

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

Tenth Avenue Convenience,

Appellant,

v.

Case Number: C0205947

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 \$33,000.00, imposed upon the former owner of Tenth Avenue Convenience (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

Tenth Avenue Convenience under the ownership of the person referenced in the cover letter was permanently disqualified from the SNAP, effective on November 10, 2014. The ROD Office obtained documentation which it viewed as evidence that the firm was sold or the ownership thereof otherwise transferred on or about January 1, 2016. By a letter dated February 20, 2018, Appellant was informed that it was ordered to pay a TOCMP in the amount of \$33,000.00. By a letter dated March 1, 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)(3) states:

At any time after a civil money penalty imposed under paragraph (f)(2) of this section has become final under the provisions of part 279, the Food and Consumer Service may request the Attorney General institute a civil action to collect the penalty from the person or persons subject to the penalty in a district court of the United States for any district in which such person or persons are found, reside, or transact business.

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.

APPELLANT'S CONTENTIONS

In Appellant's written request for review dated March 1, 2018, it was argued that:

Appellant acknowledges that the firm under Appellant's ownership was permanently disqualified. However, the retail store was not sold or the ownership otherwise transferred. The former Owner entered into a lease at 5 U.S.C. § 552 (b)(6) & (b)(7)(C), Birmingham, AL, 35212 on or about June 3, 2006 for a commercial building that would serve as the premises for the operation of the business known as Tenth Avenue Convenience. Appellant provides a copy of said lease. The lease ended on June 30, 2016. Near the end of the lease, the former Owner chose not to renew the lease, largely because the firm was unable to generate sufficient income after the firm was disqualified from the SNAP. The former Owner chose to close the business and sell all of the remaining inventory. This inventory was sold on or about January 1, 2016. Appellant provides a copy of the Bill of Sale. The sale of inventory is not equivalent to the sale of the business; there was no sale of the business name, the goodwill or any ongoing operations. The new tenants have their own business and did not pay the former Owner for anything other than a minimal amount of contents.

EVIDENCE OF A SALE/TRANSFER

The record reflects that the Appellant firm was permanently disqualified from the SNAP effective November 10, 2014 and that the firm was subsequently sold, as documented by the following, in January 2016:

- A copy of a General Assignment (Inventory) Bill of Sale and Assumption of Obligations between the current Owner, as Purchaser, of the SNAP-authorized firm located at 5 U.S.C. § 552 (b)(6) & (b)(7)(C), Birmingham, AL, 35212 and the former Owner of Tenth Avenue Convenience located at the same address, as Seller, of merchandise, inventory, all business licenses, liabilities and obligations related to the purchased assets located at and signed by representatives of the above firms on January 1, 2016.
- A copy of the Commercial Lease between the Lessor and the aforementioned Buyer, as Lessee, for the Deli located at the above-noted address and listing the provisions thereof and signed by Lessor and Lessee on January 20, 2016.
- Copies of business licenses assigned to the above-referenced Buyer and Lessee for operations on said premises, which became effective from March to October 2017.
- A copy of a Business Account Application at Wells Fargo Bank, NA, by the above-referenced Buyer/Lessee and named as Owner of Buyer's company as referenced above dated January 14, 2016 and signed by said Owner.

ANALYSIS AND FINDINGS

In regard to contention 1 above, Appellant acknowledges that the former Owner, while and through his/her operation of Tenth Avenue Convenience, was permanently disqualified from the SNAP and that the firm's assets were 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.

Appellant implies that the business assets were sold but not the business itself. Appellant implies that the business entity and the business assets were separate and distinct and/or that the sale of the latter had no bearing on the closure of the former, and/or that business assets do not solely comprise a business.

At the outset it should be noted that the closure referenced in the above argument, based upon the record at hand, occurred at or about the same time as the decision to sell the firm's assets. The Bill of Sale referenced herein was signed by both the former and the new owners of the firm on January 1, 2016; said Bill of Sale referenced the former Owner (and Owner of the corporate entity) as Seller and the new Owner as Buyer. Such indicates that the sole shareholder of the corporation and the sole Owner of the business assets sold were not distinct at the time of the sale, but were in fact one and the same. Additionally, that the former Owner signing the sales documentation and the initial application of Tenth Avenue Convenience to participate in the SNAP, are likewise the same person, tends to counter the notion that the ownership of the business assets and the SNAP Owner of record, as well as the sole shareholder in the corporate structure, were separate or distinct. Such tends to remove doubt about the connection of the business assets sold by the former Owner to the business entity known as Tenth Avenue Convenience. Moreover, there is clear indication in the Bill of Sale that substantially more than inventory was sold/transferred; the document specifically references merchandise, inventory, all business licenses, liabilities and obligations related to the purchased assets, which tend strongly to include business operations as well as inventory.

Moreover, 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. As such, 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; as noted, the Bill of Sale provided by Appellant itself specifies no exceptions and includes merchandise, inventory, all business licenses, liabilities and obligations related to the purchased

assets located at 5 U.S.C. § 552 (b)(6) & (b)(7)(C), Birmingham, AL 35212. 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; however, it is common that a new owner establishes a new business identity independent of the old one, with new or additional inventory, licenses, permits, advertising, etc.

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 the firm's assets. 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.

Other than the closure of the former Owner's business, Appellant does not specify why the sale of the business (including merchandise, inventory, all business licenses, liabilities and obligations related to the purchased assets) 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, though another person or persons now independently operate said business. It is clear in the present case that a sale and/or transfer of the former Owner's business located at 5 U.S.C. § 552 (b)(6) & (b)(7)(C), Birmingham, AL, 35212, occurred subsequent to the firm's permanent disqualification from the SNAP on November 10, 2014.

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 October 2014 Charge Letter identified three patterns of SNAP-benefit trafficking based on SNAP redemption data. Therefore, the TOCMP was correctly assessed at \$33,000.00 which is the agency limit (\$11,000.00) per violation or

trafficking pattern (in this case there were three such patterns). This review confirms that the amount of the civil money penalty, \$33,000.00, 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 \$33,000.00 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 February 20, 2018 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

September 6, 2018