

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

**Yeshi Mart Inc,**

**Appellant,**

**v.**

**Case Number: C0201405**

**Retailer Operations Division,**

**Respondent.**

**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 the permanent disqualification of Yeshi Mart Inc. (Yeshi Mart Inc. or Appellant) from participation as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP), as initially imposed by the Retailer Operations Division, was appropriate.

**ISSUE**

The issue accepted for review is whether the Retailer Operations Division took appropriate action, consistent with 7 CFR § 278.6(a), (c) and (e)(1) in its administration of the SNAP, when it assessed a permanent disqualification against Appellant.

**AUTHORITY**

7 USC § 2021 and the 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**

USDA conducted an investigation of the compliance of Appellant with federal SNAP law and regulations during the period from October 25, 2017, through November 28, 2017. The investigation report documents that personnel at Yeshi Mart Inc. exchanged SNAP benefits for cash during two of the compliance visits. Appellant also sold ineligible non-food items in exchange for SNAP benefits. The buying or selling of SNAP benefits for cash or consideration other than eligible food is trafficking as defined under 7 CFR §271.2.

As a result of evidence compiled from the investigation, the Retailer Operations Division informed Appellant, in a letter dated December 15, 2017, that it was charged with violating the terms and conditions of the SNAP regulations. The letter stated, in relevant part, that:

...[Y]our firm is charged with trafficking, as defined in Section 271.2 of the SNAP regulations. As provided by Section 278.6(e)(1) of the SNAP regulations, the sanction for the trafficking violation(s) . . . is permanent disqualification.

The charge letter also stated that:

The SNAP regulations also provide that under certain conditions, FNS may impose a civil money penalty (CMP) of up to \$59,000.00 in lieu of permanent disqualification of a firm for trafficking. The SNAP regulations, Section 278.6(i), list the criteria that you must meet in order to be considered for a CMP. If you request a CMP, you must meet each of the four criteria listed and provide the documentation as specified within 10 calendar days of your receipt of this letter.

Appellant did not reply to the charge letter. After considering the evidence, the Retailer Operations Division notified Appellant in a letter dated February 5, 2018, that the firm was permanently disqualified from participation as an authorized retailer in SNAP in accordance with Section 278.6(c) and § 278.6(e)(1) for trafficking violations. This determination letter further stated that Appellant was not eligible for a trafficking CMP because it failed to submit sufficient evidence to demonstrate that the firm had established and implemented an effective compliance policy and program to prevent violations of the SNAP.

In a letter postmarked March 8, 2018, Appellant appealed the Retailer Operations Division's determination and requested an administrative review. The appeal was granted.

### **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). Part 278.6(a), (c) and (e)(1) establish the authority upon which a permanent disqualification may be imposed against a retail food store or wholesale food concern in the event that personnel of the firm have engaged in trafficking SNAP benefits.

7 CFR § 271.2 states, in part, that, “Eligible foods means: Any food or food product intended for human consumption except alcoholic beverages, tobacco and hot food and hot food products prepared for immediate consumption.”

7 CFR § 271.2 defines trafficking as: “(1) The buying, selling, stealing, or otherwise effecting an exchange of SNAP benefits issued and accessed via Electronic Benefit Transfer (EBT) cards, card numbers and personal identification numbers (PINs), or by manual voucher and signature, for cash or consideration other than eligible food, either directly, indirectly, in complicity or collusion with others, or acting alone; . . .”

7 CFR § 278.6(a) states, inter alia, that “FNS may disqualify any authorized retail food store . . . if the firm fails to comply with the Food and 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)

7 CFR § 278.6(b)(2)(ii) states, inter alia: “Firms that request consideration of a civil money penalty in lieu of a permanent disqualification for trafficking shall have the opportunity to submit to FNS information and evidence . . . that establishes the firm’s eligibility for a civil money penalty in lieu of a permanent disqualification in accordance with the criteria included in § 278.6(i). This information and evidence shall be submitted within 10 days, as specified in § 278.6(b)(1).”

7 CFR § 278.6(b)(2)(iii) states, “If a firm fails to request consideration for a civil money penalty in lieu of a permanent disqualification for trafficking and submit documentation and evidence of its eligibility within the 10 days specified in § 278.6(b)(1), the firm shall not be eligible for such a penalty.”

7 CFR § 278.6(e)(1) reads, in part, “FNS shall disqualify a firm permanently if personnel of the firm have trafficked as defined in § 271.2.”

7 CFR § 278.6(i) states, inter alia: “FNS may impose a civil money penalty in lieu of a permanent disqualification for trafficking . . . if the firm timely submits to FNS substantial evidence which demonstrates that the firm had established and implemented an effective compliance policy and program to prevent violations of the Program.”

