

IN THE OFFICE OF STATE ADMINISTRATIVE HEARINGS
STATE OF GEORGIA

MERCADO FRESCO,

Petitioner,

v.

GEORGIA DEPARTMENT OF PUBLIC
HEALTH,

Respondent.

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OSAH-DPH-WICV-1619233-60-Kennedy



FILED
JAN 4 2016

JAN 4 2016

Kevin Westray

Kevin Westray, Legal Assistant

INITIAL DECISION

ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY DETERMINATION

I. Introduction

Mercado Fresco (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 six months.

On November 3, 2015, Respondent filed a Motion for Summary Determination. A Scheduling Order was issued on November 5, 2015, advising Petitioner that a response and/or Counter-Motion for Summary Determination was due November 30, 2015. Petitioner has not filed a response to Respondent's Motion for Summary Determination, has not filed a Counter-Motion for Summary Determination, and has not otherwise contacted the Office of State Administrative Hearings to request an extension or for any other purpose.

For the reasons set forth below, Respondent's Motion for Summary Determination is **GRANTED**. The court AFFIRMS Respondent's disqualification of Mercado Fresco for a period of six months.

II. Legal Standard

1.

A summary judgment motion before the Court is properly granted where the moving party demonstrates that there is no genuine issue of material fact and that the undisputed facts, viewed in the light most favorable to the nonmoving party, warrant judgment as a matter of law. *Prince v. Esposito*, 278 Ga. App. 310, 310 (1) (2006). *See also* Ga. Comp. R. & Regs. 616-1-2-15. When ruling on a motion for summary judgment, the opposing party is given "the benefit of all reasonable doubt, and the court should construe the evidence and all inferences and conclusions arising therefrom most favorably toward the party opposing the motion." *Moore v. Goldome Credit Corp.*, 187 Ga. App. 594, 595-96 (1988). "A motion for summary judgment should not be granted unless it affirmatively appears from the pleadings and evidence that the party so moving is entitled to prevail." *Finch v. City of Atlanta*, 232 Ga. 415, 416 (1974). *See generally* O.C.G.A. § 9-11-56(c); *Sanders v. Colwell*, 248 Ga. 376 (1981).

2.

In this matter, Respondent has the burden of proof as to all issues of fact, except as to any affirmative defenses raised by Petitioner. The administrative review is *de novo*, and the standard of proof as to all issues is a preponderance of evidence. Ga. Comp. R. & Regs 616-1-2-.07(1); Ga. Comp. R. & Regs 616-1-2-.21(4).

3.

The sole issue for determination is whether Respondent correctly applied the federal and state statutes, regulations, policies and procedures governing the WIC Program according to the evidence presented. 7 C.F.R. § 246.18(b)(8); Ga. Comp. R & Regs. 511-8-1-.06(2)(b)(5).

III. Undisputed Material Facts

1.

Petitioner is located at 4166 Buford Highway, Suite 1115, Atlanta, Georgia 30345. (Respondent Exhibit 1.)

2.

Petitioner applied to become an authorized vendor with the Georgia WIC Program on January 21, 2014. (Respondent Exhibit 1.)

3.

Petitioner was approved as an authorized vendor, and was assigned vendor authorization #6411. Upon approval, Petitioner signed a vendor agreement with the Georgia WIC Program that was effective from April 17, 2014 through September 30, 2015. (Respondent Exhibit 2.)

4.

As a condition of authorization, a vendor is required to comply with the vendor agreement, Federal and State statutes, and the regulations, policies, and procedures that govern the Georgia WIC Program, including any changes made during the agreement period. (7 C.F.R. § 246.12(h)(3)(xxiii).; Ga. Comp. R. & Regs. 511-8-1-.05. *See also* Respondent Exhibit 2, Section III, A.2. p. 3; Respondent Exhibit 3, p. 8.)

5.

A vendor violation is defined by the federal regulations as “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.” *See* 7 C.F.R. § 246.2.

6.

