

STATE OF NORTH CAROLINA
COUNTY OF PITT

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
14DHR10138

Joes Country Mart, Inesar M Ahmad Petitioner v. NC DEPARTMENT OF HEALTH AND HUMAN SERVICES, WIC Respondent	FINAL DECISION DISMISSING CONTESTED CASE
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THIS MATTER is before the undersigned on Respondent's Motion to Dismiss and in the Alternative Motion for Summary Judgment, filed January 20, 2015. Petitioner has not responded within the ten (10) days normally afforded the nonmoving party to respond to a motion. See, 26 NCAC 03 .0115.

Respondent argues that the *pro se* Petitioner failed to obtain jurisdiction of the Respondent Department due to the failure to serve it with a copy of the Petition. The file substantiates the factual basis for this motion, and that the Department's notice was very clear about this requirement, and that the Petitioner made the same mistake again when OAH sent him another certificate of service. However, the Motion does not cite any cases in which a petition has been dismissed due to failure to serve the respondent, and the undersigned can find none. Respondent received actual notice of the filing of Petition when OAH issued initial orders in the case on January 7, 2015, and the Summary Judgment Motion quotes from the Petition. In the absence of some showing that the Respondent reasonably changed position in reliance on the belief that Petitioner would not appeal the suspension, or was otherwise prejudiced, the Motion to Dismiss must be DENIED.

Respondent argues that it is entitled to Summary Judgment as a matter of law, pursuant to N.C. Gen. Stat. §§ 150B-34(e) and 1A-1, Rule 56 of the North Carolina Rules of Civil Procedure, because the Petition fails to controvert any of the material facts identified to invoke the mandatory suspension. Viewing the Petition in the light most favorable to the non-moving party, Petitioner did allege that his store's "disqualification ... would result in participant hardship," within the meaning of 10A NCAC 43D.0710 (f)(2), when he stated that, "it will be very difficult ... for my community being the only store in the neighborhood accepting WIC. Most of our clients are mothers that walk and don't have transportation." See, *Milgram Food Stores, Inc. v. U.S.*, 558 F.Supp. 629 (W.D.Mo.,1983). However, the rule further provides that the existence of "another WIC vendor ... located within seven miles of the [a] noncomplying vendor" outside of city limits, or a "WIC vendor is located within three miles of the [a] noncomplying vendor" within city limits "conclusively show[s] lack of hardship" within the meaning of the regulation. 10A NCAC 43D.0710 (f)(3) (A) and (B). An affidavit filed in

support of the Summary Judgment Motion states that, “there were four authorized WIC vendors within seven miles of Joe’s Country Mart, ranging between 2.22 and 6.97 miles from the store.”

As the Petitioner does not suggest any reason why Respondent is not required by the regulations to impose the proposed disqualification, based on facts shown by affidavits, the respondent is entitled to Summary Judgment as a matter of law.

Consequently, the Petition must be, and hereby is, DISMISSED.

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 3rd day of February, 2015.

J. Randolph Ward
Administrative Law Judge