

STATE OF NORTH CAROLINA
COUNTY OF WAKE

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
14 DHR 05930

MOHAMMAD SHAFI KHAN
d/b/a ASA FOOD MART #3,
Petitioners,

v.

N.C. DEPARTMENT OF HEALTH AND
HUMAN SERVICES, DIVISION OF
PUBLIC HEALTH, WIC,
Respondent.

**FINAL DECISION
ORDER GRANTING
SUMMARY JUDGMENT**

THIS MATTER comes before the undersigned administrative law judge on the Respondent's Motion to Dismiss and in the alternative Motion for Summary Judgment and Motion to Amend Caption. Petitioners filed a written response. The Respondent is represented by Assistant Attorney General Donna D. Smith. The Petitioner is *pro se*. The proper party as the Respondent in this matter is the North Carolina Department of Health and Human Services, Division of Public Health, and as such the listing of Gerell Smith as Respondent in the petition has been stricken. The Undersigned having considered the entire record; including but not limited to all documents submitted by both parties; finds that the Respondent's Motion and matters contained therein are ripe for disposition.

ISSUE

Whether the pattern of vendor overcharging identified through compliance buys conducted at ASA Food Mart #3 on November 15, 2013, January 31, 2014 and February 26, 2014 requires a three-year disqualification of ASA Food Mart #3 from the Special Supplemental Nutrition Program for Women, Infants and Children ("WIC Program") under 7 C.F.R. § 246.12(l)(1)(iii)(C) and 10A N.C.A.C. 43D.0710(a)(2)?

UPON CONSIDERATION of the pleadings, the Respondent's motions with supporting affidavits, Petitioners' response, and such other materials, authorities, and arguments presented by or on behalf of the parties, the Undersigned makes the following findings of fact.

FINDINGS OF FACT

1. Compliance buys were conducted at ASA Food Mart #3 on November 15, 2013, January 31, 2014 and February 26, 2014. The compliance buys identified vendor overcharging

on each of the buys.

2. Based on the results of the compliance buys, Respondent issued a July 17, 2014, Notice of Intent to Disqualify ASA Food Mart #3 for three years as an authorized vendor in the WIC Program for a pattern of vendor overcharging.

3. Petitioners filed a Petition for a Contested Case Hearing with the Office of Administrative Hearings, in response to the July 17, 2014, Notice of Intent to Disqualify ASA Food Mart #3. The Notice was issued by the North Carolina Department of Health and Human Services, Division of Public Health.

4. Petitioners do not dispute the underlying violations and sanction cited in the Notice of Intent to Disqualify. Petitioners assert in their Petition and Prehearing Statement that ASA Food Mart #3 has increased its fresh fruit and vegetable section and that losing the WIC stamp will result in a loss to their WIC customers and a loss of revenue for the store. As a result, Petitioners ask for “the mercy of the court similar to a ‘prayer for judgment.’”

5. Petitioner Khan also states in Petitioners’ response that he has “never intentionally . . . overcharge[d] WIC customers” and that he has “always train[ed] [his] employees the same way.” Petitioner Khan attributes frequent price changes, lack of a scanning system in the store, and employees whose native language is not English as potential contributing factors to the overcharges.

6. In Petitioners’ response to Respondent’s motion, Petitioners further state: “There is not a scanning system where employees can scan items. Instead they have to memorize all the prices and enter them manually on the cash register which can be challenging for some employees specially the new ones.” Petitioner Mohammad Shafi Khan asserts that he plans to get a scanning system and that he will try his best “to update all the shelf prices and have meetings with employees every week to make sure they have all the knowledge about the WIC program.”

7. Prior to issuing the July 17, 2014, Notice of Intent to Disqualify ASA Food Mart #3, the Respondent examined participant access to other authorized WIC vendors and determined there was adequate access to other WIC vendors pursuant to 10A N.C.A.C. 43D.0710(e) and (f)(3).

BASED UPON the foregoing Findings of Fact, the Undersigned makes the following:

CONCLUSIONS OF LAW

1. 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 “[t]he State agency must disqualify a vendor for three years for . . . [a] pattern of vendor overcharges.” 7 C.F.R. § 246.12(l)(1)(iii)(C).

2. 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.

3. The three occurrences of vendor overcharging identified by the compliance buys at ASA Food Mart #3 on November 15, 2013, January 31, 2014 and February 26, 2014 established a pattern of vendor overcharging which requires by law a three-year disqualification of the store from the WIC Program pursuant to 7 C.F.R. § 246.12(l)(1)(iii)(C) and 10A N.C.A.C. 43D.0710(a).

4. Pursuant to 10A N.C.A.C. 43D.0708(28) and (29), vendors are responsible for informing and training their cashiers and other staff on WIC Program requirements and are accountable for the actions of their owners, officers, managers, agents and employees who commit vendor violations. In accordance with 7 C.F.R. § 246.2 and 10A N.C.A.C. 43D.0202(20), “vendor violation” and “vendor overcharge” include both intentional and unintentional actions. Assuming that the overcharges were unintentional and attributable to frequent price changes, lack of a scanning system, and employees who are not well versed in English, these factors unfortunately do not negate or otherwise provide a defense to the overcharging violations and applicable sanction under the foregoing rules and regulations.

5. Respondent complied with 7 C.F.R. §§ 246.12(l)(1)(ix) and 246.12(l)(8) by considering participant access to other authorized WIC vendors prior to issuing its July 17, 2014, Notice of Intent to Disqualify ASA Food Mart #3 from the WIC Program.

6. Based on the foregoing, Respondent’s issuance of the July 17, 2014, Notice of Intent to Disqualify ASA Food Mart #3 from the WIC Program for three years was proper.

7. Because Petitioners do not dispute the underlying violations and sanction cited in the Notice of Intent to Disqualify ASA Food Mart #3, and because Respondent considered participant access to other authorized WIC vendors prior to issuing its disqualification Notice, there is no genuine issue as to any material fact and the Respondent is entitled to summary judgment as a matter of law.

BASED UPON the foregoing Undisputed Findings of Fact and Conclusions of Law, the Undersigned makes the following:

DECISION

WHEREFORE, it appearing to the Undersigned that there is no genuine issue of material fact with regard to the Respondent’s disqualification of ASA Food Mart #3 for three years as an authorized vendor in the WIC Program and that the Respondent is entitled to judgment as a matter of law pursuant to Rule 56 of the North Carolina Rules of Civil Procedure, Summary Judgment is hereby GRANTED. Furthermore, the caption is hereby AMENDED to reflect the North Carolina Department of Health and Human Services, Division of Public Health, WIC, as the Respondent. Respondent’s Motion to Dismiss is DENIED.

NOTICE

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 03.012, 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.

IT IS SO ORDERED.

This the 3rd day of November, 2014.

Augustus B. Elkins II
Administrative Law Judge