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**BEFORE THE OFFICE OF STATE ADMINISTRATIVE HEARINGS
STATE OF GEORGIA**

EL JALISCO MARKET #2,

Petitioner,

v.

GEORGIA DEPARTMENT OF PUBLIC
HEALTH,

Respondent.

K. Westray
Kevin Westray, Legal Assistant

Docket No.:
OSAH-DPH-WICV-1514909-67-Baxter

**ORDER GRANTING RESPONDENT'S
MOTION FOR SUMMARY DETERMINATION**

El Jalisco Market #2 ("Petitioner") appeals the Georgia Department of Public Health's ("Respondent") decision to disqualify Petitioner from Georgia's Special Supplemental Nutrition Program for Women, Infants, and Children ("WIC") for a period of three years. On October 31, 2014, Respondent moved for summary determination. Petitioner failed to respond to the Motion.¹ For the reasons set forth below, Respondent's Motion for Summary Determination is **GRANTED** and its decision to disqualify Petitioner from WIC for three years is **AFFIRMED**.

I. FINDINGS OF UNDISPUTED FACTS

1.

Petitioner applied to become a WIC vendor on April 27, 2010, and was approved as an authorized WIV vendor (VN# 6031). Petitioner signed a vendor agreement contract with the Georgia WIC Program which went into effect on July 29, 2010. Petitioner subsequently applied for vendor reauthorization and has been an approved vendor with the Georgia WIC Program

¹ In fact, not only did Petitioner fail to respond, but Petitioner's counsel failed to respond to this Court's staff attorney's repeated request for a conference.

continuously since its original authorization through September 30, 2013. (Exhibits R-1, R-2, R-3, R-4, R-5, R-6.)

2.

By signing the vendor agreement contract, Petitioner agreed to comply with all Georgia WIC Program rules and any changes made to those rules during the agreement period. (Exhibits R-10, p. 4; R-11, p. 8.)

3.

Vendors are subject to monitoring for compliance with Georgia WIC policies and procedures. Any violations found may result in sanctions. Georgia WIC Program representatives may conduct unannounced monitoring visits any time that the store is open for business. All records must be available for review by the representative of the agency upon request. (Exhibits R-10, p. 37; R-11, p. 31.)

4.

The Georgia WIC Program may conduct record or inventory audits at any time. Inventory audits include the examination of food invoices or other proofs of purchase to determine whether a vendor has purchased sufficient quantities of supplemental foods to provide the quantities of those foods redeemed by the vendor. (Exhibits R-10, p. 38; R-11, p. 31.)

5.

Certified public accounts from Myers and Stauffer, LLC ("MSLC") conducted an inventory analysis of Petitioner's vendor location between January 14 and February 20, 2014. (Exhibits R-7, R-7B, and R-7C.)

6.

As a result of the inventory analysis, MSLC determined that Petitioner committed the following violations:

(1) Petitioner claimed reimbursement for the sale of an amount of infant formula which exceeded the store's documented inventory of infant formula. Eighty-eight percent of the paid infant formula vouchers redeemed by Petitioner between January 14 and February 20, 2014, were paid in excess of the amount supported by Petitioner's inventory, resulting in an overpayment of \$10,696.00. (Exhibits R-7, ¶ 16; R-7B, p. 2; R-7C, p. 9.)

(2) Petitioner failed to comply with the requirement to purchase infant formula only from the suppliers selected and approved by the Georgia WIC Program. Specifically, the investigation revealed that Petitioner obtained infant formula from Market Grocery and from Wal-Mart. Market Grocery Company was one of the approved infant formula wholesalers listed on the Approved Infant Formula Suppliers lists posted on the Georgia WIC Program vendor website. Wal-Mart, however, was not listed as an approved infant formula supplier. (Exhibits R-7, ¶ 9; R-7C, p. 8; R-12, ¶¶ 6, 12-14; R-12A; R-12B; R-12C.)

(3) Petitioner failed to provide detailed sales and purchase documentation upon request. As part of the inventory analysis, MSLC requested that Petitioner provide detailed purchase and sales documentation for the store's inventory. MSLC, however, determined that the store did not maintain detailed sales documentation. (Exhibits R-6; R-7, ¶ 13; R-7B, p. 2; R-7C, p. 10; R-7G; R-12, ¶ 10.)

