

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

Tienda Mexicana El Compa Cheque,

Appellant,

v.

Case Number: C0202718

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 \$11,000.00, imposed upon the former owner of Tienda Mexicana El Compa Cheque (hereinafter “Appellant”) by the (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

Tienda Mexicana El Compa Cheque under the ownership of the person referenced in the cover letter, was notified in a letter dated September 23, 2016, that it would be disqualified from the SNAP for a period of three years. The letter also informed the Appellant that it could request an administrative review of the decision, during the pendency of which the disqualification decision would be held in abeyance. A Final Agency Decision, dated June 16, 2017 was received by Appellant on June 26, 2017. Administrative Review decisions are implemented 30 days following appellants' receipt of same, thus the three-year reciprocal WIC disqualification was

made effective on July 24, 2017. The ROD Office obtained documentation which it viewed as evidence that the firm was sold or the ownership thereof otherwise transferred on or about June 27, 2017. By a letter dated October 27, 2017, Appellant was informed that it was ordered to pay a TOCMP in the amount of \$11,000.00. On November 9, 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.

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 notified by a letter dated September 23, 2016 that it would be disqualified from the SNAP for a period of three years. The firm was subsequently sold, as documented by the following:

- A copy of the Sales Agreement by and between the Seller of Tienda Mexicana El Compa Cheque, and 5 U.S.C. § 552 (b)(6) & (b)(7)(C), as Buyer, for the business known as 5 U.S.C. § 552 (b)(6) & (b)(7)(C), specializing in the sale of Mexican goods, services and food, being operated at 5 U.S.C. § 552 (b)(6) & (b)(7)(C), which includes all assets thereof but is not limited to bakery ovens, food preparation implements, shelving, cases, current inventory, decorations, electronic devices and non-tangible property. The agreement was signed on June 27, 2017 by both Buyers and the Seller.
- A copy of a Bill of Sale transferring said property as referenced above from the Seller to the Buyers and including all fixtures, furnishings, equipment, property and rights, including but not limited to, ovens, fridges, food preparation implements, shelving, cases, current inventory, business related electronic devices and intangible property, signed by the above-referenced parties on June 26 and June 27, 2017.
- A copy of a Schedule B Noncompetition Agreement between said Buyers and Seller stated to be effective June 26, 2017, specifying certain non-competition provisions and signed by both parties on June 27, 2017.
- A copy of a Lease Amendment to transfer the lease of the premises located at 5 U.S.C. § 552 (b)(6) & (b)(7)(C) from the prior owner (Seller) to the current owners (Buyers) of the business operating at the same address, dated June 29, 2017 and signed by the landlord of said premises as well as the former and current owners of the business at issue as referenced above.
- A copy of the original lease pertaining to the former owner of the business for the premises noted above.

APPELLANT'S CONTENTIONS

In Appellant's written request for review dated November 9, 2017, it was argued that:

1. Appellant began planning to sell the firm in June of 2016, due to debt and low sales. It took almost a year, until May 2017, to find buyers. The firm was for sale prior to Appellant's receipt of the notice that the firm was being considered for suspension. In October of 2016, Appellant received a letter from the SNAP indicating that the firm was going to be suspended due to a WIC violation. Appellant requested a review of that decision. The firm was already for sale at that time. It took until June 30th, 2017 to receive the final response from the SNAP; Appellant was not aware of the final decision until the firm was under new ownership. Sales documents were signed on June 26, 2017.
2. The former Owner of Tienda Mexicana El Compa Cheque received a letter on October 8 from the new owners of the former Owner's firm and would like to have more time to prove that the firm was not sold, in addition to being suspended from the SNAP for three years.

3. Appellant never received nor obtained a written notice stating that it could not sell the firm while in the process of being disqualified.

ANALYSIS AND FINDINGS

In regard to contention 1 above, Appellant was notified by a letter dated August 31, 2016 of the ROD Office's consideration of imposing upon the firm a three-year WIC reciprocal disqualification. Appellant replied to this letter on September 1 and 9, 2016, requesting a civil money penalty in lieu of a disqualification. Appellant was notified of the ROD Office's decision to impose a three-year disqualification by a letter dated September 23, 2016, which Appellant received on September 26, 2016. Appellant requested an administrative review of the determination, which was granted and acknowledged by a letter to Appellant dated October 11, 2016. The review decision was rendered on June 16, 2017, which, as noted, Appellant received on June 26, 2017. Thus the firm was sold on the day following Appellant's receipt of the administrative review decision sustaining the three-year disqualification. It is noted that the above-referenced sales documents are signed on June 27, 2017, with the exception of the Seller's signature on the Bill of Sale, which is dated June 26, 2017. The lease amendment is signed on June 29, 2017. The new owners noted on their application to participate in the SNAP that the business began operations on July 1, 2017. Moreover, Appellant continued to accept SNAP benefits until just after 8 pm on June 30, 2017. Thus the record is clear that the firm was sold subsequent both to the ROD Office's Determination Letter informing the firm of the three-year disqualification and to Appellant's receipt of the Final Agency Decision sustaining that earlier decision.

Appellant notes that it did not sell the firm yet describes in substantial detail its nearly year-long plans to sell the firm and the details of that sale, referenced in like detail above.

Regarding contention 2 above, Appellant was notified via a letter dated November 20, 2017, which Appellant received at the new address it specified in its review request dated November 9, 2017 and postmarked November 13, 2017, that it may provide additional information. To date, no additional information has been received.

With regard to contention 3 above, there is no prohibition against a firm being sold after it is disqualified, but there is a civil-money-penalty imposed in such circumstances and Appellant was notified of same, as stated above. The ROD Office's Determination Letter dated September 23, 2016, which, as noted, Appellant received on September 26, 2016, clearly stated that "In the event you sell or transfer ownership of your store subsequent to your disqualification, you will be subject to and liable for a CMP as provided by SNAP regulations Section 278.6(f)(2), (3) and (4)."

Appellant acknowledges that the firm owned by the former Owner was 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; 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 sales and lease documentation referenced above states as much and specifies no exceptions, including all inventory and all intangible property. 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.

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 May 13, 2016 WIC Determination, upon which the ROD Office's three-year disqualification determination was based, identified one violation or pattern of violations (sales in excess of inventory). Therefore, the TOCMP was correctly assessed at \$11,000.00, which is the agency limit (\$11,000.00) per violation or pattern. 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 October 27, 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 27, 2018