

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

**Dhruv R. Desai, Former Owner of
OM Mart, Inc.,**

Appellant,

v.

Retailer Operations Division,

Respondent.

Case Number: C0201194

FINAL AGENCY DECISION

It is the decision of the U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS) that a Transfer of Ownership Civil Money Penalty (TOCMP) in the amount of **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** was properly imposed by the Retailer Operations Division against Dhruv R. Desai, former owner of OM Mart, Inc. (hereinafter “Appellant”), for selling or transferring ownership of a store which was permanently disqualified from the Supplemental Nutrition Assistance Program (SNAP).

ISSUE

The issue accepted for review is whether or not the Retailer Operations Division took appropriate action, consistent with 7 CFR § 278.6(f)(2) and 7 CFR § 278.6(g) in its administration of SNAP when it assessed a TOCMP in the amount of **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** 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 case record indicates that on July 5, 2016, FNS’s Retailer Operations Division charged OM Mart, Inc. with three violations of trafficking in SNAP benefits. The record shows that the Appellant replied to these charges in correspondence dated between July 18, 2016, and August

15, 2016. After considering the Appellant's reply to the charges and further reviewing the evidence in the case, the Retailer Operations Division concluded that trafficking violations did occur. As a result, the Appellant firm was permanently disqualified from SNAP effective August 23, 2016. The Appellant did not request an administrative review of this decision.

The agency's determination letter, dated August 18, 2016, stated that in the event that the firm's ownership sold or transferred ownership of 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 letter also noted that the amount of the TOCMP would be calculated based on regulations at 7 CFR § 278.6(g).

Documentation in the case record shows that on April 27, 2017, a SNAP application was submitted to FNS for a new store at the same location where OM Mart, Inc. had previously operated. According to the application, this new store, 5 U.S.C. § 552 (b)(6) & (b)(7)(C), began its operations effective March 30, 2017.

Upon discovering that a new application had been submitted at a location where SNAP violations had previously occurred, the Retailer Operations Division requested additional documentation from the new store owner to verify that the disqualified owner was not affiliated with the new store in any way and to ascertain whether or not the transfer of ownership from the Appellant to 5 U.S.C. § 552 (b)(6) & (b)(7)(C) was bona fide. In response to this request, 75 U.S.C. § 552 (b)(6) & (b)(7)(C) submitted a number of documents, including a notarized Bill of Sale, dated March 30, 2017, verifying that a bona fide change of ownership had occurred.

In a letter dated July 20, 2017, the Retailer Operations Division informed the Appellant that since the store was sold during its disqualification period, a TOCMP in the amount of 5 U.S.C. § 552 (b)(6) & (b)(7)(C) was being assessed against the former owner of OM Mart, Inc. in accordance with SNAP regulations at 7 CFR § 278.6(f)(2), (3) and (4), and § 278.6(g).

In a letter postmarked July 28, 2017, the Appellant, through counsel, appealed the Retailer Operations Division's assessment of the TOCMP by requesting an administrative review. The request was granted and implementation of the TOCMP has been held in abeyance pending completion of this review.

STANDARD OF REVIEW

In an appeal of adverse action, such as the imposition of a civil money penalty, an appellant bears the burden of proving by a preponderance of the evidence that the administrative action should be reversed. This means that 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 law in this matter is found in the Food & Nutrition Act of 2008, as amended (7 U.S.C. § 2021), and promulgated through regulation under Title 7 CFR Part 278. 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 U.S.C. § 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 or wholesale food concern 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 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...has been permanently disqualified, the civil money penalty shall be double the penalty for a ten year disqualification period...

7 CFR § 278.6(g) outlines the steps for calculating the TOCMP amount, in relevant 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....The civil money penalty may not exceed an amount specified in § 3.91(b)(3)(i) for each violation.

5 U.S.C. § 552 (b)(7)(E). It is also important to note that in Step 3 of § 278.6(g), above, 240 is the number of months used to calculate the civil money penalty for permanent disqualifications. This is in accordance with 7 U.S.C. § 2021(e)(1) and SNAP regulations at 7 CFR § 278.6(f)(2).

APPELLANT'S CONTENTIONS

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

- Appellant offered arguments relating to the trafficking charges themselves, specifically regarding even-dollar transactions; multiple transactions from a single account in unusually short timeframes; and excessively large transactions.
- In a previous instance in which USDA was on site at the store and noted program violations, OM Mart, Inc. acted appropriately to prevent further violations by promptly firing the employees in question.
- There is no evidence that any violations were approved of or done with the knowledge of OM Mart, Inc. management.
- Appellant respectfully requests that the penalties be reviewed and found to be greatly in excess of any proven instances of violations.
- OM Mart, Inc. is open to negotiate for the resolution of this matter.

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

ANALYSIS AND FINDINGS

The primary issue for review in this case is whether or not it was lawful for the Retailer Operations Division to impose a 5 U.S.C. § 552 (b)(6) & (b)(7)(C) transfer of ownership civil money penalty against the Appellant firm. To this regard, statute at 7 U.S.C. § 2021 and SNAP regulations at 7 CFR § 278.6(f)(2) are clear that a TOCMP **shall be** assessed if a store which has been disqualified is subsequently sold or the ownership of the firm is transferred prior to the end of the disqualification period. This review has no authority to dismiss or modify the penalty for any reason except in those cases where it is shown that a transfer of ownership did not occur, a monetary penalty was assessed in a manner not in accordance with regulation, or when there was an error in calculating the TOCMP amount.

