

STATE OF NORTH CAROLINA

COUNTY OF WAKE

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
13 DHR 18497

NIJAD M. ABDELRAHMAN,
ZACK'S MART,

Petitioners,

v.

DHHS - WIC,

Respondent.

FINAL DECISION

THIS MATTER came on for hearing before the undersigned administrative law judge on December 20, 2013, in Raleigh, North Carolina.

APPEARANCES

For Petitioners: Nijad M. Abdelrahman, *pro se*
1617 New Bern Avenue
Raleigh, North Carolina, 27610

For Respondent: Donna D. Smith
North Carolina Department of Justice
P.O. Box 629
Raleigh, North Carolina, 27602

ISSUE

The issue is whether the Respondent was correct in issuing its intent to disqualify Zack's Mart from participating as an authorized vendor in the Special Supplemental Nutrition Program for Women, Infants and Children ("WIC Program") for three years for the following violations:

Vendor overcharging for WIC supplemental foods provided on June 14, 2013, July 29, 2013 and August 23, 2013, in violation of 7 C.F.R. § 246.12(l)(1)(iii)(C), 10A N.C.A.C. 43D.0708(3), .0708(4), .0708(5) and .0710(a)(2) and the WIC Vendor Agreement.

STATUTES, RULES and REGULATIONS

42 U.S.C. § 1786
7 C.F.R. §§ 246.2, 246.12, 246.18

EVIDENCE

The Respondent presented three witnesses and introduced 15 exhibits. Petitioner Nijad Abdelrahman testified on his own behalf.

BASED UPON the evidence presented by the parties, including sworn testimony of witnesses and documentary evidence, the undersigned makes the following:

FINDINGS OF FACT

1. The WIC Program is the federally funded Special Supplemental Nutrition Program for Women, Infants and Children, administered in North Carolina by the Department of Health and Human Services.
2. The purpose of the WIC Program is to provide supplemental foods to pregnant women, infants and children up to age five (called "participants") who have a nutritional risk.
3. WIC supplemental foods are provided to participants through the retail grocery system via food instruments that list the authorized foods a participant may obtain. The WIC Program contracts with retail grocery stores to serve as authorized WIC vendors. As an authorized WIC vendor, the vendor agrees to accept food instruments in exchange for WIC supplemental foods provided to participants. The WIC vendor deposits the food instruments in its bank account and is paid by the WIC Program for the supplemental foods provided.
4. The WIC Vendor Agreement is the contract between the vendor and the State and local agency through which the vendor agrees to comply with the terms of the Agreement and State and Federal WIC Program rules, regulations and laws.
5. Petitioner Nijad Abdelrahman is President and owner of an 80% business interest in Zack's Mart, a store located at 1617 New Bern Avenue, Raleigh, North Carolina. Najwa Sirriyah holds a 20% business interest in the store. Zack's Mart has been an authorized vendor in the WIC Program since 2008, stamp number 9849.
6. Petitioner Abdelrahman signed WIC Vendor Agreements on behalf of Zack's Mart on June 22, 2012 and May 12, 2013. These Agreements, collectively, cover the period of October 1, 2012 through September 30, 2015, which includes the time period of the charged violations.
7. The Wake County Human Services WIC Program provides annual training to authorized WIC vendors on WIC Program procedures, rules and regulations for operating as a WIC vendor. The Wake County Human Services WIC Program provided annual training to authorized WIC vendors on June 22, 2012 and June 28, 2013. Copies of the North Carolina WIC

Program Vendor Manual and training materials were distributed to the vendor representatives attending these training sessions. The training materials and Manual contain requirements for operating as an authorized WIC vendor. Petitioner Abdelrahman attended the training sessions conducted on June 22, 2012 and June 28, 2013. Petitioner Abdelrahman or a store representative has attended annual training each year since the store was authorized as a WIC vendor.

8. The Respondent is required by federal regulation to conduct compliance investigations of its authorized WIC vendors. These investigations may be conducted through compliance buys or inventory audits.

9. A compliance buy is a covert, on-site investigation in which a representative of the Program poses as a participant, parent or caretaker of an infant or child participant, or a proxy, transacts one or more food instruments, and does not reveal during the visit that he or she is a Program representative.

10. The proper procedure for transacting a WIC food instrument by a vendor includes totaling the price of the supplemental foods provided to the WIC customer, entering the total price for the supplemental foods provided in the "Pay Exactly" box on the food instrument, filling in the date of the transaction on the food instrument, and then obtaining the signature of the WIC customer on the food instrument. The price entered by the vendor on the food instrument cannot exceed the total amount of the current shelf prices for the supplemental foods provided.

