

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

**5 U.S.C. § 552 (b)(6) & (b)(7)(C), Former
Owner,
V & V Deli Corp,**

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0225106

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 that a Transfer of Ownership Civil Money Penalty (TOCMP) of \$22,000 was properly assessed against **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**, the former owner of V & V Deli Corp., for selling or transferring a store that had 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), when it assessed a TOCMP in the amount of \$22,000 against the Appellant.

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 Retailer Operations Division permanently disqualified V & V Deli Corp., under the ownership of **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**, from the SNAP effective September 20, 2018 for trafficking in SNAP benefits. The permanent disqualification letter dated September 19, 2018, stated that if the owner sold or transferred the store after its disqualification, she would be subject to and liable for a TOCMP as provided by SNAP regulations at 7 CFR § 278.6(f)(2)(3) and (4). As noted in that letter, the amount of the TOCMP is calculated based on the SNAP regulations at 7 CFR § 278.6(g).

After the store had been permanently disqualified, the former owner sold the store to a new owner 5 U.S.C. § 552 (b)(6) & (b)(7)(C) as documented in the case record by a notarized Bill of Sale signed and dated August 20, 2019. When the new owner was authorized for the SNAP at the same location, the Retailer Operations Division determined that the permanently disqualified store had been sold or otherwise transferred by the former owner. As a result, the Retailer Operations Division, in a letter dated June 10, 2020, notified 5 U.S.C. § 552 (b)(6) & (b)(7)(C) that it had assessed a TOCMP in the amount of \$22,000 in accordance with the SNAP regulations. A copy of the TOCMP letter was delivered to the former owner at her home address by UPS on June 11, 2020.

In a letter postmarked June 15, 2020, the Appellant, represented by an accounting firm, requested an administrative review of the assessment of the TOCMP. The administrative review was granted and the assessment of the \$22,000 TOCMP was held in abeyance pending completion of this review.

STANDARD OF REVIEW

In appeals of adverse actions, an appellant bears the burden of proving by a preponderance of the evidence, that the administrative action should be reversed. That means an appellant has the burden of providing relevant evidence which a reasonable mind, considering the record as a whole, might accept as sufficient to support a conclusion that the matter asserted is more likely to be true than not true.

CONTROLLING LAW AND REGULATIONS

The controlling law in this matter is contained in the Food and Nutrition Act of 2008, as amended, 7 U.S.C. § 2021 and the SNAP regulations at 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) provides the steps for calculating the TOCMP and 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) 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

Notwithstanding the above, there is an agency limit of \$11,000 per violation as the maximum TOCMP amount.

APPELLANT'S CONTENTIONS

The Appellant, through her accountant, made the following summarized contentions in the request for administrative review, in relevant part:

- The Appellant requests a reduction in the TOCMP amount.
- 5 U.S.C. § 552 (b)(6) & (b)(7)(C) was aware of the notice regarding a TOCMP if she sold the store; however, she had to sell the store due to a family situation which forced her to move out of New York State.
- 5 U.S.C. § 552 (b)(6) & (b)(7)(C) sold the store for the sum of 5 U.S.C. § 552 (b)(6) & (b)(7)(C) for which she only got a 5 U.S.C. § 552 (b)(6) & (b)(7)(C) down payment with the balance to be paid in weekly installments of 5 U.S.C. § 552 (b)(6) & (b)(7)(C) for a year and a half. She was receiving these weekly payments until March 31, 2020; however, due to the pandemic, the purchaser has not been able to make any payments and has requested more time. If the purchaser's business fails 5 U.S.C. § 552 (b)(6) & (b)(7)(C) will lose the remaining balance owed to her as it was secured only by the business.
- 5 U.S.C. § 552 (b)(6) & (b)(7)(C) is working but her hours have been reduced due to the pandemic and she has no other source of income. For these reasons, a TOCMP reduction is requested.

The preceding may represent only a brief summary of the Appellant's contentions presented in this matter. Please be assured, however, in reaching a decision, full attention was given to all contentions presented, including any not specifically recapitulated or specifically referenced herein.

ANALYSIS AND FINDINGS

The SNAP regulations at 7 CFR § 278.6(f)(2) **require** FNS to assess a TOCMP against the owner of a disqualified store that has been sold or otherwise transferred to a new owner. The regulations do not provide **for any exceptions** relating to the motive for the sale or transfer, the adequacy of the sale price, the store's profitability or the former owner's ability to pay. In addition, the regulations at 7 CFR § 278.6(g) outline how to calculate the amount of the TOCMP and allows **no discretion** in the calculation of the TOCMP amount. Therefore, while the personal

economic situation of the Appellant is noted, the reasons why the Appellant sold the store or the Appellant's current financial status **are not relevant** to this review.

Bill of Sale

The Appellant admits that the store was sold to a new owner after V & V Deli Corp. was permanently disqualified from the SNAP. This is also supported by the notarized Bill of Sale in the case record that documents that the Appellant sold the store for **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** to a new owner in August 20, 2019. The case record documents by a preponderance of the evidence that the sale of the permanently disqualified store by the former owner as described above is a transfer of ownership within the meaning of 7 CFR § 278.6(f)(2). This transfer of ownership occurred after the store was permanently disqualified for trafficking in SNAP benefits effective September 20, 2018.

Proper Notice Given

Both the charge letter dated September 4, 2018 and the permanent disqualification letter dated September 19, 2018 stated that if the 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), (3) and (4). As noted in the letters, the amount of the TOCMP is calculated based on the SNAP regulations at 7 CFR § 278.6(g). Therefore, the Appellant was given proper notice that a TOCMP would be assessed if V & V Deli Corp. was sold or otherwise transferred after it was permanently disqualified from the SNAP.

TOCMP Calculation

The case record documents that the Retailer Operations Division correctly followed agency regulations and guidelines in calculating 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 twelve (12) months prior to the firm being charged with 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. The administrative review officer in this case does not have the authority to negotiate a reduced TOCMP amount.

The Retailer Operations Division correctly determined, using the methodology described in 7 CFR § 278.6(g) that the initial calculated amount of the TOCMP was **5 U.S.C. § 552 (b)(6) & (b)(7)(C)**. However, the Retailer Operations Division properly determined that this initial calculated TOCMP was **above the agency limit**, which is \$11,000 per violation. The September 4, 2018 charge letter identified two (2) trafficking violations. Therefore, the Retailer Operations Division correctly assessed the final TOCMP at \$22,000.00 which is the agency limit per violation multiplied by the number of trafficking violations (\$11,000.00 x 2 trafficking violations). That calculation is shown below:

5 U.S.C. § 552 (b)(6) & (b)(7)(C)

Summary

The regulations at 7 CFR § 278.6(f)(2) **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**. This administrative review does not have the authority to negotiate a reduced payment.

CONCLUSION

A review of the evidence in this case indicates by a preponderance of the evidence that a permanently disqualified store, V & V Deli Corp., formerly owned by 5 U.S.C. § 552 (b)(6) & (b)(7)(C), was sold or otherwise transferred to a new owner after it had been permanently disqualified effective September 20, 2018. Therefore, the SNAP regulation 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 Operation 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 Federal 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 you reside 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. Please note that the judicial filing timeframe is specified in the Act, and this office cannot grant an extension.

Under the Freedom of Information Act, 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.

RONALD C. GWINN
Administrative Review Officer

September 8, 2020