



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

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|---------------------------|---|-------------------------------|
| BABIES RIGHT START, INC., | : | Docket No.: |
| Petitioner, | : | OSAH-PH-WICV-1114919-31-Gatto |
| | : | |
| v. | : | |
| | : | |
| GEORGIA DEPARTMENT OF | : | |
| COMMUNITY HEALTH, | : | |
| Respondent. | : | |
| _____ | : | |

FINAL DECISION¹

COUNSEL: Anthony Lake, for Petitioner.

Chandra Jones, for Respondent.

GATTO, Judge.

I. INTRODUCTION

This matter came before the Court pursuant to an appeal of Babies Right Start, Inc. ("Babies Right Start") from the decision of the Department of Community Health of the State of Georgia ("Department") to disqualify Babies Right Start from participation in the Special Supplemental Food Program for Women, Infants, and Children ("WIC Program"). The Court has jurisdiction to hear this matter pursuant to Chapter 13 of Title 50, the "Georgia Administrative Procedure Act." For the reasons indicated below, the decision of the Department is **REVERSED** and the action is **REMANDED** with directions.

¹ Review decisions rendered under both the full and abbreviated review procedures are the final State agency action. *See* 7 CFR § 246.18(e).

II. FINDINGS OF FACT

Babies Right Start and the Department entered into a WIC Vendor Agreement, which authorized Babies Right Start to become a vendor under the WIC program, effective from March 3, 2009 through September 30, 2010. Resp't's Ex. 4, pp. 1, 11. The Department's Georgia WIC Program Vendor Handbook ("Vendor Handbook") "serves as a reference and is considered an addendum to the Vendor Agreement." Resp't's Ex. 1, p. 5. The parties stipulated that the 2008 version of the Vendor Handbook was the "addendum" to the Vendor Agreement signed by the parties in March 2009.²

Although the 2008 version of the Vendor Handbook does not appear in the record, the parties stipulated that the 2008 version contained a sanction schedule identical to the sanction schedule set forth in the signed Vendor Agreement. The Department and Babies Right Start agreed in the Vendor Agreement to the following relevant State Agency Sanctions:

| State Agency Sanction | Violation Category | Sanction |
|---|--------------------|--|
| Prices not marked clearly on WIC food items or near WIC food items. Charging above the maximum allowable reimbursement amount. | Category I | Warning on first and second offense, third offense probation for six months. While on probation if a violation occurs in Categories I, II or III the vendor will be disqualified for six months. |
| Failure to ring up a WIC purchase or failure to write the price on voucher before the participant signs. | Category II | Warning on first offense, second offense - probation for eight (8) months. |
| Providing incentive items as part of a WIC transaction. | Category III | Warning on first offense, second offense - probation for ten (10) months. |

Id., p. 8-9. The Vendor Agreement stated that the Georgia WIC Program may penalize the vendor by issuing sanctions in accordance with the procedures prescribed in "the most recent publication of the Georgia WIC Vendor Handbook and all addendums." *Id.*, p. 7. The Vendor

² The 2009 version of the Vendor Handbook did not take effect until October 1, 2009.

Agreement also provided that “[a] pattern is established when the same violation occurs twice during a covert compliance investigation.” *Id.*, at 10.

The Vendor Agreement required Babies Right Start to “clearly mark the price of WIC foods on the item, container, shelf or sign.” Resp’t’s Ex. 4, p. 4. It also required Babies Right Start “[t]o allow WIC customer[s] to participate in in-store and/or manufacturer promotions that include WIC approved food items. This includes buy one, get one or more free.” *Id.* Babies Right Start was also required “[t]o offer the WIC customer the same courtesies offered to all other customers.” *Id.*, at 5.

The Department’s covert investigator visited Babies Right Start’s store on January 26, 2010, February 25, 2010, March 31, 2010, May 21, 2010, and July 7, 2010, and prepared WIC Transaction Reports (“WTRs”). The investigator found no pricing violations on the January 26, 2010 visit. On the February 25, 2010 visit, he purchased “Great Valu 2%” milk and “Sunny Meadow” eggs and noted that the prices were marked on these items. The investigator testified, however, that the same brand of eggs and milk had no prices on his March 31, May 21 and July 7 visits.³ The investigator also testified that he was given incentive items on January 26, March 31 and May 21 in the form of candies and diapers and was given a card for Babies Right Start’s “Frequent Buyer Program,” although he did not allege that Babies Right Start provided him with any items pursuant to the Program.

