

STATE OF NORTH CAROLINA
COUNTY OF MONTGOMERY

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
15 DHR 10008

<p>MONTGOMERY FOOD INC DBA FOOD KING BRYAN DOZIER PETITIONER, V. WIC DEPT DHHS RESPONDENT.</p>	<p>FINAL DECISION</p>
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THIS MATTER came on for hearing before the undersigned on January 29, 2016, in High Point, North Carolina.

APPEARANCES

For Petitioner: Bryan Dozier, *pro se*
For Respondent: Janelle E. Varley, Assistant Attorney General, N.C. Dept. of Justice.

ISSUE

Whether the Respondent properly issued the November 24, 2015 Notice of Intent to Disqualify from the WIC Program for a period of 90 days to the Petitioner?

STATUTES, RULES, and REGULATIONS

42 U.S.C. § 1786
7 C.F.R. Part 246
N.C.G.S. § 130A-361
10A N.C.A.C. Subchapter 43D

EXHIBITS

Petitioner did not introduce any exhibits.
Respondent's Exhibits 1 through 13 were admitted into evidence.

BASED UPON the evidence presented, including sworn testimony of witnesses and documentary evidence, the undersigned makes the following:

FINDINGS OF FACT

1. The Special Supplemental Nutrition Program for Women, Infants, and Children (“WIC”) is a federally-funded program regulated by the United States Department of Agriculture (“USDA”), Food and Nutrition Services (“FNS”).
2. The purpose of the WIC program is to provide supplemental foods to pregnant women, infants, and children up to age five (called “participants”), who are at nutritional risk.
3. WIC supplemental foods are provided to participants through the retail grocery system via food instruments that list 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 and is paid by the WIC Program for the supplemental foods provided to participants.
4. Respondent, the North Carolina Department of Health and Human Services (“DHHS”), Division of Public Health (“DPH”), is the State agency authorized to administer the WIC Program in North Carolina.
5. Pursuant to 7 C.F.R. § 246.2, “Vendor” means a sole proprietorship, partnership, cooperative association, corporation, or other business entity operating one or more stores authorized by the State agency to provide authorized supplemental foods to participants under a retail food delivery system. Each store operated by a business entity constitutes a separate vendor and must be authorized separately from other stores operated by the business entity.
6. Pursuant to 10A N.C.A.C. 43D .0202(a)(3), an “authorized WIC vendor” is a food retailer or free-standing pharmacy that has executed a currently effective North Carolina WIC Agreement.
7. Petitioner, Montgomery Foods, Inc. DBA Food King is a corporation that owns the store, Food King #3. Mr. Bryan Dozier is the President of Montgomery Foods, Inc. DBA Food King. The corporate headquarters address for Montgomery Food, Inc. DBA Food King is 102 W. Chestnut Street, Troy, North Carolina, 27371. The street address for Food King #3 is 112 S. Main Street, Mt. Gilead, North Carolina 27306. This chain of groceries has serviced this area for many years without previous WIC suspension.
8. Petitioner entered into a WIC Vendor Agreement with Respondent in order for its store, Food King #3, to operate as an authorized WIC vendor.
9. The WIC Vendor Agreement is the contract between Petitioner and Respondent under which Petitioner agrees to comply with the terms of the Agreement and state and federal WIC Program rules, regulations, and laws.

10. A WIC Vendor Agreement for Food King #3 was in effect from May 20, 2013 through September 30, 2015, covering the time period in question.
11. On July 23, 2014, the Montgomery County Health Department WIC Program conducted renewal training for authorized WIC Program vendors on WIC Program procedures, rules, and regulations. This training included instruction on routine monitoring, expired food violations, and disqualifications. Copies of the training presentation and the North Carolina WIC Program Vendor Manual for October 1, 2014 to September 30, 2015 were distributed to the vendor representatives attending the training session. A representative from Food King #3 attended this training session.
12. Pursuant to 7 C.F.R. § 246.2, “Vendor violation” means any intentional or unintentional action of a vendor’s current owners, officers, managers, agents, or employees (with or without the knowledge of management) that violates the vendor agreement or Federal or State statutes, regulations, policies or procedures governing the Program.
13. Pursuant to 10A N.C.A.C. 43D .0708(25), WIC vendors must ensure that all WIC supplemental foods in the store for purchase are within the manufacturer’s expiration date.
14. Pursuant to 10A N.C.A.C. 43D .0710(b)(8), a vendor shall be disqualified from the WIC Program for 90 days for three occurrences within a 12-month period of stocking WIC supplemental foods outside of the manufacturer’s expiration date.
15. Pursuant to 7 C.F.R. § 246.12(1)(3), the State agency must 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, unless the State agency determines, in its discretion, on a case-by-case basis, that notifying the vendor would compromise an investigation.
16. The Montgomery County Health Department staff conducted a routine monitoring visit of Petitioner’s store, Food King #3, on January 29, 2015, and found an occurrence of stocking WIC foods outside of the manufacturer’s expiration date. The staff prepared a WIC Vendor Monitoring Report, and noted the findings in the report. The findings were discussed with the Store Manager; the report was signed by both the Store Manager and the WIC Monitor; and a copy of the report was left with the Store Manager on that day. The WIC Monitor explained that the store would be re-monitored and warned that another finding of noncompliance could result in disqualification from the WIC Program.
17. Based on the findings in the monitoring report, the State agency issued a Notice of Violation dated February 3, 2015 to Petitioner notifying them of the violation, stating that additional routine monitoring would be conducted at the store; and warning that future violations could lead to the disqualification of Food King #3 from the WIC Program.
18. The February 3, 2015 Notice of Violation was addressed to Mr. Bryan Dozier, Food King #3 at 112 S. Main Street, Mt. Gilead, NC 27306, sent via Federal Express and delivered on February 4, 2015. It is the routine practice of the State agency to send a copy of a Notice

of Violation to a corporate office address, if applicable, via regular mail. The Corporate Office, Montgomery Foods, Inc. is listed under “cc” at the bottom of the letter.