## INVESTIGATION DETAILS

During an investigation conducted from October 25, 2017, through November 28, 2017, a confidential informant under the direction of a USDA investigator conducted seven compliance visits at Yeshe Mart Inc. The investigation report dated December 5, 2017, was provided to the Appellant as an attachment to the charge letter, and included Exhibits A through F which provide full details on the results of each compliance visit. The investigation report documents that SNAP violations were committed during six of the seven compliance visits. The investigation reported that personnel at Yeshe Mart Inc. exchanged **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** in cash for an unknown amount of SNAP benefits on one occasion and **5 U.S.C. § 552 (b)(6) & (b)(7)(C)** in cash for an unknown amount in benefits during another transaction. Transactions of this nature are

referred to in regulatory terms as “trafficking”. During five of the visits, Appellant also exchanged ineligible non-food items for SNAP benefits.

### **APPELLANT’S CONTENTIONS**

In its administrative review request postmarked March 8, 2018, and subsequent correspondence dated April 7, 2018, Appellant provided the following summarized contentions, in relevant part:

- Appellant has been authorized for over a decade and has had no violations.
- There is no cigarette, beer, or lottery.
- Less than 15% of Appellant’s customers use EBT.
- The store has a very strict policy on EBT transactions and all employees are aware and follow the rules.
- The employee was fired for his actions.
- Appellant follows the rules and will implement another layer of compliance for the future.
- Appellant submitted documentation to show that it was not intentionally violating the program.
- Appellant submitted statistical data that shows Appellant never abused or benefited illegally from EBT because EBT is only 10% of sales.

In support of its contentions, Appellant submitted the followings documents:

- Sale and Use Returns for September 2017 through February 2018;
- Yeshi Food Mart Excel table that shows total sales, credit card sales, EBT sales, and EBT percentages; and
- Blackstone Merchant Services, Inc. Processing Statements for September 2017 through February 2018.

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**

A full review of the case record shows that the charges of violations are based on the findings of a formal USDA investigation. The transactions cited in the letter of charges were conducted under the direction of a USDA investigator and are thoroughly documented. A complete review

of this documentation has yielded no error or discrepancy. The investigation report is specific and thorough with regard to the dates of the violations, the specific facts related thereto, and is supported by documentation that confirms specific details of the transactions. The documentation presented by the Retailer Operations Division establishes by a preponderance of the evidence that the violations as reported occurred at the Appellant store.

### **Corrective Action**

Ownership explained the employee was fired and it will implement another layer of compliance for the future. It is important to clarify for the record that the purpose of this review is to either validate or to invalidate the earlier decision of the Retailer Operations Division. This review is limited to what circumstances were at the basis of the Retailer Operations Division action at the time such action was made. It is not within the authority of this review to consider what subsequent remedial actions may have been taken or will be taken in the future so that a store may begin to comply with program requirements. There is no provision in the SNAP regulations for waiver or reduction of an administrative penalty assessment on the basis of corrective actions implemented subsequent to investigative findings of program violations. Therefore, Appellant's contention that it took corrective action and can take additional action to prevent future violations does not provide any valid basis for dismissing the charges or for mitigating the penalty imposed.

### **No Previous Violations**

Appellant explains that it has been authorized for over a decade and has had no violations. A record of participation in the SNAP with no previously documented instance of violations does not constitute valid grounds for dismissal of the current charges of violations or for mitigating the impact of the violations upon which they are based. There is no provision in the Act or regulations that reverses or reduces a sanction based upon a lack of prior violations by a firm and its owners, managers and/or employees.

### **Intent to Violate**

Appellant states that it is not intentionally violating the SNAP because SNAP is only 10% of its total sales. However, to state that the store only redeems so much in SNAP benefits is not evidence that the store did not nor does not traffick SNAP benefits. It is not unusual for a store to have largely legitimate transactions while conducting a small number of SNAP trafficking violations with a few trusted households.

The definition of trafficking contained in the SNAP regulations at 7 CFR § 271.2 does not require an element of intent on the part of the violator. Therefore, whether or not the Appellant firm or its employees intended to violate SNAP regulations by exchanging cash for SNAP benefits is irrelevant.

## **CIVIL MONEY PENALTY**

Appellant did not request consideration for a trafficking CMP in lieu of a permanent disqualification under 7 CFR 278.6(i) even though it was informed of the right to do so in the

charge letter. Even if a timely request had been submitted, Appellant would likely not have been eligible for a trafficking CMP in lieu of disqualification because there is insufficient evidence to demonstrate that the firm had established and implemented an effective SNAP compliance policy and program prior to the violations. Therefore, the Retailer Operations Division's decision not to impose a trafficking CMP in lieu of disqualification is sustained as appropriate pursuant to 7 CFR § 278.6(i).

## **CONCLUSION**

SNAP regulations at 7 CFR § 278.6(e)(1)(i) reads, in part, "FNS shall disqualify a firm permanently if personnel of the firm have trafficked as defined in § 271.2." Trafficking is defined, in part, in 7 CFR § 271.2, as "the buying or selling of SNAP benefits for cash or consideration other than eligible food." The law and regulations do not provide for a lesser period of disqualification for this violation.

Based on a review of the evidence in this case, there is no question that program violations did occur during a USDA investigation. Therefore, the decision to impose a permanent disqualification against Appellant, Yeshi Mart Inc. is sustained.

## **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 10, 2018