

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

**Former Store Owner,  
Agua Azul Deli Grocery Corp.,**

**Appellant,**

**v.**

**Retailer Operations Division,**

**Respondent.**

**Case C0223605**

**FINAL AGENCY DECISION**

The U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS), finds that there is sufficient evidence that a Transfer of Ownership Civil Money Penalty (CMP) in the amount of \$55,000.00 was properly levied by the Retailer Operations Division (Retailer Operations) against the former owner of Agua Azul Deli Grocery Corp. (Appellant) for selling and/or transferring a store that was permanently disqualified from participation as a retail food store in the Supplemental Nutrition Assistance Program (SNAP).

**ISSUE**

The issue accepted for review is whether Retailer Operations took appropriate action, consistent with 7 CFR § 278.6(f)(2), (3), and (4) and 7 CFR § 278.6(f)(2) and (g), in its administration of the SNAP when it assessed a CMP against Appellant.

**CASE CHRONOLOGY**

The record supports that the USDA notified the owner by Determination letter dated September 21, 2018, that Appellant was permanently disqualified from participation as an authorized retail food store due to trafficking violations detailed by five data Attachment patterns provided with a Charge letter. The Determination letter states that in the event the owner sold or transferred the store subsequent to the permanent disqualification, Appellant would be subject to and liable for a transfer of ownership civil money penalty pursuant to the SNAP regulations at Sections 278.6(f)(2), (3), and (4).

Retailer Operations informed the former store owners including the owner listed herein, plus Luis Duran and Felix A. Perez, by letter dated January 22, 2020, that a transfer of ownership CMP in the amount of \$55,000.00, calculated in accordance with 7 CFR § 278.6(f)(2) and (g), was being assessed against ownership for the sale or transfer of the firm during a period of disqualification. By letter dated January 27, 2020, the one former store owner requested review

of the imposed sanction. The appeal was granted by letter dated February 5, 2020. The former store owner also made a FOIA request on January 27, 2020.

The FOIA office replied to former store owner's FOIA request by letter dated September 29, 2021. By email dated September 30, 2021, this office noticed the former store owner that any additional information on this matter needed to be provided to this office by email no later than October 21, 2021. To date, no response has been received.

## **STANDARD OF REVIEW**

In an appeal of an adverse action, the Appellant bears the burden of proving by a preponderance of the evidence that the administrative action 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 argument asserted is more likely to be true than not true.

## **CONTROLLING LAW AND REGULATIONS**

7 U.S.C. § 2023 and its implementing regulations at 7 CFR § 279.1 provide that a food retailer 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.

The controlling statute in this matter is contained in the Food and Nutrition Act of 2008, as amended, 7 USC § 2021 and § 278 of Title 7 of the Code of Federal Regulations (CFR). Section 278.6(f)(2) establishes the authority upon which a civil money penalty may be imposed against a SNAP disqualified retail food store or wholesale food concern in the event that it has been sold or the ownership is otherwise transferred.

7 CFR § 278.6(f)(2) states: "In the event any retail food store 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 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)."

7 CFR § 278.6(f)(3) states: "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."

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."

The regulations at 7 CFR § 278.6(g) describes how to calculate the amount of a transfer of ownership CMP: Step 1: Determine the cumulative redemptions for the 12-month period immediately preceding the issuance of Retailer Operations' Charge letter; Step 2: Determine the firm's average monthly redemptions (AMR) by dividing the amount derived in Step 1 by 12. (Round this amount to the nearest dollar); Step 3: Multiply the AMR (as determined in Step 2) by .10. (Round this amount to the nearest dollar); and Step 4: Multiply the amount derived in

Step 3 by 240. (The number 240 is used for permanent disqualifications in accordance with the Act and the regulations.)

7 CFR § 278.6(g) and § 3.91(b) (3)(i) establish an \$11,000.00 per violation limit as the maximum amount for a transfer of ownership CMP. The Act, at Section 12, on the subject of transfer of ownership, supports the responsibility of ownership of the firm to the penalty as follows: Section 12 (5) Hearing – 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 who sells or otherwise transfers 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 retailer food store 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.

### **APPELLANT'S CONTENTIONS**

All contentions as presented, listed herein or not, have been considered prior to rendering a decision.

- We understand the way SNAP/EBT regulations and procedures work as well as how small deli groceries work. For this reason we are formally requesting an administrative review for our business. We kindly ask you to request any supporting documentation needed. We have requested a FOIA in order to review all information to show the review branch that the proper steps were taken to prevent violations.
- The business was transfer because Josefina was not able to work full time at the location due to bills and economical hardships.