Furthermore, vendors are accountable for the actions of its owners, officers, managers, agents, and employees who commit violations. (7 C.F.R. § 246.12(h)(3)(xiv). *See also* Respondent Exhibit 2, Section III.A.1., p.3; Respondent Exhibit 3, p. 41.)

7.

If vendor violations are identified during the course of a compliance investigation, the Georgia WIC Program must assess and impose sanctions consistent with the nature and severity of the violation in accordance with its Sanction Schedule, which is incorporated by reference in the Vendor Agreement and outlined in the Georgia WIC Program Vendor Handbook. (7 CFR §§ 246.12(h)(3)(xix) and 246.12(h)(5); *See also* Respondent Exhibit 2, Section VI, pp. 11-12; and Respondent Exhibit 3 at pp.41-45.)

8.

The Georgia WIC Program Sanction System consists of seven categories of sanctions. Categories I, II, and III are State Agency sanctions established by the Georgia WIC Program and approved by the United States Department of Agriculture (“U.S.D.A.”), while Categories IV, V, VI, and VII are federal mandatory sanctions established by the federal regulations applicable to

the WIC Program. (7 CFR §§ 246.12(h)(5) and 246.12(l)(1) and (2). *See also* Respondent Exhibit 2, Section VI, p. 11; Respondent Exhibit 3 at pp. 41-45.)

9.

Pursuant to the Georgia WIC Program Sanction System, all State Agency violations assessed against a vendor are retained in the vendor's file for a period of one year and roll off at the end of that period. (Respondent Exhibit 3, p. 41; Respondent Exhibit 5; Respondent Exhibit 7.)

10.

Additionally, the Georgia WIC Program Sanction System provides that if a violation occurs in Category I, the vendor will receive a written warning for the first offense.¹ If the same violation occurs a second time within a one-year period, the vendor will receive another warning for the second offense. If the same violation occurs a third time within a one-year period, the vendor will be disqualified for a period of six months. (Respondent Exhibit 3, p. 42; Respondent Exhibit 5; Respondent Exhibit 7; Respondent Exhibit 9.)

11.

State and Federal regulations, along with the Vendor Agreement executed between the parties, authorize the Georgia WIC Program and/or its representatives to monitor vendors for compliance with and possible violations of Georgia WIC Program rules, regulations, policies, and procedures. (7 C.F.R. §§ 246.12(h)(3)(xv) and 246.12(j). *See also* Respondent Exhibit 2, Section III.J., p.7; Respondent Exhibit 3, pp. 37-38.)

¹ Federal regulations require Respondent notify a vendor in writing "when an investigation reveals an initial incidence of a program violation for which a pattern of incidences must be established to impose a sanction before another violation is documented" *See* 7 CFR §§ 246.12(h)(3)(xix) and 246.12(l)(3). *See also* Respondent Exhibit 2, Section VI, p. 11.

12.

Investigators from the Georgia Department of Public Health's Office of Inspector General ("OIG"), an authorized representative of the Georgia WIC Program, conducted monitoring visits of Petitioner's store on September 16, 2014, March 6, 2015, and August 12, 2015. (Respondent Exhibit 4, ¶ 8; Respondent Exhibit 5; Respondent Exhibit 6, ¶ 9; Respondent Exhibit 7; Respondent Exhibit 8, ¶ 9; Respondent Exhibit 9.)

13.

During the September 16, 2014, monitoring visit, Investigator Charlie Smith observed that Petitioner had three categories of WIC-approved food items on its shelves available for purchase that were past the manufacturer's expiration dates: one bottle of 48-ounce juice that was past the expiration date of June 3, 2014; one box of cereal that was past the "better if used before" date of July 30, 2014; and fifteen bags of dried beans, fourteen of which were beyond the "use-by" date of August 19, 2014 and one bag which was beyond the "sell-by" date of August 16, 2014. (Respondent Exhibit 4, ¶ 10.)

14.