7.

Under the WIC Program's sanction schedule, Petitioner's pattern of claiming reimbursement for the sale of an amount of a supplemental food item which exceeds the store's documented inventory of that supplemental food item is subject to a federally-mandated disqualification from the Georgia WIC Program for a three-year period. (Exhibits R-10, p. 39; R-11, p. 45.)

8.

Additionally, the *Georgia WIC Program Vendor Handbook* provides that Petitioner is subject to administrative contract termination for failure to meet the selection criteria in effect at

the time of assessment as determined at any time throughout the agreement period by failing to provide food instruments, inventory records, food sales and/or tax information upon request, and for failure to purchase infant formula solely from suppliers selected and approved by the Georgia WIC Program. (Exhibits R-10, pp. 6-7, 14, 33-34; R-11, pp. 13, 20, 24, 39-40.)

9.

Based on the violations detected during the inventory analysis, the Georgia WIC Program issued a Notice of Immediate Disqualification on August 14, 2014, disqualifying Petitioner from the Georgia WIC Program for a period of three years. Additionally, a claim for overpayment in the amount of \$10,696.00 was assessed against Petitioner. On August 28, 2014, Petitioner submitted a request for administrative review. (Exhibits R-8; R-9.)

II. STANDARD OF REVIEW

On a motion for summary determination, the moving party must demonstrate that there is no genuine issue of material fact for determination. Ga. Comp. R. & Regs. 616-1-2-.15(1). When a motion for summary determination is made and supported, a party opposing the motion may not rest upon mere allegations or denials, but must show by supporting affidavit or other probative evidence that there is, truly, a genuine issue of material fact that requires a trial. OSAH Rule 616-1-2-.15(3); *Matsushita Elec. Indus. Col. Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). Thus, where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no “genuine issue for trial.” *First Nat. Bank of Arizona v. Cities Serv. Co.*, 391 U.S. 253, 270 (1968).

III. CONCLUSIONS OF LAW

1.

Having carefully considered the Motion, the Court concludes that the Respondent has demonstrated that there is no genuine issue of material fact and that the undisputed facts warrant judgment as a matter of law.

2.

WIC is a program of the U.S. Department of Agriculture (“U.S.D.A.”) authorized under the Child Nutrition Act of 1966, 42 U.S.C. § 1786 – 1793, to assist women, infants, and children from families with inadequate income with supplemental food and nutrition education through grants to state agencies. 7 C.F.R. § 246.1. Although the U.S.D.A. administers the WIC program, it has delegated the administration of the program to the states. 7 C.F.R. § 246.3(b). In Georgia, the WIC program is administered by the Georgia Department of Public Health on behalf of the U.S.D.A. in accordance with specifications found in federal state law. *See* 42 U.S.C. § 1786; 7 C.F.R. § 246; O.C.G.A. § 31-2A-8; Ga. Comp. R. & Regs. 511-8-1-.04.

3.

Federal regulations require that the Georgia WIC Program develop and implement criteria that determine which stores are selected for authorization in the vendor program and that the state agency must terminate the agreements with vendors that fail to meet the selection criteria during the agreement period. 7 C.F.R. § 246.12(g)(3). Federal law also requires that, as a condition of authorization under the WIC program, a vendor must comply with the vendor agreement, federal, and state statutes, and the regulations, policies, and procedures that govern the WIC Program. 7 C.F.R. § 246.12(h)(3)(xxii); Ga. Comp. R. & Regs. 511-8-1-.05.

4.

The Georgia WIC Program must develop and implement a system for monitoring vendor compliance with program rules, and a sanction system to enforce against vendors who commit program violations. 7 C.F.R. §§ 246.12(j)(1), 246.12(I). In compliance with the federal regulations, the Georgia WIC Program has developed a process for monitoring vendors as well as a sanction system, which are listed in the *Georgia WIC Program Vendor Handbook*. *Georgia WIC Program Vendor Handbook, effective October 1, 2012*, pp. 37-38, 41-45; *Georgia WIC Program Vendor Handbook, effective April 1, 2014*, 31-32, 35-39.

