

STATE OF NORTH CAROLINA
COUNTY OF FORSYTH

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
16 DHR 03475

<p>Mrs. Mariana I Arellanes Owner Liberty Tienda de la Comunidad Petitioner,</p> <p>v.</p> <p>N.C. Department Of Health And Human Services Division of Public Health Respondent.</p>	<p>FINAL DECISION</p>
--	------------------------------

This matter coming on to be heard and being heard June 27, 2016, in High Point, North Carolina, and appearing for the Petitioner were attorneys Mr. Stephen M. Ball and Mr. Niles Gerber, and Special Deputy Attorney General Ms. Lisa K. Bradley appeared for the Respondent.

Based upon a review of the record, the exhibits submitted by the parties, and the evidence presented, the following facts have been proven by a preponderance of the evidence:

1. Petitioner is a business/business-owner located in Forsyth County, North Carolina. Liberty Tienda de la Comunidad is located at 1420 Liberty Street, Winston Salem, North Carolina, 27105. Ms. Arellanes is also the owner of Titi's Convenience Store, located at 1613 Benbow Street, Winston-Salem, North Carolina, 27106.
2. The WIC Program is the federally funded Special Supplemental Nutrition Program for Women, Infants and Children, which is administered in North Carolina by Respondent.
3. The WIC program provides supplemental foods to pregnant women, infants and children up to age five (called "participants") who have a nutritional risk.
4. 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.
5. Authorized WIC vendors, accept food instruments in exchange for WIC supplemental foods provided to participants.
6. The WIC vendor is paid by the WIC Program the dollar amount entered by the vendor on the food instrument for the supplemental foods provided.

7. 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.
8. Titi's Convenience Store has been a WIC authorized store for approximately 10 years. Liberty Tienda de la Comunidad has been a WIC authorized store for approximately 3 years.
9. The WIC stamp number for Liberty Tienda de la Comunidad is 0989.
10. Petitioner Mariana Arellanes signed a WIC Vendor Agreement on 7/30/15. This agreement is effective from October 1, 2015 to September 30, 2016, which includes the time period of the charged violations.
11. The Forsyth County Department of Public Health WIC Program provides annual training to authorized WIC vendors on WIC Program procedures, rules and regulations for operating as a WIC vendor.
12. The Forsyth County WIC Program hosted annual training to authorized WIC vendors through a webinar on July 16, 2016. 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 WC transaction and information on violations and sanctions.
13. Petitioner Mariana Arellanes attended the July 16, 2015 annual vendor training session on behalf of Liberty Tienda de la Comunidad. She has attended annual vendor training sessions since becoming a WIC authorized vendor approximately ten years ago.
14. 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.
15. In addition to covering these requirements at annual training, these requirements are also included in the WIC Vendor Agreement signed by Petitioner Mariana Arellanes on July 30, 2016.
16. The Responded is required by federal regulation to conduct compliance investigations of its authorized WIC vendors.

17. A compliance buy is an on-site investigation in which an undercover representative of the Program poses as a participant, parent or caretaker of an infant or child participant, or a proxy, and he or she makes a purchase involving one or more food instruments.
18. Ms. Laura Romero worked for the North Carolina Department of Health and Human Services as a compliance buy investigator during 2015.
19. Ms. Romero conducted compliance buys at Liberty Tienda de la Comunidad on September 3, 2015, November 13, 2015 and December 30, 2015. On each of these dates, Ms. Romero posed as a WIC customer and obtained WIC supplemental foods using a WIC food instrument.
20. During each compliance buy, Ms. Romero contemporaneously recorded the price marked for each food item as she selected the items in the store.
21. Immediately following each compliance buy, Ms. 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.
22. Each food instrument used by Ms. Romero was marked with a unique identifying serial number so that she 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 items obtained.
23. On September 16, 2015, Respondent notified Petitioner of a violation related to overcharging during a compliance buy.
24. The Notice advised Petitioner that additional compliance buys would be conducted at the store and that another occurrence of vendor overcharging required a three-year disqualification of Liberty Tienda de la Comunidad from the WIC Program. The Notice also recommended that Petitioners request additional vendor training from their local WIC agency.
25. Petitioner requested additional vendor training, and the same was held on October 8, 2015 at the Forsyth County WIC Department.
26. Ms. Josephina Acosta conducted the training which was attended by employees of Petitioner's businesses, Javier Moreno and Reydavid Arellanes.
27. The Respondent conducted additional undercover compliance buys at Liberty Tienda de la Comunidad on November 13, 2015, December 10, 2015, and December 30, 2015.
28. No overcharging occurred on December 10, 2015.