Investigator Smith recorded his observations of the expired food violations on a Vendor Review Form (hereinafter "VRF"), which was signed by him and by the owner, Ms. Reeves.²

² The VRF also noted that Petitioner had an inadequate amount of infant formula inventory since the store had only eight cartons of concentrated milk-based infant formula when the required minimum inventory is nineteen cartons, and the store had no cans of powdered soy-based infant formula when the required minimum inventory is twenty cans. (Respondent Exhibit 4, ¶ 13; Respondent Exhibit 4-A.) However, this violation is not at issue in this matter. Additionally, Investigator Smith observed that there were no manufacturer's expiration dates marked on two different brands of dried beans. (Respondent Exhibit 4, ¶ 14.) He also observed that two 64 ounce bottles of WIC-approved juice were marked with a manufacturer's expiration date of the following day, September 17, 2014, and that approximately 60% of the store's inventory of WIC-approved juice was marked with manufacturer's expiration dates that would expire in less than one month from the date of his visit to the store. (Id.) He recorded his additional observations in the WIC Representative's Notes section on the last page of the VRF, since they were not violations. (Id.; Respondent Exhibit 4-A.) These additional notes did not serve as a basis for the subsequent

(Respondent Exhibit 4, ¶ 11; Respondent Exhibit 4-A.) In addition, Investigator Smith took photographs of each of the three types of expired WIC-approved foods that he found in Mercado Fresco. (Respondent Exhibit 4, ¶ 12; Respondent Exhibits 4-B, 4-C, 4-D, 4-E, 4-F, 4-G, and 4-H.)

15.

At the conclusion of the monitoring visit, Investigator Smith reviewed each portion of the VRF with Ms. Reeves, including the expired food deficiencies and the infant formula deficiencies that he observed. (Respondent Exhibit 4, ¶ 15.) Ms. Reeves placed her initials in the space provided on the VRF for each WIC-approved and non-WIC approved food item counted. (Id.) In addition, both Investigator Smith and Ms. Reeves signed and dated the last page of the VRF. (Id.; Respondent Exhibit 4-A.)

16.

Following the completion of the September 16, 2014 monitoring visit, a first offense warning notice was issued to Petitioner, dated October 20, 2014, assessing a Category I, number 1 violation, for stocking one or more WIC food items outside of the manufacturer's expiration date, and a category 1, Number 4 violation, for failing to stock the required inventory of contract infant formula. (Respondent Exhibit 3, p. 42; Respondent Exhibit 5; Respondent Exhibit 6, ¶ 8.)

17.

A follow-up monitoring visit of Mercado Fresco was conducted by Investigator Tamara Johnson on March 6, 2015. (Respondent Exhibit 6.)

disqualification that was imposed and that is on appeal in this matter.

18.

During the second monitoring visit, Investigator Johnson observed that the store had two 18-ounce boxes of WIC-approved cereal that were past the manufacturer's "better if used by" date of January 28, 2015. (Respondent Exhibit 6, ¶ 11.) Investigator Johnson recorded her observations of the expired food violation on the VRF, which was signed by her and by the store manager. (*Id. See also* Respondent Exhibit 6-A.) In addition, the investigator took photographs of the front and the top of the two expired boxes of cereal. (Respondent Exhibits 6-B and 6-C.)

19.

At the conclusion of the monitoring visit, Investigator Johnson reviewed each portion of the VRF with the store manager, including the expired food deficiency that she observed. (Respondent Exhibit 6, ¶ 13.) The store manager placed his initials in the space provided on the VRF for each WIC-approved and non-WIC approved food item counted. (*Id.*) In addition, Investigator Johnson and the store manager both signed and dated the last page of the VRF. (*Id. See also* Respondent Exhibit 6-A.)

20.

Following the March 6, 2015 monitoring visit, a second offense warning notice, dated April 3, 2015, was issued to Petitioner, assessing a second offense for the commission of a Category I, number 1 violation of stocking one or more WIC food items outside of the manufacturer's expiration date. (Respondent Exhibit 3, p. 42; Respondent Exhibit 7; Respondent Exhibit 8, ¶ 8.)

