In this case the firm received the Charge Letter in November 2011 referencing both the sale of ineligibles and SNAP-benefit trafficking; the Charge Letter included instructions in this regard. Appellant's implied request for consideration of a trafficking civil money penalty in its 2016 review request regarding the TOCMP is thus well beyond (in fact several years beyond) the 10-day timeframe. In its reply to the Charge Letter Appellant provided no such request for consideration of this alternative sanction and no evidence or information in support thereof. While in its documentation in support of the review request the firm provided photographs of store posters, as well as assertions that it met the criteria at § 278.6(i), none of this information was present in the firm's reply to the trafficking Charge Letter, which tends to indicate that this information was produced at some point after the firm's reply to the Charge Letter, which likewise indicates that the described actions were not in effect at the time of the violations.

It is worth noting that had Appellant provided the same material to the ROD Office in its reply to the trafficking Charge Letter that it provided in its request for review of the TOCMP the firm would not have qualified for a trafficking civil money penalty, as noted in the following:

Criterion 1:

- Appellant provided insufficient written and dated documentation to reflect a commitment to ensure that the firm was operated in a manner consistent with SNAP regulations and policy:
 - Documentation of the development and/or operation of a policy to terminate violating employees (not provided).

- Documentation of the development and/or operation of procedures/policy to implement corrective action in response to complaints of violations (not provided).
- Documentation of the development and/or operation of procedures providing for internal review of employees' compliance (not provided).
- Documentation must establish that the policy statements were provided to violating employees prior to the commission of the violation(s) (not provided).

Criterion 2:

- Appellant did not provide documentary evidence which establishes that the firm's compliance policy and program were in operation prior to the occurrence of the violations at issue.

Criterion 3:

- Appellant did not provide the following:
 - Documentation of dated training curricula and dates of training sessions prior to the violations.
 - Records of dates of employment of all firm personnel.
 - Contemporaneous documentation of participation of violating personnel in initial and follow-up training prior to violations.
- Appellant provided insufficient documentation to demonstrate that its training program meets or is otherwise equivalent to the following standards:
 - Training shall be designed to establish a level of competence that assures compliance with program requirements as included in part 278.
 - Written materials, which may include FNS publications and program regulations available to all authorized firms, are used in the training program.
 - Training materials shall clearly state that the following acts are prohibited and are in violation of the statute and regulations:
 - The exchange of SNAP benefits for cash.
 - The exchange of SNAP benefits for firearms, ammunition, explosives or controlled substances.
 - Training for all who work in the store within one month of implementing the compliance policy documented in Criterion 1.
 - Any subsequently hired employees are trained within one month of hiring and trained periodically thereafter.

Criterion 4:

- Appellant provided insufficient evidence in support of the following:
 - Ownership/Management was not aware of, did not approve, did not benefit from or was not involved in trafficking. Appellant has provided no records or documentation demonstrating that SNAP benefits used in the transactions noted in the Charge Letter were in fact not deposited into its bank account. Conversely, as noted above, transaction data and other evidence confirms that the violative transactions did in fact result in monetary deposits into the firm's bank account in the exact amounts noted in the Charge Letter. It is noted for the record that the regulations allow an exception to the Criterion 4 language if it is ownership/management's first involvement in SNAP-benefit trafficking.

7 USC 2018 (b)(7)(e). The standard of substantial evidence employed above is difficult to meet, indeed impossible if such policy and program are not implemented and documented prior to the violations, but such is the standard required by the regulations, as noted above, and to which Appellant is held during the course of this review. Additionally, neither the size of an organization nor the number of its personnel is a consideration in determining the eligibility of a firm for a civil money penalty in lieu of permanent disqualification for trafficking. Moreover, while significant effort may be required to develop and maintain a compliance policy and program, if such fails to meet the requirements, that level of effort, even if substantial, does not mitigate the insufficiency. Lastly, the criteria for eligibility for a civil money penalty in lieu of permanent disqualification are clearly stated as *minimum* standards below which eligibility is precluded.

