

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

**Super Amanecer,**

**Appellant,**

**v.**

**Office of Retailer Operations and  
Compliance,**

**Respondent.**

**Case Number: C0221337**

**FINAL AGENCY DECISION**

The U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS) finds that there is insufficient evidence to support the determination by the Office of Retailer Operations and Compliance to impose a fiscal claim and permanent disqualification against Super Amanecer (“Appellant”) from participating as an authorized retailer in the Supplemental Nutrition Assistance Program (SNAP). The determination is modified to eliminate the fiscal claim.

**ISSUE**

The purpose of this review is to determine whether the Office of Retailer Operations and Compliance took appropriate action, consistent with Title 7 of Code of Federal Regulations (CFR) § 278.6(e)(1)(i) in its administration of SNAP when it imposed a permanent disqualification against Appellant on January 22, 2021.

**AUTHORITY**

According to 7 U.S.C. § 2023 and its implementing regulations at 7 CFR § 279.1, “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 USDA conducted an investigation Appellant’s compliance with federal SNAP law and regulations during the period of April 25, 2020 through April 28, 2020. The investigation reported that personnel at Appellant accepted an unknown total in SNAP benefits in exchange for cash (trafficking) and goods purchased with SNAP benefits (indirect trafficking) in the amount 5 U.S.C. § 552 (b)(6) & (b)(7)(C) on one occasion and 5 U.S.C. § 552 (b)(6) & (b)(7)(C) on another occasion, as well as permitting the purchase of

other non-food items with SNAP benefits. The investigation revealed that a clerk and an owner were involved in the impermissible transactions.

As a result of evidence compiled from this investigation, the Office of Retailer Operations and Compliance informed Appellant, in a letter dated August 25, 2020, that its firm was charged with violating the terms and conditions of the SNAP regulations, 7 CFR § 278.6(e)(1). This letter stated, in part, “As provided by Section 278.6(e)(1) of the SNAP regulations, the sanction for trafficking . . . is permanent disqualification.” The letter also states that “under certain conditions, FNS may impose a civil money penalty (CMP) . . . in lieu of a permanent disqualification of a firm for trafficking.”

Appellant replied to the charges in a subsequent letter to the Office of Retailer Operations and Compliance. The record reflects that the Office of Retailer Operations and Compliance received and considered this information prior to making a determination.

The Office of Retailer Operations and Compliance notified Appellant in a letter dated January 22, 2021 that the firm was being 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 also stated that Appellant’s eligibility for a trafficking civil money penalty (CMP) according to the terms of Section 278.6(i) of the SNAP regulations was considered. However, the letter stated to Appellant that “. . . you are not eligible for the CMP because you failed to submit sufficient evidence to demonstrate that your firm had established and implemented an effective compliance policy and program to prevent violations of the Supplemental Nutrition Assistance Program.”

On January 29, 2021, Appellant appealed the Office of Retailer Operations and Compliance’s assessment and requested an administrative review of this action. The appeal was granted.

### **STANDARD OF REVIEW**

In an appeal of an adverse action, Appellant bears the burden of proving by a preponderance of evidence that the administrative action should be reversed. That means Appellant has the burden of providing relevant evidence that 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 untrue.

### **CONTROLLING LAW**

The controlling law in this matter is contained in the Food and Nutrition Act of 2008, as amended (7 U.S.C. § 2021), and implemented through regulation under Title 7 CFR Part 278. In particular, 7 CFR § 278.6(e)(1)(i) establishes 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 of SNAP benefits.

7 CFR § 278.6(e)(1)(i) reads, in part:

FNS shall . . . [d]isqualify 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] or other benefit instruments for cash or consideration other than eligible food.”

### **APPELLANT’S CONTENTIONS**

Appellant’s responses regarding this matter are essentially as follows:

- The clerks in Exhibits A and B did not speak English well.
- The investigator in Exhibit B appeared to be in physical pain.
- The investigator said he had authorization due his job to sell energy drinks at a discount.
- Appellant denies he directed the investigator to purchase energy drinks with SNAP benefits.
- Appellant has trained staff in the proper handling of SNAP benefits. Appellant provided nine pages of documents regarding SNAP training.
- There have not been any issues with SNAP compliance.
- Appellant requests a warning.
- Disqualification poses a hardship to the SNAP participants who rely on the firm.
- The owner authorized cash for the investigator due to the investigator’s indigent condition.