21.

A third monitoring visit of Mercado Fresco was conducted by OIG investigator Talia Butts on August 12, 2015. (Respondent Exhibit 8.)

22.

During the third monitoring visit, Investigator Butts observed that the store had four cans of evaporated milk that were past the manufacturer's "best-by" date of August 4, 2015. (Respondent Exhibit 8, ¶ 11.)

23.

Investigator Butts recorded her observations of the expired food violation on a VRF, which was signed by her and by the store manager. (Respondent Exhibit 6, ¶ 11; Respondent Exhibit 6-A.) In addition, Investigator Butts took photographs of the front and the top of the four cans of expired evaporated milk. (Respondent Exhibits 8-B and 8-C.)

24.

At the conclusion of the monitoring visit, Investigator Butts reviewed each portion of the VRF with the store manager, including the expired food deficiency that she observed. (Respondent Exhibit 8, ¶ 13.) The store manager placed his initials in the space provided on the VRF for each WIC-approved and non-WIC approved food item counted. (*Id.*) In addition, Investigator Butts and the store manager both signed and dated the last page of the VRF. (*Id. See also* Respondent Exhibit 8-A.)

25.

The observation of four cans of expired evaporated milk available for purchase on Petitioner's shelf during the August 12, 2015 monitoring visit constituted a third instance of commission of a Category I, number 1 violation by Petitioner within a twelve month period, which is subject to a state agency sanction of six months' disqualification under the Georgia WIC Program Sanction System. (Respondent Exhibit 3, p. 43; Respondent Exhibit 8, ¶ 15; Respondent Exhibit 9.)

26.

Prior to disqualifying a vendor for a state agency violation, the Georgia WIC Program is required to determine whether disqualification of the vendor would result in inadequate participant access. *See* Respondent Exhibit 3, p. 46, and Respondent Exhibit 8, ¶ 16. The Georgia WIC Program standard for determining inadequate participant access is whether any other WIC-authorized vendors are located within ten miles of the vendor at issue. *Id.* Before disqualifying Mercado Fresco for committing three Category I, number 1 violations within twelve (12) months, the Georgia WIC Program determined that at least one other WIC-authorized vendor was located less than ten miles away from Mercado Fresco, so that inadequate participant access was not an issue. *See* Respondent Exhibit 8, ¶ 17. *See also* Respondent Exhibit 8-D.

27.

Based on Petitioner's commission of a third offense of a Category 1, number 1 violation within one year as observed during the August 12, 2015 monitoring visit, Respondent issued a Notice of Immediate Disqualification, dated September 1, 2015, disqualifying Petitioner from the Georgia WIC Program for a period of six months. (Respondent Exhibit 9.)

28.

Petitioner timely appealed Respondent's adverse decision. However, Petitioner has not raised any affirmative defense to the federal and state violations identified by Respondent, or the sanction assessed against Petitioner in Respondent's Notice of Immediate Disqualification for a six-month period. Instead, in Petitioner's appeal Petitioner specifically admits and apologizes for the expired food violations that were observed during the March 6, 2015 and August 12, 2015

monitoring visits, but contests the expired food violation observed during the September 16, 2014 monitoring visit on the basis that “the item in question was 1 day from the best sale date, therefore; technically it should not have been marked on the report.” However, as noted above, Respondent’s representative during the September 16, 2014 monitoring visit noted multiple WIC-approved food items with manufacturer’s expiration dates that had expired one month before, which served as the basis for the first offense warning. In its appeal, Petitioner also requests reconsideration of the six month disqualification period due to the impact the disqualification will have on Petitioner’s customers by causing them to have to travel farther and possibly “pay for more taxi trips.” However, given that there is no evidence that imposition of the disqualification will result in inadequate participant access, this assertion cannot serve as the basis for reversal of the disqualification period. (Respondent Exhibit 10.)