In its request for administrative review, and in subsequent correspondence, Appellant does not appear to acknowledge the occurrence of SNAP-benefit trafficking and its connection with the resulting permanent disqualification effective on February 1, 2012. The TOCMP in the present case is the result of the subsequent sale and/or transfer of ownership of Appellant's previously permanently disqualified firm (see 7 C.F.R. § 278.6(f)).

The amount of the TOCMP, summarized below, is based on a regulatory formula that is not discretionary; there is no alternative method for calculating such penalties and no provisions for factoring in mitigating circumstances. 7 USC 2018 (b)(7)(e). As such, the review officer has no authority to reduce or eliminate the TOCMP based on the former owner's personal or financial situation.

7 USC 2018 (b)(7)(e)

7 USC 2018 (b)(7)(e).

Appellant acknowledges that the firm owned by Sunny Thomas was sold/transferred to a new owner that operated a firm at the same location. There is no indication in the record that the buyer was involved in any of the violative activity which formed the basis of the firm's previous disqualification and there is no indication in the record that the new owner was in any way financially connected to the previous owners. There is no indication in the record that the sale/transfer was illegitimate in any relevant respect.

7 USC 2018 (b)(7)(e).

Appellant's arguments do not specify why the sale of the business (including inventory and fixtures and any/all related assets) by Mr. Thomas to 7 U.S.C. 2018 (b)(6) & (b)(7)(c) did not constitute a transfer. As noted above, for the purposes of the SNAP, the terms "sale" and "transfer of ownership" are synonymous. The term "sale" is traditionally viewed as a legal transaction, generally resulting in the drawing up of a Bill of Sale in which an owner agrees to sell 100 percent of operational and financial interest in a property to another person or entity. "Transfer of ownership," on the other hand, is somewhat more informal in nature. It simply means the owner of the disqualified firm no longer has an operational or financial interest in the business, but does not necessarily mean the business was legally "sold" to another person (e.g., the disqualified owner "goes out of business" and may or may not lease the premises and/or equipment to another person or entity). It is clear in the present case, however, that a sale of Mr.

Thomas's business occurred (on or about November 1, 2012) subsequent to the firm's permanent disqualification from the SNAP on February 2, 2012.

In addition, the plain language in subparagraph (e)(1) of Section 12 of the Food and Nutrition Act of 2008, as amended [7 U.S.C. 2021(e)(1)], is clear that:

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 or persons who sell or otherwise transfer ownership of the retail food store or wholesale food concern shall be subjected to a civil penalty...

There is no indication in the record of the existence of any business assets other than those sold by Mr. Thomas to [7 U.S.C. 2018 (b)(6) & (b)(7)(c)]. [7 U.S.C. 2018 (b)(6) & (b)(7)(c)] subsequently operated a SNAP- authorized firm under a similar name, Modern Food Store, which occupied the same location as that occupied by Modern Food Store 1 when owned by Mr. Thomas.

Regarding contention 3 above, prior periods of program participation without violations have no bearing on whether to impose a TOCMP or upon the amount of said penalty; as noted, the sale/transfer of a firm serving a disqualification period warrants a TOCMP.

[7 USC 2018 (b)(7)(e)].

CONCLUSION

In view of the above, the decision of the ROD Office to impose a TOCMP in the amount of \$22,000.00 is hereby sustained. Please contact the Centralized Receivables Service at 1-855-549-4285 to discuss payment options, or follow the instructions in the Retailer Operations Division's letter dated May 3, 2016 regarding online or check payment options. This decision will become effective upon the 30th day following Appellant's receipt of this document.

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 provisions of the Freedom of Information Act (FOIA), it may be necessary to release this document and related correspondence and records upon request. If such a request is received, FNS will seek to protect, to the extent provided by law, personal information that if released could constitute an unwarranted invasion of privacy.

DANIEL S. LAY
ADMINISTRATIVE REVIEW OFFICER

January 26, 2017
DATE