A. Violation One

5.

Federal regulation prohibits a “pattern of claiming reimbursement for the sale of an amount of a specific supplemental food item which exceeds the store's documented inventory of that supplemental food item for a specific period of time.” 7 C.F.R. § 246.12(I)(1)(iii)(B).

6.

A violation of this type is subject to a federally-mandated sanction of disqualification from the Georgia WIC Program for a three-year period. 7 C.F.R. § 246.12(I)(1)(iii)(B); *Georgia WIC Program Vendor Handbook, effective October 1, 2012*, 39; *Georgia WIC Program Vendor Handbook, effective April 1, 2014*, 45.

7.

Petitioner violated federal regulations and the vendor handbook by redeeming infant formula vouchers paid by the Georgia WIC Program in an amount that exceeded the documented infant formula inventory for Petitioner’s store during the investigated time period. This violation is subject to a three-year disqualification from the Georgia WIC Program.

B. Violation Two

8.

Among the Georgia WIC Program's selection criteria are the requirements that infant formula inventory be purchased only from infant formula supplies selected and approved by the WIC Program and the requirement to provide, upon request, detailed sales and purchase documentation for all items intended for sale in the store. 7 C.F.R. § 246.12(g)(11)(i); *Georgia WIC Program Vendor Handbook, effective October 1, 2012*, 6-7, 14; *Georgia WIC Program Vendor Handbook, effective April 1, 2014*, 13-14, 20)

9.

The vendor agreement between the Georgia WIC Program and Petitioner is subject to termination for failure to meet the Georgia WIC Program's selection criteria in effect at the time of the assessment. *Georgia WIC Program Vendor Handbook, effective October 1, 2012*, 34; *Georgia WIC Program Vendor Handbook, effective April 1, 2014*, 40. After being terminated from the program, the vendor must re-apply to the program no sooner than one year after being terminated from the program. *Id.*

10.

Petitioner violated program requirements by purchasing infant formula from Wal-Mart, which was not on the state-approved supplier list during the time period in question. Accordingly, Petitioner was subject to termination.

C. Violation Three

11.

The Georgia WIC Program vendor agreement requires vendors to "submit total food sales and gross sales revenue records, and any other records or information needed to validate total

food sales and gross sales, as requested by the Georgia WIC Program, and to complete and submit, upon request, any authorization documents pertaining thereto.” *Georgia WIC Program Vendor Agreement*, § III.A.5 and V.12; *Georgia WIC Program Vendor Handbook, effective October 1, 2012*, 33; *Georgia WIC Program Vendor Handbook, effective April 1, 2014*, 39.

12.

The vendor agreement between the Georgia WIC Program and Petitioner is subject to termination for failure to provide food instruments, inventory records, food sales, or tax information when requested. *Georgia WIC Program Vendor Handbook, effective October 1, 2012*, 33; *Georgia WIC Program Vendor Handbook, effective April 1, 2014*, 39.

13.

Petitioner violated the vendor agreement when it failed to maintain and provide detailed sales and purchase documentation upon request.

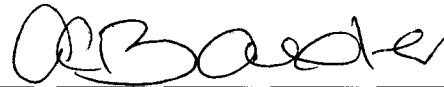
14.

In accordance with federal regulation, the Georgia WIC Program’s sanction schedule provides that, in the event that multiple violations are committed during an investigative period, the violation that corresponds to the most severe sanction will be assessed. 7 C.F.R. 246.12(I)(1)(xii); *Georgia WIC Program Vendor Handbook, effective October 1, 2012*, 35-39; *Georgia WIC Program Vendor Handbook, effective April 1, 2014*, 41-45. In this case, the most severe sanction is a three-year disqualification from the Georgia WIC Program.

V. ORDER

For the foregoing reasons, Respondent's Motion for Summary Determination is **GRANTED** and its decision to disqualify Petitioner's participation in the Georgia WIC Program for a period of three years is hereby **AFFIRMED**.

SO ORDERED this 12th day of December, 2014.



Amanda Baxter
Administrative Law Judge