These explanations may represent only a brief summary of Appellant’s contentions. However, in reaching a decision, full consideration has been given to all contentions presented, including any others that have not been specifically listed here.

### **ANALYSIS AND FINDINGS**

A review of the evidence in the Office of Retailer Operations and Compliance’s case file does not support the determination to impose a fiscal claim against Appellant. Accordingly, it is unnecessary to address Appellant’s contentions regarding this matter.

As to Appellant’s denial of violations, this review examines the relevant information regarding the determination. Once the Office of Retailer Operations and Compliance establishes a violation occurred, Appellant bears the burden of providing relevant evidence to support a conclusion, considering the record as a whole, that that the permanent disqualification should be reversed. If this is not demonstrated, the case will be sustained. Without supporting evidence and rationale, assertions that the firm has not violated program rules do not constitute valid grounds for overturning the determination.

Appellant’s contentions regarding Exhibits A and B are not relevant to the determination as the determination was not based on the conduct which occurred during those transactions.

Appellant has trained staff in the proper handling of SNAP benefits. When ownership signed the FNS application to become an authorized SNAP retailer, this included a certification and

confirmation that the owner(s) would “accept responsibility on behalf of the firm for violations of the SNAP regulations, including those committed by any of the firm’s employees, paid or unpaid, new, full-time or part-time.” The violations listed on this certification document include trafficking. Regardless of whom the ownership of a store may utilize to operate the cash register and handle store business, ownership is accountable for the proper handling of SNAP benefit transactions. To allow store ownership to disclaim accountability for the acts of persons chosen to handle store business, would render the enforcement provisions of the Food and Nutrition Act and the enforcement efforts of the USDA virtually meaningless.

### **First SNAP Violation**

Appellant contends that this is the first time there has been an issue related to SNAP. A record of program participation with no documented previous violations, however, does not constitute valid grounds for mitigating the impact of the present serious determination of trafficking. In addition, the investigation report shows the owner was involved in the trafficking violations. Further, the report indicates that both times that trafficking was attempted, it was permitted by store personnel.

### **Egregiousness of Trafficking Violation**

Appellant requests a warning. Appellant stated it did not knowingly engage in indirect trafficking, although the owner did authorize trafficking on one occasion.

Neither the Food and Nutrition Act of 2008, as amended, nor the accompanying regulations cite any minimum dollar amount of cash or SNAP benefits, or number of occurrences, for such exchanges to be defined as trafficking. Nor do they cite any degrees of seriousness pertaining to trafficking of SNAP benefits. Trafficking is always considered to be extremely serious, even when the exchange of SNAP benefits for cash is dollar-for-dollar or is conducted by a non-managerial store clerk. This is reflected in the Food and Nutrition Act, which reads, in part, that disqualification “shall be permanent upon . . . the first occasion of a disqualification based on . . . trafficking . . . by a retail food store.” In keeping with this legislative mandate, Section 278.6(e)(1)(i) of the SNAP regulations states that FNS must disqualify a firm permanently if personnel of the firm have trafficked. There is no agency discretion in the matter of what sanction is to be imposed when trafficking is involved.

### **No Undue Hardship to SNAP Participants**

Appellant asserts that disqualification would be a hardship to SNAP households who rely on the store. Some degree of inconvenience to SNAP benefit users is inherent in the disqualification from SNAP of any participating food store, since the normal shopping pattern of such SNAP participants may be changed due to the disqualification. Section 278.6(f)(1) of SNAP regulations provides for Civil Money Penalty (CMP) assessments in lieu of disqualification in cases where disqualification would cause “hardship” to SNAP households because of the unavailability of a comparable participating retail food store in the area to meet their needs. However, this regulation also sets forth the following specific exception: “A CMP for hardship to SNAP

households may not be imposed in lieu of a permanent disqualification.” Because the matter at hand involves a permanent disqualification, this CMP provision is not applicable.

### **CIVIL MONEY PENALTY**

For a firm to have the opportunity to be considered for a civil money penalty (CMP), it must request that FNS consider a CMP in lieu of permanent disqualification and submit supporting documentation within ten days of receipt of the charge letter. Appellant was advised of these provisions in the charge letter of August 25, 2020. The regulations specify that such supporting documentation must demonstrate that the firm had established and implemented an effective SNAP compliance policy and training program prior to the occurrence of violations. A review of the administrative record indicates Appellant did not, at any time, request a CMP.