11. Laura Romero works for the North Carolina Department of Health and Human Services as a compliance buy investigator for the WIC Program. Ms. Romero conducts compliance buys at authorized WIC vendors to determine compliance with the laws, rules and regulations governing the WIC Program. Ms. Romero conducted compliance buys at Zack's Mart on June 14, 2013, July 9, 2013, July 29, 2013, and August 23, 2013. On each of these dates, Romero posed as a WIC customer and obtained WIC supplemental foods using a WIC food instrument.

12. During each compliance buy, Romero contemporaneously recorded the price marked for each food item as she selected the items in the store. Immediately following each compliance buy, Romero went to a separate location and recorded in her report the supplemental foods obtained with the food instrument and the prices marked for each food item. Therefore, for each of the compliance buys conducted by Romero, the WIC Program was able to determine the actual total price of the supplemental foods provided to Romero in exchange for the WIC food instrument.

13. Each food instrument used by Romero was marked with a unique identifying serial number so that Romero could compare the price entered by the vendor on the food instrument to the actual total price of the supplemental foods provided to Romero with each food instrument.

14. Following the June 14, 2013 compliance buy, Respondent informed Petitioners by Notice of Violation(s) dated June 24, 2013, that a recent compliance buy at Zack's Mart had revealed the violation of vendor overcharging. The Notice advised Petitioners that additional compliance buys would be conducted at the store and that another occurrence of vendor overcharging required a three-year disqualification of Zack's Mart from the WIC Program. The Notice also offered Petitioners the opportunity to request additional vendor training through the local WIC agency. The Respondent resumed its investigation of Zack's Mart in July, 2013.

A PATTERN OF VENDOR OVERCHARGING FOR WIC SUPPLEMENTAL FOODS

June 14, 2013, Compliance Buy:

15. When investigator Romero entered Zack's Mart on June 14, 2013, she used food instrument #00280739 to obtain WIC supplemental foods listed on the food instrument.

16. Romero selected two gallons of Maola 2% milk marked at \$4.69 per gallon, one dozen Latta's Farm Fresh eggs marked at \$2.99, one 64-oz. container of Mott's apple juice marked at \$6.79, two 18-oz. boxes of Kellog's Frosted Mini Wheats marked at \$4.99 per box, and one 16-oz. bag of Goya small red beans marked at \$1.99.

17. The actual total price of the supplemental foods obtained by Romero with food instrument #00280739 was \$31.13. The amount entered in the "Pay Exactly" box of the redeemed food instrument was \$50.81.

18. The amount entered in the "Pay Exactly" box of redeemed food instrument #00280739 exceeded the actual total price of the supplemental foods provided to Romero by \$19.68.

July 29, 2013, Compliance Buy:

19. When investigator Romero returned to Zack's Mart on July 29, 2013, she used food instrument #00280832 to obtain WIC supplemental foods listed on the food instrument.

20. Romero selected two gallons of Maola 2% milk marked at \$6.29 per gallon and one 64-oz. container of kiwi-strawberry Juicy Juice marked at \$6.29.

21. The actual total price of the supplemental foods obtained by Romero with food instrument #00280832 was \$18.87. The amount entered in the "Pay Exactly" box of the redeemed food instrument was \$22.06.

22. The amount entered in the "Pay Exactly" box of redeemed food instrument #00280832 exceeded the actual total price of the supplemental foods provided to Romero by \$3.19.

August 23, 2013, Compliance Buy:

23. When investigator Romero returned to Zack's Mart on August 23, 2013, she used food instrument #00280836 to obtain WIC supplemental foods listed on the food instrument.

24. Romero selected two gallons of Maola 2% milk marked at \$6.29 per gallon and one 64-oz. container of kiwi-strawberry Juicy Juice marked at \$6.25.

25. The actual total price of the supplemental foods obtained by Romero with food instrument #00280836 was \$18.83. The amount entered in the "Pay Exactly" box of the redeemed food instrument was \$21.95.

26. The amount entered in the "Pay Exactly" box of redeemed food instrument #00280836 exceeded the actual total price of the supplemental foods provided to Romero by \$3.12.

INTENT TO DISQUALIFY

27. Based on the findings of the compliance buys conducted on June 14, 2013, July 29, 2013 and August 23, 2013, Respondent notified Petitioners by letter dated October 4, 2013, of its intent to disqualify Zack's Mart from the WIC Program for three years and advised Petitioners of the right to appeal to the Office of Administrative Hearings.

28. Prior to issuing the October 4, 2013 Notice of Intent to Disqualify from WIC Program, the Respondent complied with 7 C.F.R. § 246.12(l)(1)(ix) and 7 C.F.R. § 246.12(l)(8) by considering participant access to other authorized WIC vendors and determined there was adequate access in accordance with 15A N.C.A.C. 43D.0710(e) and .0710(f)(3).

29. Petitioners filed a petition for a contested case hearing with the Office of Administrative Hearings on October 17, 2013, in response to the October 4, 2013 Notice of Intent to Disqualify Zack's Mart from the WIC Program.

