

STATE OF NORTH CAROLINA  
COUNTY OF WAKE

IN THE OFFICE OF  
ADMINISTRATIVE HEARINGS  
15DHR03739

<p>Zakkee Hill SR. Petitioner</p> <p>v.</p> <p>N.C. Department Of Health And Human Services Respondent</p>	<p><b>FINAL DECISION GRANTING SUMMARY JUDGMENT FOR RESPONDENT</b></p>
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THIS MATTER is before the undersigned on Respondent's Motion for Summary Judgment--pursuant to N.C. Gen. Stat. § 1A-1 and § 150B-23(a), Rule 56 of the North Carolina Rules of Civil Procedure, and 26 NCAC 03 .0101(b), .0103(a), and .0115--which was filed and served on June 8, 2015.

Petitioner is an approved vendor for the Federal Special Supplemental Nutrition Program for Women, Infants, and Children ("WIC") which is administered in this State by Respondent. An affidavit prepared by a Vendor Compliance Officer for Respondent's Nutrition Services Branch was filed with and in support of the Motion. It recounts that "compliance buys" were made at Petitioner's place of business, POD Convenience Store, on May 14, June 16, and July 24, 2014; and on each occasion, Petitioner was found to be overcharging for foods subject to the WIC Program's pricing rules.

The Compliance Officer further avers that Respondent complied with the requirement of 7 C.F.R. § 246.12(l)(3) that the "State agency ... notify a vendor in writing when an investigation reveals an initial incidence of a violation for which a pattern of incidences must be established in order to impose a sanction, before another such incidence is documented," by sending a certified letter with such a notice to Petitioner on May 23, 2014, which was delivered May 27, 2014. This "Notice of Violation" letter warned that, "Additional compliance buys will be conducted at the store and further violations can lead to ... disqualification ... from the WIC program."

The affidavit shows that on May 11, 2015, the Compliance Officer issued a "Notice of Intent to Disqualify from WIC Program" letter to Petitioner. It stated that overcharges found during the three compliance buys established a "pattern" of noncompliance, per 10A NCAC 43D .0710(a)(2), requiring "that a vendor be disqualified for three years," citing 7 C.F.R. § 246.12 (l)(1)(iii)(C) and 10A NCAC 43D .0710(a).

A sanction other than the suspension stated in the Notice of Intent would likely be imposed if a suspension would create a hardship for the population served by the vendor. The affidavit

discusses the surveys undertaken by Respondent to determine whether suspension of Petitioner would create such a hardship. These found that Petitioner's store was located within city limits, 10 other authorized WIC vendors were located within 3 miles of Petitioner's store, and there were two such vendors within a mile of Wake County's WIC office. Guidelines in 10A NCAC 43D .0710(f)(3)(B) & (C) provide that these facts "conclusively show lack of hardship."

The Notice of Intent letter duly notified Petitioner of his right to appeal in the Office of Administrative Hearings, and the Petition was timely filed on May 20, 2015. It alleged that Respondent had failed to use proper procedure and failed to act as required by law or rule. In the space provided to "briefly state facts showing how ... you have been harmed," Petitioner wrote:

In May of 2014, I receive [*sic*] a letter stating that I over charge, but also in June and July I was told [by the *Notice of Intent*] the same thing happened again [.] I did not know of anything taking place in June and July until almost a year later!

The undersigned (and Respondent) understands this to mean that Petitioner feels aggrieved because Respondent did not also notify him that they had found overcharges with the second and third "compliance buys" on June 16 and July 24, 2014.

"[S]ummary judgment should be 'granted when, viewing the record in the light most favorable to the non-moving party, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.'" *Aetna Casualty & Surety Co. v. Nationwide Mut. Ins. Co.*, 326 N.C. 771, 774, 392 S.E.2d 377, 379 (1990) (quoting *Beckwith v. Llewellyn*, 326 N.C. 569, 573, 391 S.E.2d 189, 191, *reh'g denied*, 327 N.C. 146, 394 S.E.2d 168 (1990)). *Floraday v. Don Galloway Homes, Inc.*, 340 N.C. 223, 225-26, 456 S.E.2d 303, 305 (1995).

26 NCAC 03 .0101(a) allows the non-moving party 10 days from the date of service of the motion to respond. That time has elapsed without response. The facts set forth in movant Respondent's supporting affidavit are credible and uncontradicted.

The regulations did not require Respondent to warn Petitioner that it had found that he had again overcharged customers in violation of the applicable requirements of the WIC program on June 16 and July 24, 2014. 7 C.F.R. § 246.12(1)(3). Viewing the allegations of the Petition in the light most favorable to the non-movant Petitioner, the Petition nonetheless fails to state grounds for relief from the agency's proposed action.

IT APPEARING that there is no genuine issue as to any material fact and that Respondent is entitled to judgment as a matter of law, it is ORDERED:

That Respondent's Motion for Summary Judgment is GRANTED; and

Respondent may disqualify Petitioner as a WIC Vendor for a period of three (3) years, pursuant to 10A NCAC 43D .0710(a).

## 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 25<sup>th</sup> day of June, 2015.

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J. Randolph Ward  
Administrative Law Judge