

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

**Former Store Owner,  
Jose Supermarket Corporation #1,**

**Appellant,**

**v.**

**Retailer Operations Division,**

**Respondent.**

**Case Number: C0214109**

**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 a finding that a Transfer of Ownership Civil Money Penalty (TOCMP) of \$33,000.00 was properly levied by the Retailer Operations Division against the former owner of Jose Supermarket Corporation #1 (Jose Supermarket or Appellant) for selling and/or transferring a store that was disqualified from participation in 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), (3), and (4) and 7 CFR § 278.6(f)(2) and (g), in its administration of the SNAP when it assessed a TOCMP in the amount of \$33,000 against Appellant by letter dated December 3, 2018.

**CASE CHRONOLOGY**

The Retailer Operations Division permanently disqualified Jose Supermarket from participation as a SNAP retailer on December 28, 2017, for accepting SNAP benefits in exchange for cash. After receiving the determination letter, Appellant appealed the decision by requesting an administrative review. However, the permanent disqualification determination was upheld in a Final Agency Decision dated April 16, 2018.

Both the November 15, 2017, charge letter and the disqualification letter dated December 27, 2017, stated that if the owner(s) 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). The letters also noted that the amount of the TOCMP would be calculated based on regulations at 7 CFR § 278.6(g).

The case record documents the former store owner of Jose Supermarket sold the firm to a new owner on or about August 1, 2018. These documents were provided to FNS when the new store owner applied for SNAP retailer authorization at this location. As a result, the Retailer Operations Division, in a letter dated December 3, 2018, notified the former owners of Jose Supermarket that it had assessed a TOCMP in the amount of \$33,000.00 in accordance with the SNAP regulations.

By letter postmarked December 13, 2018, Appellant appealed the Retailer Operations Division's assessment of the TOCMP and requested administrative review of this action. The appeal was granted and implementation of the sanction has been held in abeyance pending completion of this review.

### **STANDARD OF REVIEW**

In appeals of adverse actions, the Appellant bears the burden of proving by a clear preponderance of the evidence, that the administrative actions 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 matter asserted is more likely to be true than not true.

### **CONTROLLING LAW**

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). In particular, 7 CFR § 278.6(f)(2) and (g) establish the authority upon which a TOCMP may be imposed against a retail food store or wholesale food concern.

7 USC § 2021(e)(1) states:

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. 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 subsection.

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 . . .

The following steps, based on the regulations at 7 CFR § 278.6(g), are used to calculate the amount of a TOCMP:

- Step 1: Determine the cumulative redemptions for the 12 month period immediately preceding the issuance of the Retailer Operations Division's 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);
- 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.) The result is the amount of the TOCMP.

### **APPELLANT'S CONTENTIONS**

In Appellant's December 13, 2018, administrative review request, Appellant stated the following summarized contentions, in relevant part:

- Appellant never committed the offenses that it was accused and it still lost its SNAP license.
- The business lost its value and it had to sell under market value.
- Appellant is receiving 5 U.S.C. § 552 (b)(6) & (b)(7)(C) per month and not currently working.
- Appellant cannot afford to pay the penalty.
- Appellant is requesting a reduction in the penalty amount.

The preceding may represent only a brief summary of the Appellant's contentions presented in this matter. However, in reaching a decision, full attention and consideration has been given to all contentions presented, including any not specifically recapitulated or specifically referenced.

### **ANALYSIS AND FINDINGS**

The purpose of this review is limited to determining whether the Retailer Operations Division's decision to assess a TOCMP against Appellant was appropriate. The disqualification itself is not under review. Thus, any contentions pertaining to the original disqualification action by the Retailer Operations Division are not subject to review.

Jose Supermarket was permanently disqualified from the SNAP effective December 28, 2017. Documents in the case file show that Appellant sold and/or transferred the permanently disqualified store to a new owner on or about August 1, 2018, and that this was the basis of the Retailer Operations Division's assessment of a \$33,000.00 TOCMP.

The permanent disqualification letter dated December 27, 2018, informed Appellant that "in the event that 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 Sections 278.6(f)(2),

(3), and (4). The amount of this sale or transfer CMP will be calculated based on SNAP regulations at 278.6(g).”

### **TOCMP Calculation**

A review of the case record documents that the Retailer Operations Division correctly calculated 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 12 months prior to the firm being notified of 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.

Appellant explains that the business lost its value and was sold for under market value. Neither the Food and Nutrition Act of 2008 nor its implementing regulations allow for factoring in individual circumstances such as profitability when determining whether a TOCMP is warranted because of a sale of a business. As such, the regulations require that a TOCMP be assessed and there is no authority in this administrative review to reduce or eliminate the TOCMP based on the former owner’s financial situation.

### **Summary**

In summary, the SNAP regulations at 7 CFR § 278.6(f)(2) authorize FNS to assess a TOCMP against the owner of a disqualified retail food store that has been sold or in which the ownership is otherwise transferred. The Retailer Operations Division determined that a legal sale of Jose Supermarket did occur on or about August 1, 2018, and this is supported by documents in the case record. Appellant’s contentions do not give any legal grounds for vacating or reducing the TOCMP. Moreover, the regulations at 7 CFR § 278.6(g) outline how to calculate the amount of the TOCMP, as described above, and do not provide any authority to waive or reduce the assessed TOCMP. As such, there is no discretion in the calculation of the TOCMP amount.

### **CONCLUSION**

This review finds that the evidence provided by the Retailer Operations Division as to a bona fide sale of a disqualified retail food store is sufficient to support its determination to assess a transfer of ownership CMP against Appellant in the amount of \$33,000.00.

### **RIGHTS AND REMEDIES**

Applicable rights to a judicial review of this decision are set forth in 7 USC § 2023 and 7 CFR § 279.7. 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 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.

Mary Kate Karagiorgos  
Administrative Review Officer

May 15, 2019