CONCLUSIONS OF LAW

1. All parties are properly before the Office of Administrative Hearings and the Office of Administrative Hearings has personal and subject matter jurisdiction over this case.

2. The North Carolina WIC Program is vested with the authority to authorize and disqualify WIC vendors pursuant to N.C. Gen. Stat. § 130A-361, 10A N.C.A.C. 43D Section .0700, and 7 C.F.R. Part 246.

3. As an authorized WIC vendor, Petitioners are bound by the terms of the WIC Vendor Agreement and the administrative rules, regulations and laws governing the WIC Program.

4. Pursuant to 10A N.C.A.C. 43D.0708(27) and the WIC Vendor Agreement, a vendor representative is required to attend annual vendor training.

5. Pursuant to 10A N.C.A.C. 43D.0708(28) and (29) and the WIC Vendor Agreement, vendors are responsible for informing and training their cashiers and other staff on WIC Program requirements. Vendors are also accountable for the actions of their owners, officers, managers, agents and employees who commit vendor violations.

6. "Vendor violation," as defined by 7 C.F.R. § 246.2, includes both intentional and unintentional actions of the vendor's current owners, officers, managers, agents or employees that violate the vendor agreement or Federal or State statutes, regulations, policies or procedures governing the WIC Program.

7. Title 10A N.C.A.C. 43D.0708(3), .0708(4) and .0708(5) and the WIC Vendor Agreement require a vendor to accurately determine the charges for the supplemental food provided to a WIC customer and to charge no more for supplemental food provided to a WIC customer than to a non-WIC customer or no more than the current shelf price, whichever is less.

8. Title 10A N.C.A.C. 43D.0202(20) states that "[a] 'vendor overcharge' is intentionally or unintentionally charging more for supplemental food provided to a WIC customer than to a non-WIC customer or charging more than the current shelf price for supplemental food provided to a WIC customer."

9. Title 7 C.F.R. § 246.12(l)(1)(iii)(C), incorporated by reference at 10A N.C.A.C. 43D.0710(a), provides that the State agency must disqualify a vendor for three years for a pattern of vendor overcharges.

10. Title 10A N.C.A.C. 43D.0710(a)(2) specifies that a pattern shall be established when there are two occurrences of vendor overcharging within a 12-month period.

11. In accordance with 7 C.F.R. § 246.12(l)(1)(iii)(C) and 10A N.C.A.C. 43D.0710(a)(2), a pattern of vendor overcharges has been established at Zack's Mart by the three occurrences of vendor overcharging within a 12-month period, in violation of 10A N.C.A.C. 43D.0708(3), .0708(4) and .0708(5) and the WIC Vendor Agreement.

12. Pursuant to the regulatory scheme set forth at 7 C.F.R. § 246.12(l)(1)(iii)(C) and 10A N.C.A.C. 43D.0710(a)(2), the Respondent correctly issued its Notice of Intent to Disqualify Zack's Mart from participating as a WIC vendor for a period of three years.

13. The Respondent did not act in an arbitrary and capricious manner in administering the WIC Program rules, regulations and law, did not fail to act as required by law or rule, did not fail to use proper procedure, did not act erroneously, nor did it exceed its authority or jurisdiction.

DECISION

Based upon the foregoing Findings of Fact and Conclusions of Law, the undersigned has determined that Respondent's decision to disqualify Zack's Mart as an authorized WIC vendor for three years should be **UPHELD**.

NOTICE

This is a Final Decision issued under the authority of N.C. Gen. Stat. § 150B-34.

Under the provisions of North Carolina General Statute § 150B-45, any party wishing to appeal the final decision of the Administrative Law Judge must file a Petition for Judicial Review in the Superior Court of the county where the person aggrieved by the administrative decision resides, or in the case of a person residing outside the State, the county where the contested case which resulted in the final decision was filed. **The appealing party must file the petition within 30 days after being served with a written copy of the Administrative Law Judge's Final Decision.** In conformity with the Office of Administrative Hearings' rule, 26 N.C. Admin. Code 03.0102, and the Rules of Civil Procedure, N.C. General Statute 1A-1, Article 2, **this Final Decision was served on the parties the date it was placed in the mail as indicated by the date on the Certificate of Service attached to this Final Decision.** N.C. Gen. Stat. § 150B-46 describes the contents of the Petition and requires service of the Petition on all parties. Under N.C. Gen. Stat. § 150B-47, the Office of Administrative Hearings is required to file the official record in the contested case with the Clerk of Superior Court within 30 days of receipt of the Petition for Judicial Review. Consequently, a copy of the Petition for Judicial Review must be sent to the Office of Administrative Hearings at the time the appeal is initiated in order to ensure the timely filing of the record.

This the 10th day of January, 2014.

Eugene J. Cella
Administrative Law Judge