

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

**Nanoo Foods,**

**Appellant,**

**v.**

**Retailer Operations Division,**

**Respondent.**

**Case Number: C0200866**

**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 \$11,000.00, imposed upon the former Owners of Nanoo Foods (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**

Nanoo Foods under the ownership of the persons referenced in the cover letter was permanently disqualified from the SNAP on September 19, 2013. The ROD Office obtained documentation which it viewed as evidence that the firm was sold or the ownership thereof otherwise transferred

on or about November 22, 2014. By a letter dated June 29, 2017, Appellant was informed that it was ordered to pay a TOCMP in the amount of \$11,000.00. On July 6, 2017, Appellant requested an administrative review of the ROD Office's decision; the request was granted.

### 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. There also exist FNS policy memoranda and clarification letters which further explain the conditions necessary to impose such sanctions.

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.

## **EVIDENCE OF A SALE/TRANSFER**

The record reflects that the firm previously owned by Appellant was permanently disqualified from the SNAP effective September 19, 2013 and that the firm was subsequently sold, as documented by the following:

- A copy of the Affidavit of the new Owner of the firm signed April 21, 2017, stating that said Owner purchased the business located at 621 Woodcrest Lane, Arlington, Texas, 76010 from Appellant (the previous Owner of the business).
- A copy of the Certificate of Filing and Articles of Incorporation of the new Owner effective November 21, 2014.
- A copy of the The Inventory Downpayment Agreement between and signed by the former Owner as Seller and the new Owner as Buyer of the business inventory at the firm previously known as Nanoo Foods located at 621 Woodcrest Lane, Arlington, Texas, 76010, dated November 22, 2014.
- A copy of the Purchase Agreement dated November 21, 2014 between and signed by the former Owner as Seller and the new Owner as Purchaser of the business inventory at the firm previously known as Nanoo Foods located at 621 Woodcrest Lane, Arlington, Texas, 76010, including goodwill, merchandise inventory, fixtures, equipment, cash registers, related software, business customers and sellers rights to all contracts and deposits connected with such business, free and clear of any liabilities, debts, mortgages, security, interests or other liens or encumbrances.
- A copy of the Receipt for Health Food Establishment Permit, Fast Food, for the new Owner of said firm referenced above, dated December 30, 2015.
- A copy of the Health Food Establishment Permit, Fast Food, for the new Owner of said firm referenced above, issued January 1, 2016.
- Copies of various other business licenses issued to the new Owner of said firm referenced above effective following the sale of the firm referenced above.
- A copy of the Commercial Lease naming the new Owner referenced above as Tenant related to the property located at 621 Woodcrest Lane, Arlington, Texas, 76010 and signed by the Landlord and Tenant on November 18, 2014.

## **APPELLANT'S CONTENTIONS**

In Appellant's written request for review dated July 6, 2017, it was noted that:

Appellant requested a copy of the notice informing the former Owner that if it were sold following the disqualification, a civil money penalty could be imposed. This information was provided to the former Owners via letters dated August 30, 2013 and September 18, 2013 and to Appellant on July 19, 2017 in response to the review request.

## ANALYSIS AND FINDINGS

In reference to Appellant's statement above, no additional information or contentions have been provided by the Appellant; consequently, no further findings are rendered in this regard.

As noted, the record reflects that the firm owned by the former Owners was permanently disqualified from the SNAP and that the firm's assets were sold/transferred to a new Owner. There is no indication in the record that the new Owner was involved in any of the violative activity which formed the basis of the firm's previous disqualification while operated by the former Owner, and there is no indication in the record that the new Owner was in any way financially connected to the prior Owner. There is no indication in the record that the sale/transfer was illegitimate in any relevant respect. Accordingly, the statute and regulations afforded the ROD Office no latitude to take any action (including failure to act) other than to impose the sanction at issue in the present case; likewise, the review officer is afforded no latitude to reverse or modify a correct and appropriate administrative sanction.

FNS, in its administration of SNAP, imposes penalties for Program violations upon the Owner(s) of the "firm," whose operational definition has been the physical retail food store together with the specific individuals who are responsible for the management, day-to-day operations, and policy decisions regarding that store. The saleable remnants of said business continue to constitute the "firm" or establishment for the purposes of the SNAP; there is no "corporate veil" that protects/shields/conceals a firm's Owner with regard to administrative penalties for SNAP violations. Moreover, there is no indication in the record of the existence of any business assets other than those transferred by the former Owner to the current Owner. Neither the applicable statute nor the implementing regulations contemplate whether the new Owner assumes the old Owner's operations or begins operations anew; it is common that a new firm establishes its own identity independent of the old firm, with new or additional inventory, licenses, permits, advertising, etc.

Furthermore, the former Owners were the sole officers of the business and signed as "President" and "VP" the application to participate as an authorized SNAP retailer, and also signed the documents associated with the sale of this same business. 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...*

The language taken from the Act above makes no accommodation to alleviate a firm owner acting in his/her role as an officer in a corporation from being assessed a transfer-of-ownership civil money penalty. This is no less true if that individual is the sole officer in a privately-owned

company and was directly involved in the sale/transfer of the firm's ownership, as in the present case.

It is clear in the present case that a sale/transfer of the former Owner's business located at 621 Woodcrest Lane, Arlington, Texas, 76010, occurred subsequent to the firm's permanent disqualification from the SNAP on September 19, 2013.

### **CIVIL MONEY PENALTY**

The Retailer Operations Division correctly determined that, using the methodology described in 7 CFR § 278.6(g), the initial calculated amount of the TOCMP exceeded the agency limit, which is \$11,000 per violation or trafficking pattern. The August 30, 2013 Charge Letter referenced the exchange of SNAP benefits for cash or other consideration during an undercover investigation. Therefore, the TOCMP was assessed at \$11,000.00, which is the agency limit. This review confirms that the amount of the civil money penalty, \$11,000.00, was correctly calculated by the ROD Office.

### **CONCLUSION**

In view of the above, the decision of the ROD Office to impose a TOCMP in the amount of \$11,000.00 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 June 29, 2017 regarding online or check payment options. This decision will become effective upon the 30<sup>th</sup> 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), 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.

DANIEL S. LAY  
Administrative Review Officer

February 16, 2018