Tonya Armour, the manager of the store, testified that she and the stores employees made sure that prices for all food items were displayed on or near the item. During the time period of the alleged violations, Armour testified that prices were always marked on apples, oranges, eggs, juice and milk and other items using WIC labels provided by the Department to list the prices for

³ The investigator relied on the WTRs he prepared at the time the alleged violations occurred.

most WIC food items.⁴ Although the Court finds her testimony credible, her testimony generally described the pattern and practices of the store but did not establish the condition of the labels on the dates of the alleged violations. Therefore, the Court finds the investigator’s testimony, based on recorded observations on the incident dates, to be more credible.

Armour further testified that Babies Right Start offered all its customers—including WIC recipients—the diapers and candies and participation in its Frequent Buyer Program as a courtesy or in-store promotion. Armour explained that Babies Right Start offered these courtesies or promotions to customers in order to be competitive since other stores in the area used similar promotions. In regard to the other alleged violations in the Disqualification Notice, Armour admitted that although her employees are instructed regarding the handling of WIC transactions, some mistakes could have been made in the transactions that formed the basis for the Disqualification Notice.

Relying on the 2009 version of the Vendor Handbook to support its disqualification,⁵ the Department sent Babies Right Start an Immediate Disqualification Notice (“Disqualification Notice”) on November 9, 2010, stating that a compliance investigation had found the following violations based on the Georgia WIC Sanction System:

| Date(s) | Violation(s) | Alleged Category |
|----------------------------------|---|-------------------------|
| 02/25/10 03/31/10 05/21/10 | Prices not marked clearly on WIC food items or near WIC food items (Apples, oranges, eggs, juice and milk). | Category IV |
| 0/31/10 | Overcharging on WIC vouchers. | Category III |
| 0/31/10 | Providing unauthorized food items in exchange for WIC vouchers. | Category III |
| 1/26/10 3/31/10 5/21/20 | Providing incentive items as part of the WIC transaction. | Category III |
| 1/26/10 | Failure to write the price on voucher before the participant signs. | Category II |

⁴ The Department’s investigator conceded that the juice did have a price displayed on or near it.

⁵ See Resp’t’s Ex. 1, p. 20-24.

| | | |
|--------------------|--|------------|
| 3/31/10 | | |
| 3/31/10 | Failure to check the WIC participants and/proxy's WIC ID card. | Category I |
| 1/26/10 3/31/10 | Failure to provide WIC participants with a receipt. | Category I |

Resp't's Ex. 9, p. 1-2. The Disqualification Notice made no reference to an alleged pattern of Category I, II or III violations as a basis for disqualification. *See id.*

III. CONCLUSIONS OF LAW

In all proceedings before this Court, the independent determination and *de novo* review mandated by this Court's rules⁶ require the Court to consider the applicable facts and law anew, without according deference or presumption of correctness to the Department's decision, and to render an independent decision. *See Longleaf Energy Assocs., LLC v. Friends of the Chattahoochee, Inc.*, 298 Ga. App. 753 , 768 (2009).⁷ Rather, this Court's decision "is based solely on whether the State agency has correctly applied Federal and State statutes, regulations, policies, and procedures governing the Program." 7 C.F.R. § 246.18(b)(8), (c)(2).

WIC is a program of the U.S. Department of Agriculture ("USDA") authorized under the Child Nutrition Act of 1966, 42 USC § 1786 *et seq.*, to provide free supplemental foods to meet the specific nutritional needs of pregnant, postpartum, and breastfeeding women, and infants and children of low-income families determined to be "at nutritional risk."⁸ *Id.* § 1786(a), (c)(1), (d)(1). The program is designed to supplement the food stamp program, and to provide nutrition

⁶ *See also* A.R.P. Rule 21(3).

