

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

Former Owner of Nashville Food Mart,

Appellant,

v.

Case Number: C0212301

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 Nashville Food Mart, 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 Nashville Food Mart on September 13, 2018.

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 Nashville Food Mart, under the ownership of the Appellant, from the SNAP effective July 14, 2016 for trafficking in SNAP benefits. The permanent Disqualification Letter dated July 13, 2016 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 February 23, 2018, the Appellant sold Nashville Food Mart to a new store owner as agreed upon by both the Seller and the Buyer as documented by a Purchase of Business Agreement and a Commercial Lease Agreement in the case record. When the new store owner was authorized to participate in the SNAP on September 5, 2018, the Retailer Operations Division discovered that Nashville Food Mart had been sold or otherwise transferred by the former owner/Appellant. As a result, the Retailer Operations Division, in a letter dated September 13, 2018, 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 September 19, 2018, the Appellant requested an administrative review of the assessment of the TOCMP. FNS granted the Appellant's request for administrative review by letter dated October 5, 2018 and the assessment of the TOCMP was held in abeyance pending completion of this 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) Multiple 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, the Appellant argued that:

- The Appellant owned this business for 2.5 years before transferring ownership. The Appellant's earnings profile shows that there was a loss 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in 2015 and profits 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in 2016 and 2017, respectively. The total income of the company for the last three years was a loss 5 U.S.C. § 552 (b)(6) & (b)(7)(C).
- The Appellant started the business with 5 U.S.C. § 552 (b)(6) & (b)(7)(C) investment and transferred the shares of the company with the same amount. This shows that the owner did not make any profit from its investment and the firm does not have enough funds to pay the \$33,000.00 civil money penalty.
- The Appellant requests that FNS consider its financial situation and adjust the amount of the civil money penalty down to the level that the company can afford to pay.

In support of these contentions, the following documents were submitted to FNS:

- Business tax returns for the last three years;
- Purchase Business Agreement; and
- Stock Transfer Agreement.

ANALYSIS AND FINDINGS

Nashville Food Mart, under the ownership of the Appellant, was permanently disqualified from the SNAP effective July 14, 2016. Documents in the case file show that the Appellant sold and/or transferred the permanently disqualified store to a new store owner on or about February 23, 2018, and that this was the basis of the Retailer Operations Division's assessment of a \$33,000.00 TOCMP.

Appellant Not Profitable

The Appellant contends that it owned this business for 2.5 years before transferring ownership. The Appellant's earnings profile shows that there was a loss 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in 2015 and profits 5 U.S.C. § 552 (b)(6) & (b)(7)(C) in 2016 and 2017, respectively. The total income of the company for the last three years was a loss 5 U.S.C. § 552 (b)(6) & (b)(7)(C). The Appellant started the business with 5 U.S.C. § 552 (b)(6) & (b)(7)(C) investment and transferred the shares of the company with the same amount. This shows that the owner did not make any profit from its investment and the firm does not have enough funds to pay the \$33,000.00 civil money penalty. In support of its contentions, the Appellant provided FNS with business tax returns for the last three years, the Purchase Business Agreement, and the Stock Transfer Agreement.

While FNS is sympathetic to the store owner's circumstances, neither the Food and Nutrition Act of 2008 nor its implementing regulations allow for factoring in individual circumstances such as profitability 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 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 of a business making Nashville Food Mart subject to the TOCMP as outlined in the Federal regulations at 7 CFR §278.6(f)(2).

Request to Reduce TOCMP Amount

The Appellant requests that FNS consider its financial situation and adjust the amount of the civil money penalty down to the level that the company can afford to pay. A review of the case record documents that the Retailer Operations Division correctly calculated the amount of the TOCMP under 7 CFR § 278.6(g). 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 agency limit.

As mentioned above, the formula for the computation for the TOCMP is specific per 7 CFR §278.6(g) and does not allow for any reductions. However, the regulations do provide that an installment plan be allowed for paying the TOCMP over the period of disqualification. The regulations, 7 CFR §278.6(h), state the following:

A firm has 15 days from the date the FNS Retailer Operations Division notifies the firm in writing in which to pay the civil money penalty or to notify the Retailer Operations Division in writing of its intent to pay in installments as specified by the Retailer Operations Division ... The civil money penalty must be paid in full by the end of the period for which the firm would have been disqualified (emphasis added). FNS shall:

- (1) Disqualify the firm for the period determined to be appropriate under paragraph (e) of this section if the firm refuses to pay any of the civil money penalty;

- (2) Disqualify the firm for a period corresponding to the unpaid part of the civil money penalty if the firm does not pay the civil money penalty in full or in installments as specified by the FNS Retailer Operations Division ...

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

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 \$78,720.00. However, the initial calculated TOCMP of \$78,720.00 is above the agency limit, which is \$11,000.00 per violation. The June 6, 2016 Charge Letter identified three (3) patterns of trafficking based on EBT redemption data. Therefore, the TOCMP was correctly assessed at \$33,000.00 which is the agency limit per violation multiplied by the number of trafficking patterns (\$11,000.00 x 3 trafficking patterns).

Summary

The regulations at 7 CFR § 278.6(f) require FNS to assess a TOCMP against the former owner of a disqualified store that has been sold or otherwise transferred to a new owner. Moreover, the regulations at 7 CFR § 278.6(g) outline how to calculate the amount of the TOCMP utilizing the aforementioned formula. As such, there is no discretion in the calculation of the TOCMP amount.

CONCLUSION

A review of the evidence in this case indicates by a preponderance of the evidence that Nashville Food Mart, formerly owned by the Appellant, was sold on or about February 23, 2018 after it had been permanently disqualified effective July 14, 2016. 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.

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

March 13, 2019