19. The Montgomery County Health Department staff conducted a second routine monitoring visit of Petitioner’s store, Food King #3, on February 12, 2015, and found another occurrence of stocking WIC foods outside of the manufacturer’s expiration date. The staff prepared a WIC Vendor Monitoring Report, and noted the findings in the report. The findings were discussed with the Store Manager; the report was signed by both the Store Manager and the WIC Monitor; and a copy of the report was left with the Store Manager on that day. The WIC Monitor explained that the store would be re-monitored and warned that another finding of noncompliance could result in disqualification from the WIC Program.
20. Based on the findings in the monitoring report, the State agency issued a Notice of Violation dated February 20, 2015 to Petitioner notifying them of the violation, stating that additional routine monitoring would be conducted at the store; and warning that future violations could lead to the disqualification of Food King #3 from the WIC Program.
21. The February 20, 2015 Notice of Violation was addressed to Mr. Bryan Dozier, Montgomery Foods Inc. d/b/a/ Food King #3 at 112 S. Main Street Mt. Gilead, NC 27306, sent via Federal Express, and delivered on February 23, 2015. It is the routine practice of the State agency to send a copy of a Notice of Violation to a corporate office address, if applicable, via regular mail. The Corporate Office, Montgomery Foods, Inc. is listed under “cc” at the bottom of the letter.
22. The Montgomery County Health Department staff conducted a third routine monitoring visit of Petitioner’s store, Food King #3, on March 4, 2015, and found another occurrence of stocking WIC foods outside of the manufacturer’s expiration date. The staff prepared a WIC Vendor Monitoring Report, and noted the findings in the report. The findings were discussed with the Front End Manager; the report was signed by both the Front End Manager and the WIC Monitor; and a copy of the report was left with the Front End Manager on that day. The WIC Monitor explained that the store would be re-monitored and warned that another finding of noncompliance could result in disqualification from the WIC Program.
23. Based on the findings in the monitoring report, the State agency issued a Notice of Intent to Disqualify dated November 24, 2015 to Petitioner, notifying them of the Respondent’s intent to disqualify Food King #3 from the WIC Program for 90 days because there had been three (3) occurrences within a 12 month period of stocking WIC supplemental foods outside of the manufacturer’s expiration date, and as required by 10A N.C.A.C. 43D .0710(b)(8).
24. The November 24, 2015 Notice of Intent to Disqualify was addressed to Mr. Bryan Dozier, Montgomery Foods Inc. d/b/a/ Food King #3 at 102 W. Chestnut Street, Troy, NC 27371, sent via Federal Express, and delivered on November 25, 2015.

25. Prior to issuing the November 24, 2015 Notice of Intent to Disqualify to Petitioner, the WIC Program considered the impact on participant access. Because another WIC Vendor, Food King #1, is located within one mile of the Montgomery County Health Department, where participants pick up their WIC food instruments, there would be adequate participant access despite the 90 day disqualification of Food King #3.

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

CONCLUSIONS OF LAW

1. The North Carolina WIC Program is vested with the authority to authorize and disqualify WIC vendors pursuant to N.C.G.S. § 130A-361 and 10A N.C.A.C. 43D .0700 et seq.
2. As an authorized WIC vendor, the Petitioner is bound by the terms of the WIC Vendor agreement and the administrative rules, regulations, and laws governing the WIC Program.
3. The Petitioner violated 10A N.C.A.C. 43D .0708(25) by stocking expired WIC supplemental foods in the Food King #3 store for purchase on January 29, 2015; February 12, 2015; and March 4, 2015.
4. Respondent properly issued the November 24, 2015 Notice of Intent to Disqualify proposing to disqualify Food King #3 from participating as an authorized vendor in the WIC Program for 90 days, as required by 10A N.C.A.C. 43D .0710(b)(8).
5. Respondent satisfied the notification of violation requirements in 7 C.F.R. § 246.12(l)(3) when it provided a copy of each monitoring report to Food King #3 on 1/29/15; 2/12/15; and 3/4/15, when it sent two Notices of Violation to Food King #3 on 2/3/15 and 2/20/15; and where its routine practice is to send a copy of any Notice of Violation to a corporate office headquarters address, if applicable.
6. Pursuant to 10A N.C.A.C. 43D .0710(e) and .0710(f)(3)(C), disqualification of Food King #3 from the WIC Program for a 90 day period will not cause inadequate participant access.
7. The Respondent did not act in an arbitrary or capricious manner in administering the WIC Program rules, regulations, and laws; did not fail to act as required by law or rule; did not fail to use proper procedure; did not act erroneously; nor did it exceed its authority or jurisdiction.

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

DECISION

Based on the forgoing Findings of Fact and Conclusions of Law, Petitioner's store, Food King #3, shall be disqualified as an authorized WIC Vendor for a 90 day period.

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.

IT IS SO ORDERED.

This the 29th day of February, 2016.

J Randall May
Administrative Law Judge