⁷ *See also, Piedmont Healthcare, Inc. v. Georgia Dept. of Human Resources*, 282 Ga. App. 302, 303-304 (2006) (this Court applied the incorrect standard of review when it afforded great weight and deference to the agency's interpretations and affirmed the agency's decision that was not "clearly erroneous" or "arbitrary or capricious").

⁸ "WIC authorizes the Secretary to administer the program and implements the program by awarding federal grants-in-aid to state agencies. *Id.* § 1786(c), (c)(1). "State agency" means "the health department or comparable agency of each State." *Id.* § 1786(b)(13); *Id.* § 246.2.

education to prevent health problems and improve the health of its participants during critical periods of growth and development. *Id.* § 1786(a), (c) (1), (e).

“WIC operates much like a food stamp program. Individuals who qualify to receive WIC benefits receive food vouchers through local WIC offices.” *United States v. Kim*, 364 F.3d 1235 (11th Cir. Ga. 2004). In practice, the WIC vouchers are used to obtain food specified on the approved food list (milk, juice, cereal, etc.) from vendors⁹ who are approved to participate in the WIC program. *So v. Ledbetter*, 209 Ga. App. 666, 667 (1993). WIC vouchers are given to the vendors to pay for food as if they were checks and the vouchers are processed through the banking system for payment. *Id.* Vouchers are valid only for foods on the WIC food list and must be countersigned by the participants for the food items set forth on the voucher in the amounts and prices stated on the vouchers when food is obtained from the vendors.¹⁰ *Id.*

The WIC program is funded fully by the federal government, but under the Federal WIC regulations, USDA has delegated administration of the program to the state agencies. *See Id.* § 1786(c)(1); *Id.* § 246.3(b). In Georgia, USDA has delegated administration of the program to the Department, Georgia’s public health department.¹¹ *The Administrative Rules for the Special*

⁹ Before being allowed to participate as WIC food vendors, vendors must execute agreements with the Department that contain the terms and conditions under which they participate in the program. *See* § 246.12(h).

¹⁰ Only those foods that the Secretary of Agriculture prescribes may be distributed by the participating state agencies. *Id.* § 1786(b)(14), (f)(11); *see also Id.* § 246.10 (listing prescribed foods and recommended food packages including milk, cheese, eggs, cereals, fruit juices, and legumes). The statute, however, permits state agencies to submit proposals to substitute different, nutritionally equivalent foods in order to allow for varying cultural eating patterns, subject to the approval of the Secretary. *Id.* § 1786(b)(14); *see also Id.* § 246.10(i).

¹¹ *See* O.C.G.A. § 31-2-4(a)(1).

Supplemental Nutrition Program for Women, Infants and Children (WIC),¹² which were adopted pursuant to the rule-making provisions of the Georgia Administrative Procedure Act (“APA”), O.C.G.A. § 50-13-3 et seq., are Georgia’s WIC regulations that “provide for the administration of Georgia WIC as set forth by the Child Nutrition Act of 1966, as amended, and the Code of Federal Regulations. The definitions found in 7 C.F.R. § 246.2 are incorporated by reference with all subsequent amendments and editions.” Ga. Comp. R. & Regs. r. 111-9-1-.02.

The Federal WIC regulations provide for mandatory vendor sanctions for certain violations. *See* § 246.12(1)(1). A vendor violation is “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.” § 246.2. Thus, when a vendor engages in proscribed conduct, strict liability applies. *See Hy-Vee Food Stores, Inc. v. Minn. Dep't of Health*, 705 N.W.2d 181 (Minn. 2005).