In the absence of a request for a CMP, a CMP was not assessed by the Office of Retailer Operations and Compliance. According to the requirements stated in 7 CFR § 278.6(b)(1), § 278.6(b)(2)(ii and iii), and § 278.6(i), Appellant is not eligible for a CMP in lieu of a permanent disqualification from participation as an authorized retailer in SNAP.

Had Appellant requested a CMP, the regulations at 7 CFR § 278.6(i) specify the criteria for a firm’s eligibility for a civil money penalty in lieu of permanent disqualification for trafficking. Together, the criteria listed are specifically identified as the minimum standard that firms must meet in order to be eligible for such a penalty. Given these considerations, the statute and the regulations allow no flexibility below the level of this stated standard. The record reflects that Appellant’s reply to the charge letter fell short of this standard since Appellant did not provide the following:

- Documentation of the development and/or operation of a policy to terminate violating employees;
- Documentation of development and/or operation of policy and procedures to implement corrective action in response to complaints of violations;
- Documentation of development and/or operation of procedures providing for internal review of employees’ compliance;
- Records of dates of employment of all firm personnel;
- Documentation to demonstrate a training program that meets or is otherwise equivalent to the following standards:
- Training for all who work in the store within one month of implementing the compliance policy documented in Criterion 1;
  - ✓ Training for any subsequently hired employees within one month of hiring and trained periodically thereafter;
  - ✓ Training that is designed to establish a level of competence that assures compliance;
  - ✓ Written materials, which may include FNS publications and regulations, are used in the training programs;
  - ✓ Materials that clearly state that acceptance of SNAP benefits in exchange for cash, firearms, ammunition, explosives or controlled substances are prohibited and in violation of the statute and regulations; and,

- Sufficient evidence to support the contention that ownership or management was not aware of, did not approve, and did not benefit from or was not involved in trafficking.

In short, the various documentation provided by Appellant is not “substantial evidence” that fulfills each of the four criteria of 7 CFR § 278.6(i). As a result, Appellant failed to demonstrate “that the firm had established and implemented an effective compliance policy and program to prevent violations.”

The standards of eligibility for a trafficking CMP are high. They require substantial proof that a compliance policy and program was established and implemented prior to the occurrence of violations. These standards exist to thwart attempts to falsely present compliance policies and programs that were not actually implemented prior to violations. Although these standards are high, they are required by the regulations and Appellant must be held to them during the course of this review.

The size of a firm, or its number of personnel, is not a consideration in determining eligibility for a civil money penalty in lieu of permanent disqualification for trafficking. It might require significant effort to develop and maintain a compliance policy and program. Yet, even substantial effort does not lessen the consequences if the firm fails to meet the requirements. As noted, the criteria for eligibility for a civil money penalty in lieu of permanent disqualification are clearly stated as minimum standards below which eligibility is precluded.

The determination by the Office of Retailer Operations and Compliance to deny Appellant a civil money penalty is sustained.

## **CONCLUSION**

Based on a review of the evidence, it appears that the program violations at issue did, in fact, occur as charged. As noted previously, the charges of violations are based on the findings of a formal USDA investigation. All transactions cited in the letter of charges were conducted under the supervision of a USDA investigator and all are fully documented. A review of this documentation has yielded no indication of error or discrepancy in any of the reported findings. Rather, the investigative record is specific and accurate with regard to the dates of the violations, the specific exchanges of SNAP benefits for cash, and in all other critically pertinent detail.

Based on the discussion above, the determination by the Office of Retailer Operations and Compliance to impose a permanent disqualification against Super Amanecer from participating as an authorized retailer in SNAP is modified to eliminate the fiscal claim. A paid fiscal claim should be refunded in full.

## **RIGHTS AND REMEDIES**

Applicable rights to a judicial review of this decision are set forth in 7 U.S.C. § 2023 and 7 CFR § 279.7. If Appellant desires a judicial review, the complaint must be filed in the U.S. District Court for the district in which Appellant’s owner resides, is engaged in business, or in any court

of record of the State having competent jurisdiction. This complaint, naming the United States as the defendant, 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.

RICH PROULX  
ADMINISTRATIVE REVIEW OFFICER

April 5, 2021