As best as can be determined, there is no dispute that a sale of the business occurred. Evidence provided by the owner of 5 U.S.C. § 552 (b)(6) & (b)(7)(C) clearly shows that a transfer of ownership occurred on March 30, 2017, and that the transaction took place after OM Mart, Inc. was permanently disqualified from SNAP participation.

All documentation of new ownership in this case appears to be legitimate and proof of a bona fide sale. Therefore, it is the determination of this review that the assessment of a TOCMP against OM Mart, Inc., under the ownership of Dhruv R. Desai, is wholly appropriate and was imposed in accordance with established statute and regulation.

Contentions Regarding Original Trafficking Allegations

In its request for administrative review, the Appellant, through counsel, offered several arguments relating to the original trafficking charges, specifically contentions regarding even-dollar transactions; multiple transactions from a single account in unusually short timeframes; and excessively large transactions. The Appellant also stated that in a previous instance in which USDA was on-site at the store and noted program violations, OM Mart, Inc. acted appropriately to prevent further violations by promptly firing the employees in question. Finally, the Appellant argues that there is no evidence that any violations were approved of or done with the knowledge of OM Mart, Inc. management.

It is critical to note at this stage of the review that a request for reevaluation of the decision to permanently disqualify OM Mart, Inc. from SNAP participation cannot be granted. The Appellant has exhausted all avenues of appeal in that case. The permanent disqualification took effect on August 23, 2016. In accordance with regulation, the firm had 10 days from the date of receipt of the determination notice to file a request for administrative review. Unfortunately, the firm did not make such an appeal. Because the window of time for reviewing the merits of the disqualification has passed, the permanent disqualification decision is final and this review has no authority to revisit it.

The sole issue for review in this case is whether or not the Retailer Operations Division appropriately imposed a 5 U.S.C. § 552 (b)(6) & (b)(7)(C) transfer of ownership civil money penalty against the Appellant firm.

Request for Negotiation

The Appellant, through counsel, has stated that it is open to negotiate a resolution in this matter. Unfortunately, this review has no authority to enter into such negotiations. The role of the administrative review officer is to determine, based on a preponderance of the evidence, whether or not the TOCMP was appropriately assessed in accordance with SNAP regulations.

Entering into any kind of settlement negotiation is outside of this review's purview and is best done at the judicial level.

Hardship to Appellant

The Appellant, through counsel, contends that that the penalties in this case are greatly in excess of any proven instances of violations. This contention implies that a TOCMP is unwarranted and unduly burdensome.

With regard to this contention, it is recognized that some degree of economic hardship is a likely consequence whenever a store is disqualified from participation in SNAP or when a civil money penalty is imposed. However, there is no provision in statute or in SNAP regulations for waiver or

reduction of an administrative penalty on the basis of possible economic hardship to either the ownership personally or to the firm itself resulting from the imposition of such a penalty.

To allow store ownership to be excused from administrative penalties based on a purported economic hardship to the Appellant or firm would render virtually meaningless the provisions of the Food and Nutrition Act of 2008 and the enforcement efforts of the USDA. Moreover, giving special consideration to economic hardship to the Appellant would forsake fairness and equity, not only to competing stores and other participating retailers who are complying fully with Program regulations, but also to those retailers who have incurred monetary penalties in the past for similar violations. Therefore, the Appellant's insinuation that it has incurred or may incur economic hardship based on the assessment of an administrative penalty does not provide a valid basis for dismissing the charges or for mitigating the penalty imposed.

TOCMP Calculation

As noted earlier, regulations at 7 CFR § 278.6(g) outline the steps for calculating the TOCMP amount. The TOCMP is derived from the firm's SNAP redemption volume during the 12 months immediately prior to being charged with the violations that led to the store's disqualification. Modifications to a TOCMP may occur only when there is an error in calculation or when the TOCMP exceeds the statutory limit. This review has no authority to modify a TOCMP amount for any other reason. The calculation of the TOCMP in this case is as follows:

5 U.S.C. § 552 (b)(6) & (b)(7)(C)

5 U.S.C. § 552 (b)(6) & (b)(7)(C). Based on regulations cited at 7 CFR § 278.6(g), it is the determination of this review that a TOCMP in the amount of **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** was properly assessed in this matter.

CONCLUSION

The permanent disqualification of OM Mart, Inc. took effect on August 23, 2016. A review of the evidence in this case clearly indicates that the store was sold to a buyer on March 30, 2017. Therefore, 7 CFR § 278.6(f)(2) of the SNAP regulations is applicable, and the assessment of a TOCMP is required. A review of the calculation indicates that the amount of the TOCMP as assessed by the Retailer Operations Division is proper as noted in the analysis above. Thus, the decision by the Retailer Operations Division to impose a **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** civil money penalty against Dhruv R. Desai, former owner of OM Mart, Inc., is sustained.

To arrange payment, the Appellant must contact FNS's Financial Management Accounting Division at (703) 605-0483 within 30 days of receipt of this decision.

RIGHTS AND REMEDIES

Applicable rights to a judicial review of this decision are set forth in Section 14 of the Food and Nutrition Act of 2008 (7 U.S.C. § 2023) and in Section 279.7 of the SNAP regulations. 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 owner resides or is engaged in business, or in any court of record of the State having competent jurisdiction. If a complaint is filed, it must be filed within 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.

JON YORGASON
Administrative Review Officer

February 20, 2018