

STATE OF NORTH CAROLINA
COUNTY OF MECKLENBURG

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
15DHR03419

SEON M OH, EXPRESS INTERNATIONAL TRADING INC. D/B/A SOUTHSIDE FISH & GROCERY Petitioner, v. NUTRITION SERVICES, WIC PROGRAM, DHHS Respondent.	FINAL DECISION ORDER GRANTING SUMMARY JUDGMENT
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THIS MATTER came on for hearing on July 8, 2015 before the undersigned administrative law judge on the Respondent's Motion for Summary Judgment filed on June 4, 2015 and the Petitioners' written response dated June 15, 2015. Petitioners appeared *pro se* and the Respondent was represented by Donna D. Smith, Special Deputy Attorney General. This matter is now ripe for disposition.

ISSUE

Whether vendor overcharging identified through compliance buys conducted at Express International Trading Inc. d/b/a Southside Fish & Grocery ("Southside Fish & Grocery") on May 6, 2014, June 17, 2014 and August 13, 2014, requires a three-year disqualification of Southside Fish & Grocery 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 motion 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:

UNDISPUTED FINDINGS OF FACT

1. Compliance buys were conducted at Southside Fish & Grocery on May 6, 2014, June 17, 2014 and August 13, 2014. The compliance buys identified vendor overcharging on each of the buys.

2. Based on the results of the compliance buys, Respondent issued on April 14, 2015, Notice of Intent to Disqualify Southside Fish & Grocery for three years as an authorized vendor in the WIC Program for a pattern of vendor overcharging.

3. Petitioners filed a petition with the Office of Administrative Hearings on May 12, 2015, in response to the April 14, 2015, Notice of Intent to Disqualify Southside Fish & Grocery.

4. Petitioners acknowledge that an untrained employee unintentionally committed the overcharging violations.

5. Prior to issuing the April 14, 2015, Notice of Intent to Disqualify Southside Fish & Grocery, 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 Undisputed 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 Southside Fish & Grocery on May 6, 2014, June 17, 2014 and August 13, 2014 established a pattern of vendor overcharging which requires 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. Under the foregoing rules and regulations, the fact that an untrained employee unintentionally commits vendor overcharging does not negate or otherwise provide a defense to the overcharging violations and applicable sanction.

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 April 14, 2015, Notice of Intent to Disqualify Southside Fish & Grocery from the WIC Program.

6. Based on the foregoing, Respondent’s issuance of the April 14, 2015, Notice of Intent to Disqualify Southside Fish & Grocery from the WIC Program for three years was proper.

7. Because Petitioners do not controvert the overcharging violations that triggered the mandatory three-year disqualification, and because Respondent considered participant access to other authorized WIC vendors prior to issuing its disqualification, 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:

FINAL DECISION

WHEREFORE, it appearing to the undersigned that there is no genuine issue of material fact with regard to the Respondent's disqualification of Southside Fish & Grocery 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**.

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 16th day of July, 2015.

J. Randall May
Administrative Law Judge