



IN THE OFFICE OF STATE ADMINISTRATIVE HEARINGS AUG 6 2013
STATE OF GEORGIA

LOS 4 REYES CONVENIENCE STORE, :
Petitioner, :
v. :
GEORGIA DEPARTMENT OF PUBLIC :
HEALTH, :
Respondent. :

Kevin Westray, Legal Assistant

OSAH-DPH-WICV-1339978-67-Teate

INITIAL DECISION
ORDER GRANTING MOTION FOR SUMMARY DETERMINATION

I. Introduction

In response to the Georgia Department of Public Health's (DPH's) Notice of Immediate Disqualification issued on February 26, 2013, Rafael Vergara d/b/a LOS 4 REYES CONVENIENCE STORE, (LOS 4) requested a hearing that was scheduled for August 14, 2013. Prior to that hearing date, DPH filed a motion for summary determination on May 10, 2013. LOS 4 filed no response within 20 days of the motion or prior to the issuance of this order.

For reasons indicated, DPH's motion for summary determination is **GRANTED**. Accordingly, DPH's Notice of Immediate Disqualification is **AFFIRMED**.

II. Findings of Fact

Based on supporting affidavits, or other probative evidence, there is no genuine issue for determination regarding the following material facts:¹

1. LOS4 applied to become an authorized vendor with the Georgia WIC Program on October 4, 2010, and has been an authorized vendor since February 22, 2011. The current authorization expires on September 30, 2013. By signing the contract, LOS4 agreed to comply with all Georgia WIC Program rules including a sanction system set out in the Georgia WIC Program Vendor Handbook. (Exhibits A, B, and C).

2. On December 2, 2011, a representative of LOS4 signed an Annual Training Checklist acknowledging that she had read the current Georgia WIC Program Vendor Handbook, had been trained by the WIC Program, and understood the Vendor Sanction System, program violations, and the responsibility of the vendor to remain in compliance with program rules throughout the term of the vendor agreement. (Exhibit D).

¹ Exhibits are those attached to DPS's Motion for Summary Determination.

3. A covert investigation was initiated by the DPH's Office of Inspector General after LOS4 was identified as a high risk vendor for fraud. The covert investigation consisted of a series of compliance buys conducted between February 2012 and June 2012. (Exhibits E through I).

4. LOS4 committed a Category V, violation number 3, by redeeming food instruments transacted during compliance buys conducted on March 22, 2012, May 2, 2012, and June 15, 2012, for an amount that exceeded the actual purchase price. This pattern of violations is subject to a federal mandatory sanction of disqualification from the Georgia WIC program for a three-year period. *See* 7 CFR 246.12 (l) (2) (iii) (C). (Exhibit C, p. VM-66).

5. During the compliance buy on March 22, 2012, voucher 04863879 was used to purchase 1-gallon of Friendly Farms 2% milk at \$4.99 and 1-46 oz. Juicy Juice Grape at \$3.99, for a total purchase price of \$8.98. (Exhibits E and E.1). On April 3, 2012, Petitioner redeemed this voucher for \$13.97, causing an overcharge of \$4.99. (Exhibit E.2).

6. During the compliance buy on May 2, 2012, voucher 04863884 was used to purchase 1-gallon of Great Value fat free milk at \$4.99 and 1-46 oz. plastic Juicy Juice Orange Tangerine at \$4.00, for a total purchase price of \$8.99. (Exhibits G and G.1). On May 14, 2012, Petitioner redeemed this voucher for \$13.97, causing an overcharge of \$4.98. (Exhibit G.2).

7. During the compliance buy on June 15, 2012, vouchers 04863889 and 05302301 were used. Voucher 04863889 was used to purchase 1-gallon Friendly Farms 2% milk at \$4.99 and 1-46 oz. plastic Juicy Juice Apple at \$3.99, for a total purchase price of \$8.98. (Exhibits I and I.1). On June 22, 2012, Petitioner redeemed this voucher for \$13.97, causing an overcharge of \$4.99. *See* Exhibit I.2. Voucher 05302301 was used to purchase one 16 oz. Lysol toilet bowl cleaner, which is not a WIC-eligible food item. (Exhibits I.3. and I.4). No WIC eligible food items were purchased with this voucher. However, Petitioner redeemed it for \$6.00, causing an overcharge of \$6.00. (Exhibit I.5).

8. On May 23, 2012 and June 15, 2012, Petitioner committed a Category V, violation number 2 when one of Petitioner's employees allowed for the purchase of non WIC-eligible food items in exchange for WIC food instruments. On May 23, 2012, the employee allowed for the purchase of laundry detergent, bleach, and fabric softener. (Exhibits H through H.2). On June 15, 2012, the employee allowed for the purchase of Lysol toilet cleaner. (Exhibits I.3. and I.4). This pattern of violations is subject to a federal mandatory sanction of disqualification from the Georgia WIC program for a three-year period. *See* 7 CFR 246.12 (l) (1) (iii) (F). (Exhibit C, p. VM-66).

9. Based on the violations detected during the covert investigation, the Georgia WIC program assessed a Category V sanction against Petitioner, and a Notice of Immediate Disqualification was issued against Petitioner. The Notice also notified Petitioner of the right to request an administrative review, the time frame in which Petitioner was required to submit his request for administrative review, and what was to be included in the request. Specifically, Petitioner was to provide a copy of the Notice and any documents, argument, or information that he would contend justifies a reversal of the sanction assessed in the Notice. (Exhibit M).

10. Although LOS4 appeals DPH's decision to disqualify it from the WIC Program for a period of three years, it does not dispute the factual occurrences that resulted in that decision. Further, there is another WIC vendor within 1.42 miles of LOS4 that is accessible to LOS4 customers with no geographical barriers. The alternate vendor is accessible by sidewalk, crosswalks, traffic lights, and public transportation. (Exhibits K, L, and M).