Vendors may also be sanctioned for other violations in accordance with the State agency’s sanction schedule “as long as such vendor violations and sanctions are included in the State agency's sanction schedule.” § 246.12(1)(2)(i); *see also* § 246.12(h)(3)(xviii)(vendor may be sanctioned for vendor violations in accordance with the State agency's sanction schedule). State agency sanctions may include disqualifications, civil money penalties assessed in lieu of disqualification, and administrative fines. *Id.*

“The State agency must include its sanction schedule in the vendor agreement or as an attachment to it.” § 246.12(h)(5). “If the sanction schedule is in State law or regulations or in a

¹² *See* the official compilation, *Rules and Regulations of the State of Georgia* at Chapter 111-9-1.

document provided to the vendor at the time of authorization, the State agency instead may include an appropriate cross-reference in the vendor agreement.” *Id.* Here, the Vendor Agreement did contain a sanction schedule as required by § 246.12(h)(5). The 2008 version of the Vendor Handbook, which had a sanction schedule identical to the schedule included in the Vendor Agreement, was also incorporated by attachment to the Vendor Agreement and was the “document provided to the vendor at the time of authorization.”

However, the cross reference in the Vendor Agreement stated that the Georgia WIC Program may penalize the vendor by issuing sanctions in accordance with the procedures prescribed in “the most recent publication of the Georgia WIC Vendor Handbook and all addendums.” The Court concludes that the Vendor Agreement did not “include an appropriate cross-reference” since “the most recent publication of the Georgia WIC Vendor Handbook and all addendums” was not the “document provided to the vendor at the time of authorization” and was not the version incorporated by attachment to the Vendor Agreement. § 246.12(h)(5).

Alternatively, “if the sanction schedule [is] in the State agency’s regulations, [it may be included] through citations to the regulations.” § 246.4(a)(14)(iii); *see also* § 246.12(h)(5). In Georgia, the State agency’s regulations published in the *Administrative Rules for the Special Supplemental Nutrition Program for Women, Infants and Children (WIC)* do not contain a sanction schedule and are not appropriately cross-referenced by citation in the Vendor Agreement. Rather, as indicated *supra*, the Vendor Handbook was the “regulation” cross-referenced by citation in the Vendor Agreement. The Court again concludes that the Vendor Agreement did not “include an appropriate cross-reference” with a “citation to the regulations” since, as indicated *infra*, the Vendor Handbook is not the “State agency’s regulations.”

WIC is a form of public assistance (see *Dix v. State*, 156 Ga. App. 868, 869 (1981)) provided under the Georgia Public Assistance Act, O.C.G.A. § 49-4-1 et seq. Since they concern "loans, grants, and benefits" within the meaning of O.C.G.A. § 50-13-2(6)(I), the Department's regulations for the WIC program are exempt from the rule-making provisions in the APA. However, the same is not true of the Vendor Handbook, which does not concern "loans, grants, and benefits" within the meaning of O.C.G.A. § 50-13-2 (6) (I), since it is not concerned with establishing criteria for receiving grants or benefits. See *Ledbetter*, 209 Ga. App. at 669.

Instead, the Vendor Handbook addresses the operations of WIC vendors. *Id.* The Vendor Handbook is not contained in the official compilation, *Rules and Regulations of the State of Georgia*, which contains the "all rules adopted by each agency" pursuant to the rule-making provisions in the APA. O.C.G.A. § 50-13-7(a). Therefore, it is not a valid rule, see O.C.G.A. § 50-13-4(d), and is not "the State agency's regulations" contemplated by § 246.4(a)(14)(iii) and § 246.12(h)(5).

The Court therefore concludes that the Department may not impose sanctions from a sanction schedule referenced by citation to the Vendor Handbook unless it was the actual version of the Vendor Handbook incorporated by attachment to the Vendor Agreement or it was the actual version "provided to the vendor at the time of authorization" with a *properly* cross-referenced citation in the Vendor Agreement. 7 C.F.R. § 246.12(h)(5). Alternatively, the Department may include the sanction schedule in the *Administrative Rules for the Special Supplemental Nutrition Program for Women, Infants and Children (WIC)*, using the rule-making procedures of the APA, and include a *properly* cross-referenced citation in the Vendor Agreement.

The Court therefore concludes that the sanction schedule included in the Vendor Agreement signed by the parties is the operative sanction schedule in this case. Thus, the Court relies solely on the sanction schedule included in the Vendor Agreement to determine which penalty, if any, is appropriate in this case.

