

STATE OF NORTH CAROLINA
COUNTY OF WAKE

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
14 DHR 09906

MR. IMAD SIDER, EMSS INC. d/b/a)
NEW BERN MINI MART,)
)
Petitioners,)
)
v.)
)
N.C. DEPARTMENT OF HEALTH AND)
HUMAN SERVICES, DIVISION OF)
PUBLIC HEALTH,)
)
Respondent.)

FINAL DECISION

THIS MATTER came on for hearing before the undersigned administrative law judge on April 28, 2015, in Raleigh, North Carolina. After presentation of testimony and exhibits, the record was left open for the parties' submission of materials, including but not limited to supporting briefs, further arguments and proposals. Mailing time was allowed for submissions including the day of mailing as well as time allowed for receipt by the Administrative Law Judge. Petitioner requested a copy of the tape recording of the hearing on April 28, 2015 which was received by him no later than May 12, 2015. Respondent requested a copy of the tape recording on June 5, 2015 which was received on June 8, 2015.

The Respondent submitted proposals and argument to the Clerk's Office of the Office of Administrative Hearings (OAH) on May 29, 2014 which was received by the Undersigned on June 2, 2015. Based on Petitioner's receipt of the tape recording, the Undersigned set submissions from Petitioner at June 15, 2015. Receiving nothing further beyond the hearing and holding the record open for seven additional business days, the record was closed on June 24, 2015.

APPEARANCES

For Petitioners: Mr. Imad Sider, *pro se*
1601 New Bern Avenue
Raleigh, North Carolina, 27610

For Respondent: Donna D. Smith, Special Deputy Attorney General
North Carolina Department of Justice
P.O. Box 629

Raleigh, North Carolina, 27602

ISSUE

Whether the Respondent was correct in issuing its intent to disqualify EMSS Inc. d/b/a New Bern Mini 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 November 14, 2013, December 12, 2013 and December 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
N.C.G.S. § 130A-361
10A N.C.A.C. 43D.0202, .0708, .0710

WITNESSES and EVIDENCE

The Respondent presented three witnesses, Gerell Smith, NC DHHS Vendor Compliance Officer, Laura Romera, NC DHHS Compliance Investigator and Carolyn Wynn, Wake County Vendor Coordinator. Petitioner Imad Sider testified on his own behalf.

Admitted into evidence was Respondents Exhibits 1 – 12.

BASED UPON careful consideration of the sworn testimony of the witnesses presented at the hearing and the entire record in this proceeding, the Undersigned makes the following findings of fact. In making the findings of fact, the Undersigned has weighed all the evidence and has assessed the credibility of the witnesses by taking into account the appropriate factors for judging credibility, including but not limited to the demeanor of the witness, any interests, bias, or prejudice the witness may have, the opportunity of the witness to see, hear, know or remember the facts or occurrences about which the witness testified, whether the testimony of the witness is reasonable, and whether the testimony is consistent with all other believable evidence in the case. From the evidence presented, the undersigned makes the following Findings of Fact.

FINDINGS OF FACT

1. The WIC Program is the federally funded Special Supplemental Nutrition Program for Women, Infants and Children, which is administered in North Carolina by the Department of Health and Human Services. 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.

2. 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 instrument in its bank account and is paid by the WIC Program the dollar amount entered by the vendor on the food instrument for the supplemental foods provided. The WIC Vendor Agreement is the contract between the vendor and the State and local agencies through which the vendor agrees to comply with the terms of the Agreement and State and Federal WIC Program rules, regulations and laws.

3. Petitioner Imad Sider is Vice President and owner of a 100% business interest in EMSS Inc. d/b/a New Bern Mini Mart, a store located at 1601 New Bern Avenue, Raleigh, North Carolina. New Bern Mini Mart has been an authorized vendor in the WIC Program since 2009, stamp number 0026.

4. Petitioner Sider signed a WIC Vendor Agreement on behalf of New Bern Mini Mart on May 8, 2013. This Agreement is effective from June 13, 2013 through September 30, 2015, which includes the time period of the charged violations.

5. 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 28, 2013. Copies of the North Carolina WIC Program Vendor Manual and training materials were distributed to the vendor representatives attending this training session. The training materials and Manual contain requirements for operating as an authorized WIC vendor, including guidance on how to properly conduct a WIC transaction and information on violations and sanctions.

6. A store representative of Petitioner attended the June 28, 2013 annual vendor training session on behalf of New Bern Mini Mart. Petitioner Sider or a store representative has attended annual training each year since the store was authorized as a WIC vendor.

7. 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. In addition to covering these requirements at annual training, these requirements are also included in the WIC Vendor Agreement signed by Petitioner Sider on May 8, 2013.

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. 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.

9. 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 New Bern Mini Mart on November 14, 2013, December 12, 2013, and December 23, 2013. On each of these dates Romero posed as a WIC customer and obtained WIC supplemental foods using a WIC food instrument.

10. 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 with her food items and recorded in her report the supplemental foods obtained with the food instrument and the prices marked for each food item. Again, Romero contemporaneously viewed the food items that she obtained at the store and their prices as she completed her report. 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.

11. Each food instrument used by Romero was marked with a unique identifying serial number so that Romero could retrieve the food instrument after it came through the banking system for payment and 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.

12. Following the November 14, 2013 compliance buy, Respondent notified Petitioners by Notice of Violation(s) dated November 22, 2013, that a recent compliance buy at New Bern Mini 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 New Bern Mini Mart from the WIC Program. The Notice also recommended that Petitioners request additional vendor training from their local WIC agency.