IV. Analysis

1.

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. The program provides supplemental foods, health care referrals, nutrition services, and nutrition education to low-income pregnant, breastfeeding and postpartum women, infants, and children up to age 5. 7 C.F.R. § 246.1. *See also* Respondent’s Exhibit 5, ¶ 2. 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 both federal and state law. *See* 42 U.S.C. § 1786; 7 C.F.R. § 246.1; O.C.G.A. § 31-2A-8; Ga. Comp. R. & Regs. 511-8-1-.04.

2.

Federal regulations provide that a vendor may appeal certain adverse actions imposed by the Georgia WIC Program and that certain appealable adverse actions are subject to full administrative review and others to an abbreviated administrative review. *See* 7 C.F.R. §§ 246.18(a)(1)(i), (ii). Federal regulations further require that Respondent develop procedures for a full administrative review of those adverse actions subject to such a review, which, at a minimum, must include that the matter be heard before an “impartial decision-maker whose determination is based solely on whether the State agency has correctly applied Federal and State statutes, regulations, policies, and procedures governing the Program, according to the evidence presented at the review.” 7 C.F.R. § 246.18(b)(8); Ga. Comp. R. & Regs. 511-8-1-.06(2)(b)(5).

3.

State regulations governing the administration of the WIC Program provide that matters subject to full administrative review must be referred to the Office of State Administrative Hearings (“OSAH”) for an initial decision. Ga. Comp. R. & Regs. 511-8-1-.06(2)(b)(3). OSAH must “comply with all applicable federal statutes, regulations, and guidelines, including those related to time frames for hearings, release of decisions, and other procedural requirements.” O.C.G.A. § 50-13-43.

4.

In this matter, Respondent disqualified Petitioner from the Georgia WIC Program for a period of six-months based on a determination that Petitioner committed three incidences of a Category 1,

number 1 violation by stocking one or more WIC food items outside of the manufacturer's expiration date within a period of 12 months.

5.

Federal law requires that the Georgia WIC Program must develop and implement a system for monitoring vendor compliance with program rules, and a sanction system to enforce against authorized vendors who commit program violations. See 7 C.F.R. §§ 246.12(j)(1) and 246.12(l). 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. See Respondent Exhibit 4, pp. 37-38, 41-45.

6.

The Georgia WIC Program Vendor Handbook requires all vendors to stock and maintain daily the minimum inventory of approved WIC foods as well as a substantial amount of non-WIC foods, which inventory must be in the store or in the store's stockroom. See Respondent Exhibit 3, p. 11, # 9, and pp. 20-22. The Georgia WIC Program Vendor Handbook also provides that stocking one or more WIC food items outside of manufacturer's expiration date corresponds to a Category I, number 1 violation in the Georgia WIC Program's Sanction System. *Id.* at p. 43. As mentioned in Finding of Fact #10, above, pursuant to the Georgia WIC Program Sanction System, if a violation occurs in Category I, the vendor will receive a written warning for the first offense. If the same violation occurs a second time, the vendor will receive another warning for the second offense. If the same violation occurs a third time, the vendor will be disqualified for a period of six (6) months. See Respondent Exhibit 3, p. 42. See also Respondent Exhibit 5, Respondent Exhibit 7, and Respondent Exhibit 9.

7.