III. Conclusions of Law

1. The United States Department of Agriculture (USDA) funds the WIC Program and sets the program rules. 7 CFR 246.3 (a), (b). In Georgia, DPH administers the WIC program. *Id.*; O.C.G.A. §31-2A-8. As required by USDA regulations, Georgia WIC has developed and implemented a monitoring system to track vendor compliance with program rules as well as a sanction system to enforce against authorized vendors who commit program violations. 7 CFR 246.12 (j) (1); *Georgia WIC Program Vendor Handbook*. Federal regulations provide for mandatory sanctions that Georgia WIC is required to impose if specific violations are committed by a vendor. Each category of sanctions has a prescribed period of disqualification. *Id.*; *Georgia WIC Program Vendor Handbook* pp. VM-65 – VM-66. As a condition of authorization, a vendor is required to comply with the vendor agreement and Federal and State statutes, regulations, policies, and procedures that govern the Georgia WIC program, including any changes made during the agreement period. 7 CFR 246.12 (h) (3) (xxii); *Georgia WIC Program Vendor Handbook*, p. VM-33). LOS4 acknowledged and agreed to all such terms in the contract that it signed with DPH.

2. Federal regulations provide that in the event a vendor commits multiple violations in a single investigation, the State agency is required to disqualify a vendor "for the period that corresponds to the most serious mandatory violation." 7 CFR 246.12 (l) (xii); *Georgia WIC Program Vendor Handbook*, p. VM-62.

3. The vendor is accountable for the actions of its owners, officers, managers, agents, and employees who commit violations. 7 CFR 246.12(h)(3)(xiii). Federal regulation does not require notice of a violation detected during a covert compliance buy if the vendor is identified as high risk and such notice would compromise an investigation. 7 CFR 246.12 (l) (3). During the compliance buys that were conducted on March 22, 2012, May 2, 2012, and June 15, 2012, LOS4 committed a Category V, number 3 violation. *Id.* Following each compliance buy, LOS4 redeemed the vouchers for an amount that exceeded the actual purchase price. During the compliance buys conducted on May 23, 2012 and June 15, 2012, LOS4 committed a Category V, number 2 violation when one of its employees allowed the purchase of non-WIC eligible food items using WIC vouchers. *See* 7 CFR 246.12 (l) (1) (iii) (F). On May 23, 2012, Petitioner allowed the purchase of laundry detergent, bleach, and fabric softener. On June 15, 2012, the employee allowed the purchase of Lysol toilet cleaner. DPH was required to disqualify LOS4 for a period of three years, which is the disqualification period that corresponds to the most serious mandatory violation. *See* 7 CFR 246.12(l)(xii).

4. Summary determination in this proceeding is governed by OSAH Rule 15, which provides, in relevant part:

Any party may move, based on supporting affidavits or other probative evidence, for a summary determination in its favor upon any of the issues being adjudicated on the basis that there is no genuine issue of material fact for determination.

Ga. Comp. R. & Regs. r. 616-1-2-.15(1).

On a motion for summary determination, the moving party must demonstrate that there is no genuine issue of material fact such that the moving party "is entitled to a judgment as a matter of law on the facts established." Pirkle v. Env'tl. Prot. Div., Dep't of Natural Res., OSAH-BNR-DS-0417001-58-Walker-Russell, 2004 Ga. ENV. LEXIS 73, at *6-7 (OSAH 2004) (citing Porter v. Felker, 261 Ga. 421 (1991)); see generally Piedmont Healthcare, Inc. v. Ga. Dep't of Human Res., 282 Ga. App. 302, 304-305 (2006) (noting that a summary determination is "similar to a summary judgment" and elaborating that an administrative law judge "is not required to hold a hearing" on issues properly resolved by summary adjudication); G.J. v. Muscogee County Sch. Dist., 2010 U.S. Dist. LEXIS 28764 (N.D. Ga. 2010); A.B. v. Clarke County Sch. Dist., 2009 U.S. Dist. LEXIS 47701 (N.D. Ga. 2009).

Further, pursuant to OSAH Rule 15:

When a motion for summary determination is made and supported as provided in this Rule, a party opposing the motion may not rest upon mere allegations or denials, but must show, by affidavit or other probative evidence, that there is a genuine issue of material fact for determination in the hearing.

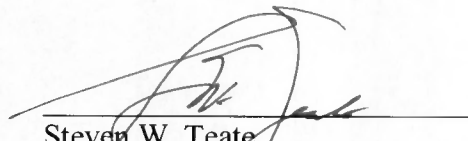
Ga. Comp. R. & Regs. r. 616-1-2-.15(3). See Guy Lockhart v. Dir., Env'tl. Prot. Div., Dep't of Natural Res., OSAH-BNR-AE-0724829-33-RW, 2007 Ga. ENV LEXIS 15, at *3 (OSAH 2007) (citing Leonaitis v. State Farm Mutual Auto Ins. Co., 186 Ga. App. 854 (1988)).

As the moving party, DPH has met its burden to demonstrate there is no genuine issue of material fact and that DPH is entitled to judgment as a matter of law on the facts established.

IV. Decision

Material facts established support a determination that LOS4 has committed three or more Category V violations that require disqualification of LOS4 from participation in the WIC program for three years. DPH's motion for summary determination is **GRANTED**. Accordingly, the disqualification of LOS4 from participation in the WIC program for three years is **AFFIRMED**.

SO ORDERED, this 6th day of August 2013.


Steven W. Teate
Administrative Law Judge