

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

Smiley's Market,

Appellant,

v.

Case Number: C0203002

Retailer Operations Division,

Respondent.

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 owner of Smiley's Market (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

Smiley's Market under the ownership of the person(s) referenced in the cover letter was permanently disqualified from the SNAP on October 26, 2016. The ROD Office obtained documentation which it viewed as evidence that the firm was sold or the ownership thereof otherwise transferred on or about August 23, 2017. By a letter dated October 10, 2017, Appellant was informed that it was ordered to pay a TOCMP in the amount of \$22,000.00. On October 19, 2018, 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.

7 U.S.C. § 2021(e)(1) states, in part:

(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, in part:

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 Appellant firm was permanently disqualified from the SNAP effective October 26, 2016 and that it was subsequently sold, as documented by the following:

- A copy of a Bill of Sale stating that the business located at 5 U.S.C. § 552 (b)(6) & (b)(7)(C), including all furniture fixtures, machinery, equipment, vehicles, tools, blueprints, specifications, supplies, leasehold or other existing improvements and other tangible property located at said premises, including inventories of raw materials, general stores, spare parts with any additional inventories obtained in the ordinary course of business prior to the Closing Date, among other assets enumerated therein, is sold by 5 U.S.C. § 552 (b)(6) & (b)(7)(C) to a new owner and signed by the former owner and seller of the store located at the same address on August 23, 2017.
- A copy of a Lease Agreement between the current owner of the business located at the above-noted address and the City of Madison, Illinois and signed by the current owner as Lessee and the Mayor of Madison, Illinois on August 1, 2017.
- The written statement of the former owner of the firm, 5 U.S.C. § 552 (b)(6) & (b)(7)(C), indicating that all inventory and equipment associated with the store located at the above address was sold for a substantial sum and payments are currently being made on the remaining debt owed for said sale. The new owner of the firm opened said store on August 1, 2017 under his own lease.

APPELLANT'S CONTENTIONS

In Appellant's written request for review dated October 19, 2018, and in subsequent correspondence, it was argued that:

Appellant sold all inventory and equipment "as is" from its former business to a new Owner in July 2017 for a specific amount. A down payment has been received and the buyer is making payments on the remaining amount. The new owner opened the store August 1, 2017 under his own lease. Appellant provides documentation of said sale.

ANALYSIS AND FINDINGS

In regard to Appellant's contentions above, as noted, the record reflects that that the firm operated by the former owner was permanently disqualified from the SNAP, effective October 26, 2016. The former owner affirms that the firm's assets were subsequently sold/transferred to a new owner (in this case the new owner now operates a SNAP-authorized retail food store at the same location). There is no indication in the record that the current 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 is in any way financially connected to the previous 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.

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; the Bill of Sale provided by Appellant itself states as much and specifies no exceptions, including all of Seller's rights under, and interest in, the contracts, customer agreements, purchase orders, leases and other agreements. The new owner now operates a SNAP-authorized firm which occupies the same premises as that occupied by the former 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 owner was the sole officer of the business and signed as "Owner" 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.

Appellant does not specify why the transaction at issue did not constitute a sale and/or transfer of the business. The record is otherwise clear in the present case that a sale/transfer of the former Owner's business located 5 U.S.C. § 552 (b)(6) & (b)(7)(C), occurred subsequent to the firm's permanent disqualification from the SNAP on October 26, 2016.

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 far exceeded the agency limit, which is \$11,000 per violation. The July 19, 2016 Charge Letter identified two patterns of trafficking based on SNAP redemption data. Both patterns were sustained during administrative review on or about February 17, 2017. Therefore, the TOCMP was correctly assessed at \$22,000.00 which is the agency limit (\$11,000.00) per violation or trafficking pattern (in this case there were two such patterns). This review confirms that the amount of the civil money penalty, \$22,000.00, 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 \$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 October 10, 2017 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), 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

June 6, 2018