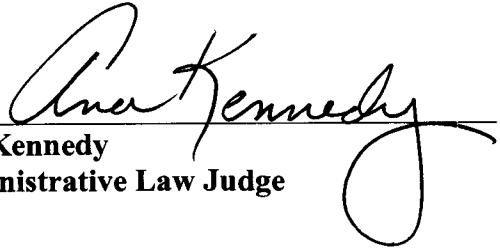
In this case, Respondent has proven, as set forth in the findings of fact, above, that Petitioner had one or more WIC food items in stock which were outside of the manufacturer's expiration date on three separate occasions within a one-year period, and that Respondent properly issued Petitioner a first and second warning letter following the first two monitoring visits in which a violation was observed. Petitioner's actions in each instance constituted a violation of the Georgia WIC Program's policies and procedures that, upon the third violation, requires the imposition of the sanction of disqualification for a period of six (6) months. *See* Respondent Exhibit 3, p. 11, # 9; pp. 20-22, and pp. 42-43. Additionally, Respondent determined that disqualification of Petitioner would not result in inadequate participant access because at least one other WIC-authorized vendor was located less than ten miles away from Petitioner's store location. *See* Respondent Exhibit 8, ¶¶ 16-17. *See also* Respondent Exhibit 3, p. 46 and Respondent Exhibit 8-D. For these reasons, the court concludes that Respondent correctly applied the federal and state statutes, regulations, policies and procedures governing the WIC Program according to the evidence presented. 7 C.F.R. § 246.18(b)(8); Ga. Comp. R & Regs. 511-8-1-.06(2)(b)(5).

V. ORDER

For the foregoing reasons, Respondent's Motion for Summary Determination is **GRANTED**. The court hereby **AFFIRMS** Respondent's disqualification of Petitioner for a period of six-months beginning on the fifteenth calendar day from the date of the September 1, 2015 Notice of Immediate Disqualification.

- **Signature page follows** -

SO ORDERED, this 4th day of January, 2016.



Ana Kennedy
Administrative Law Judge

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

MERCADO FRESCO,	:	
Petitioner,	:	Docket No.: OSAH-DPH-WICV-1619233-60-KENNEDY
	:	
v.	:	
	:	
GEORGIA DEPARTMENT OF PUBLIC HEALTH,	:	
Respondent.	:	

NOTICE OF INITIAL DECISION

This is the Initial Decision of the Administrative Law Judge (Judge) in the case. This decision is reviewable by the Referring Agency. If a party disagrees with this decision, the party may file a motion for reconsideration, a motion for rehearing, or a motion to vacate or modify a default order with the OSAH Judge. A party may also seek agency review of this decision.

FILING A MOTION WITH THE JUDGE AT OSAH

The Motion must be filed in writing within ten (10) days of the entry, i.e., the issuance date, of this decision. **The filing of such motion may or may not toll the time for filing an application for agency review.** See O. C.G.A. §§ 50-13-19 and 50-13-20.1. Motions must include the case docket number, be served simultaneously upon all parties of record, either by personal delivery or first class mail, with proper postage affixed, and be filed with the OSAH clerk at:

Clerk
Office of State Administrative Hearings
Attn.: Hazel Jackson, hjackson@osah.ga.gov
225 Peachtree Street, NE, South Tower, Suite 400
Atlanta, Georgia 30303-1534

APPLICATION FOR AGENCY REVIEW

An application for Agency Review must be filed within ten (10) days of the date of the Judge's Initial Decision. O.C.G.A. Sections 50-13-17 and 50-13-41; Ga. Comp. R. & Regs. 511-8-1-.06(2)(b)(6). A copy of the application for agency review must be simultaneously served upon all parties of record and filed with the OSAH clerk. The application for Agency Review should be filed with:

Office of General Counsel
Georgia Department of Public Health
15th Floor
2 Peachtree Street, NW
Atlanta, GA 30303

This Initial Decision will become the Final Decision of the agency if neither party makes a timely application for agency review. O.C.G.A. Sections 50-13-17 and 50-13-41; Ga. Comp. R. & Regs. 511-8-1-.06(2)(b)(6). In certain cases, an Initial Decision may become Final and therefore not subject to review either by agency provision or the provisions of O.C.G.A. Section 50-13-17(c). When a decision becomes Final, an application for judicial review must be filed within thirty (30) days in the Superior Court of Fulton County or the county of residence of the appealing party. If the appealing party is a corporation, the action may be brought in the Superior Court of Fulton County or the superior court of the county where the party maintains its principal place of doing business in this state. O.C.G.A. Section 50-13-19(b).