SEPTEMBER 3, 2015

29. When investigator Romero entered Liberty Tienda de la Comunidad on September 3, 2015, she used food instrument #112567337 to obtain WIC supplemental foods listed on the food instrument.
30. Romero selected one gallon of Daily Chef Whole Milk marked at \$4.49 and 16 ounces of Great Value brown rice marked at \$2.29.
31. The actual total price of the supplemental foods obtained by Romero with food instrument #112567337 was \$6.78.
32. The amount entered in the "Pay Exactly" box of the redeemed food instrument was \$8.88.
33. The amount entered in the "Pay Exactly" box of redeemed food instrument #112567337 exceeded the actual total price of the supplemental foods provided to Romero by \$2.10.

November 13, 2015

34. When investigator Romero returned to Liberty Tienda de la Comunidad on November 13, 2015, she used food instrument #114484598 to obtain WIC supplemental foods listed on the food instrument.
35. Romero selected one gallon of Daily Chef Whole Milk marked at \$4.99, one dozen Grade A Large eggs marked at \$3.39, three 12 ounce boxes of General Mills Kix cereal marked at \$4.78 a piece, one loaf of 16 ounce Bimbo Whole Wheat bread marked at \$3.49, one 16 ounce dry black beans marked at \$1.69.
36. The actual price of the supplemental foods obtained by Romero with food instrument #114484598 was \$27.90. The amount entered in the "Pay Exactly" box of the redeemed food instrument was \$33.99.
37. The amount entered in the "Pay Exactly" box of redeemed food instrument #114484598 exceeded the actual total price of the supplemental foods provided to Romero by \$6.09.

December 30, 2015

38. When investigator Romero returned to Liberty Tienda de la Comunidad on December 30, 2015, she used food instrument #115729676 to obtain WIC supplemental foods listed on the food instrument.
39. Romero selected one gallon of Daily Chef Whole Milk marked at \$4.99, one dozen Grade A Large eggs marked at \$3.39, two 18 ounce boxes of General Mills Cheerios

cereal marked at \$7.02 a piece, one loaf of 16 ounce Bimbo Whole Wheat bread marked at \$3.89, one 16 ounce dry black beans marked at \$1.99.

40. The actual price of the supplemental foods obtained by Romero with food instrument #115729676 was \$28.30. The amount entered in the "Pay Exactly" box of the redeemed food instrument was \$34.29.
41. The amount entered in the "Pay Exactly" box of redeemed food instrument #115729676 exceeded the actual total price of the supplemental foods provided to Romero by \$5.99.

INTENT TO DISQUALIFY

42. Based on the findings of the compliance buys conducted on September 3, 2015, November 13, 2015 and December 30, 2015, Respondent notified Petitioners by letter dated March 4, 2016, of its intent to disqualify Liberty Tienda de la Comunidad from the WIC Program for three years and advised Petitioners of the right to appeal to the Office of Administrative Hearings.
43. Prior to issuing the March 4, 2016 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(f)(3).
44. Petitioner filed a petition for a contested case hearing with the Office Administrative Hearings on April 5, 2016, in response to the March 4, 2016, Notice of Intent to Disqualify Liberty Tienda de la Comunidad from the WIC Program.

Based upon the foregoing Findings of Fact, the undersigned makes the following conclusions of law:

1. The Office of Administrative Hearings has jurisdiction over the parties and the subject matter herein.
2. The North Carolina WIC Program is vested with the authority to authorize and disqualify WIC vendors pursuant to N.C.G.S. § 130A-361, 10A N.C.A.C. 43D Section .0700 and 7 C.F.R. Part 246.
3. As 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.
4. 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 requirement. 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. 10A N.C.A.C. 43D .0708(3), .0708(4), .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. 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 supplemental food provided to a WIC customer.”
9. 7 C.F.R. § 246.12(1)(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.
10. 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.
11. In accordance with 7 C.F.R. § 246.12(1)(1)(iii)(C) and 10A N.C.A.C. 43D .0710(a)(2), a pattern of vendor overcharges has been established at Liberty Tienda de la Comunidad 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.
12. Pursuant to the regulatory scheme set forth in 7 C.F.R. § 246.12(1)(1)(iii)(C) and 10A N.C.A.C. 43D .0710(a)(2), the Respondent correctly issued its Notice of Intent to Disqualify Liberty Tienda de la Comunidad from participating as a WIC vendor for a period of three years.
13. 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, nor did it exceed its authority or jurisdiction.

Based upon the foregoing Findings of Fact and Conclusions of Law, the undersigned has determined that Respondent's decision to disqualify Liberty Tienda de la Comunidad as an authorized WIC vendor for three years should be **UPHELD**.

NOTICE

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 03.012, and the Rules of Civil Procedure, N.C. G.S. 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.G.S. § 150B-46 describes the contents of the Petition and requires service of the Petition and requires service of the Petition on all parties. Under N.C.G.S. § 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 6th day of July, 2016.

Philip E Berger Jr.
Administrative Law Judge