13. Petitioners did not request additional vendor training and the Respondent resumed its investigation of New Bern Mini Mart in December, 2013, following the November 22, 2013, Notice of Violation(s).

14. When investigator Romero entered New Bern Mini Mart on November 14, 2013, she used food instrument #00280839 to obtain WIC supplemental foods listed on the food instrument.

15. Romero selected two gallons of Maola 2% milk marked at \$6.25 per gallon, one dozen Simpson eggs marked at \$2.99, one 64-oz. container of Everfresh apple juice marked at \$6.49, three 12-oz. boxes of General Mills Kix cereal marked at \$0.45 per ounce, one 16-oz.

package of Mahatma brown rice marked at \$3.91, and one 16-oz. bag of Great Value pinto beans marked at \$2.43.

16. The actual total price of the supplemental foods obtained by Romero with food instrument #00280839 was \$44.52. The amount entered in the "Pay Exactly" box of the redeemed food instrument was \$52.30. The amount entered in the "Pay Exactly" box of redeemed food instrument #00280839 exceeded the actual total price of the supplemental foods provided to Romero by \$7.78.

17. When investigator Romero returned to New Bern Mini Mart on December 12, 2013, she used food instrument #00281320 to obtain WIC supplemental foods listed on the food instrument.

18. Romero selected two gallons of Maola 2% milk marked at \$6.25 per gallon, one dozen Simpson eggs marked at \$2.99, one 64-oz. container of Everfresh apple juice marked at \$6.49, three 12-oz. boxes of Kellogg's Rice Krispies Gluten-Free marked at \$0.45 per ounce, one 16-oz. package of Mahatma brown rice marked at \$3.91, and one 16-oz. bag of Goya black beans marked at \$2.43.

19. The actual total price of the supplemental foods obtained by Romero with food instrument #00281320 was \$44.52. The amount entered in the "Pay Exactly" box of the redeemed food instrument was \$52.30. The amount entered in the "Pay Exactly" box of redeemed food instrument #00281320 exceeded the actual total price of the supplemental foods provided to Romero by \$7.78.

20. When investigator Romero returned to New Bern Mini Mart on December 23, 2013, she used food instrument #00281321 to obtain WIC supplemental foods listed on the food instrument.

21. Romero selected two gallons of Maola 2% milk marked at \$6.25 per gallon, one 64-oz. container of Everfresh apple juice marked at \$6.49, and one 16-oz. package of Mahatma brown rice marked at \$3.91.

22. The actual total price of the supplemental foods obtained by Romero with food instrument #00281321 was \$22.90. The amount entered in the "Pay Exactly" box of the redeemed food instrument was \$22.98. The amount entered in the "Pay Exactly" box of redeemed food instrument #00281321 exceeded the actual total price of the supplemental foods provided to Romero by \$0.08.

23. Based on the findings of the compliance buys conducted on November 14, 2013, December 12, 2013 and December 23, 2013, Respondent notified Petitioners by letter dated November 12, 2014, of its intent to disqualify New Bern Mini Mart from the WIC Program for three years and advised Petitioners of the right to appeal to the Office of Administrative Hearings.

24. Prior to issuing the November 12, 2014 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 10A N.C.A.C. 43D.0710(e) and .0710(f)(3).

25. Petitioner testified that he had been in the store since approximately 2003 and became an authorized vendor in the WIC Program because many in the neighborhood had asked. He stated that he believed the errors made involved small amounts and were honest mistakes.

BASED UPON the foregoing FINDINGS OF FACT and upon the preponderance or greater weight of the evidence in the whole record, the Undersigned makes the following:

CONCLUSIONS OF LAW

1. The Office of Administrative Hearings has personal and subject matter jurisdiction over this contested case. The parties received proper notice of the hearing in the matter. To the extent that the Findings of Fact contain Conclusions of Law, or that the Conclusions of Law are findings of fact, they should be so considered without regard to the given labels.

2. The Undersigned need not make findings as to every fact which arises from the evidence and need only find those facts which are material to resolution of the dispute. *Flanders v. Gabriel*, 110 N.C. App. 438, 440, 429 S.E.2d 611, 612 (1993).

3. 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.

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

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. 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.

10. 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 New Bern Mini 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.

11. Pursuant to the regulatory scheme set forth in federal and State rules, the Respondent correctly issued its Notice of Intent to Disqualify New Bern Mini Mart from participating as a WIC vendor for a period of three years. 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, and did not it exceed its authority or jurisdiction.

BASED UPON the foregoing Findings of Fact and Conclusions of Law the Undersigned makes the following Final Decision.

FINAL DECISION

The Undersigned finds and holds that there is sufficient evidence in the record to properly and lawfully support the Conclusions of Law cited above. The Undersigned enters the following Final Decision based upon the preponderance of the evidence, having given due regard to the demonstrated knowledge and expertise of the Agency with respect to facts and inferences within the specialized knowledge of the Agency.

Based upon the foregoing Findings of Fact and Conclusions of Law, the Undersigned holds that the greater weight of the evidence regarding the issues presented in this contested case lies with Respondent. As such, Respondent’s decision to disqualify New Bern Mini Mart as an authorized WIC vendor for three years is **AFFIRMED**.

NOTICE

THIS IS A FINAL DECISION issued under the authority of N.C. Gen. Stat. § 150B-34.

Under the provisions of North Carolina General Statutes Chapter 150B, Article 4, 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 in which the party resides. 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. N.C. Gen. Stat. §150B-46 describes the contents of the Petition and requires service of the Petition on all parties.

In conformity with the Office of Administrative Hearings' Rules, 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.

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 is the 29th day of July, 2015.

Augustus B. Elkins II
Administrative Law Judge