### **ANALYSIS AND FINDINGS**

This review is to determine whether Retailer Operations' decision to assess a transfer of ownership CMP against the former owner of a previously permanently disqualified firm was in accordance with the applicable regulations. The permanent disqualification of Appellant and the former store owner, is not under review. The 2018 permanent disqualification was previously reviewed, and sustained in 2019 by the Administrative Review Branch in a letter to the former store owner dated February 21, 2019.

The SNAP regulations at 7 CFR § 278.6(f) authorize FNS to assess a CMP against the owner, or other legal entity, who sells or otherwise transfers ownership of a disqualified retail food store in an amount to reflect that portion of the disqualification period that has not expired. Using the methodology described in 7 CFR § 278.6(g), Retailer Operations determined that the initial calculated amount of the Transfer of Ownership CMP was above the agency limit. Therefore, the CMP was assessed at \$55,000.00, which is the agency limit per violation.

The record contains a Bill of Sale executed and dated March 5, 2019, by the former store owner and a buyer, that states: "THAT: JOSEFINA SANTANA, (Seller) for and in consideration of the sum of \$75,000.00 and other goods and valuable consideration, lawful money of the United

States to it paid, at or before the delivery of the presents by **AGUA AZUL DELI GROCERY CORP., (Transferee)** the receipt of which is hereby acknowledge, Has Bargained, sold and transferee, its/heirs successors and assigns the Bargained, Sold and transferee, its/heirs successors and assigns the **GROCERY STORE** located al 52 Arden Street. New York, NY 10040 including the stock in trade, fixtures, equipment, Accounts receivable, contract rights, Lease, Goodwill, licenses, rights under any contract For telephone service or other Rental, Maintenance or use of equipment, machinery and Fixtures at the said premises, more particularly described in the Schedule herein. The Seller, its officers, stockholders and directors agree it that it will engage in a similar Line of business as the one being sold herein a any capacity whatsoever, directly or indirectly, within a radius of ten (10) blocks form the premises being sold herein for a Period of Five (5) Years.” Retailer Operations noted in the record that “the addressees look to associated with the same building the store AGUA AZUL DELI GROCERY CORP is located.”

The record includes a lease agreement, dated December 20, 2018, that “52 Arden Street, New York, NY 10040 (aka 33 Sherman Avenue) to be used and occupied by the Tenant deli /grocery store only.” This information supports that the store authorized at 35 Sherman Ave. most likely the same one referred to as being on Arden Street.

The record also contains minutes of a meeting on March 5, 2019, that show that the former store owner resigned 100% of the shares of the corporation and assigned them to the new store buyer.

Based on the entirety of record, the preponderance of the evidence supports that Appellant is subject to a CMP under the SNAP regulations cited herein. As noted in the executed Bill of Sale, the former store owner “Has Bargained, sold and transferee, its/heirs successors and assigns the Bargained, Sold and transferee, its/heirs successors and assigns the **GROCERY STORE** located al 52 Arden Street. New York, NY 10040 including the stock in trade, fixtures, equipment, Accounts receivable, contract rights, Lease, Goodwill, licenses, rights under any contract For telephone service or other Rental, Maintenance or use of equipment, machinery and Fixtures at the said premises, more particularly described in the Schedule herein.”

The record supports that the former store owner sold a permanently disqualified store, in an executed, notarized and bona fide Bill of Sale. As such, Retailer Operations took appropriate action, consistent with 7 CFR § 278.6(f)(2), (3), and (4) and 7 CFR § 278.6(f)(2) and (g), in its administration of the SNAP when it assessed a transfer of ownership CMP against Appellant. A review of the amount of the CMP supports that it was properly computed.

## **CONCLUSION**

This review finds that by a preponderance of the evidence, a bona fide sale of a permanently disqualified retail food store occurred. The evidence is sufficient to support Retailer Operations’ determination to assess a Transfer of Ownership CMP against Appellant.

## **RIGHTS AND REMEDIES**

Attention is called to Section 14 of the Food and Nutrition Act of 2008 and to 7 CFR Section 279.7 of the regulations with respect to applicable rights to a judicial review of this

determination. 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's former owner resides or is 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, we are 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.

M. Viens  
ADMINISTRATIVE REVIEW OFFICER

October 27, 2021