As to the alleged violations that Babies Right Start failed on three separate occasions to clearly mark prices on or near WIC food items, the Court concludes that the Department did establish by a preponderance of evidence that the violations actually occurred. However, these are not Category IV violations as alleged by the Department, but rather, are Category I violations in the operative sanction schedule. The Court therefore concludes that the Department's disqualification was not proper since the maximum sanction for a third offense in Category I was probation for six (6) months. Thus, the Court concludes that the appropriate sanction to be imposed for these Category I violations is probation for six (6) months.

As to the Department's allegation that that Babies Right Start offered incentives "as part of the WIC transaction" on three separate occasions, the Court concludes that these violations did not occur since the incentives were extended to all customers. Had Babies Right Start not provided the incentive to WIC customers that it provided to all other customers, it would have violated the Federal WIC regulations that provide that "[t]he vendor must offer program participants, parents or caretakers of infant of child participants, and proxies the same courtesies offered to other customers." § 246.12(h)(3)(iii). Therefore, the Court concludes that a sanction is not warranted based upon these allegations.

As to the Category II violations for the alleged "Failure to write the price on voucher before the participant signs," the Department did establish one violation but was unable to produce the vouchers at trial for the violation alleged on March 31, 2010. Therefore, the Court

concludes that the Department did not establish that Babies Right Start committed the March 31, 2010 violation. The maximum sanction for this one Category II violation is a warning, which the Court concludes is appropriate.

As to the remaining alleged violations in the Disqualification Notice, the Court concludes that the Department has established a violation for “Overcharging on WIC vouchers”, a Category I violation in the operative sanction schedule, not a Category III violation as alleged by the Department. Therefore, the maximum sanction for the first offense in Category I was a warning, which the Court concludes is appropriate. Likewise, Babies Right Start’s one Category III violation for “[p]roviding unauthorized food items in exchange for WIC vouchers” as set forth in the operative sanction schedule mandates a warning for one offense, which the Court concludes is appropriate.

As to the alleged violations of Babies Right Start’s “Failure to check the WIC participants and/proxy’s WIC ID card”, and “Failure to provide WIC participants with a receipt,” neither of these violations appear in Category I of the operative sanction schedule. Therefore, the Court concludes that since these are not Category I violations, no sanction may be imposed.

A “State agency vendor sanction must be based on a pattern of violative incidences.” § 246.12(1)(2)(i). Surprisingly, the Child Nutrition Act, the Federal WIC regulations, and the Georgia WIC regulations do not indicate what is required to establish a “pattern of violative incidences.” However, as indicated *supra*, the Vendor Agreement signed by the parties provides that “[a] pattern is established when the same violation occurs twice during a covert compliance investigation.”

The Federal WIC regulations provide that a “compliance investigation of a high-risk vendor may be considered complete when the State agency determines that a sufficient number

of compliance buys have been conducted to provide evidence of program noncompliance, when two compliance buys have been conducted in which no program violations are found, or when an inventory audit has been completed.” § 246.12(j)(4)(i). Here, the Department did not establish how it decided that the investigation of Babies Right Start, a vendor it had categorized as high risk, was complete. Since the Department must prove that the vendor sanction was based on a pattern of violative incidences, the Court concludes that the Department must first prove that the investigation was limited to a permissible investigation period, since any alleged violations beyond the permissible period cannot be used to establish a pattern of violative incidences. The Court therefore concludes that the Department has failed to carry its burden of proving the alleged pattern of violative incidences since it failed to carry the burden of establishing the compliance investigation period.

The Court also concludes that the Department was required to establish that Babies Right Start was a high-risk vendor “using criteria developed by FNS and/or other statistically-based criteria developed by the State agency.” § 1786(f)(24); § 246.12(j)(3). The Georgia WIC regulations do not provide the criteria used to identify high-risk vendors. Neither does the Vendor Agreement signed by the parties. Therefore, the Department has not established that it properly determined that Babies Right Start was a “high-risk” vendor.

Babies Right Start also argued that the Department did not properly notify it of an alleged violation that requires a pattern of occurrences in order to impose a penalty or sanction.¹³

¹³ “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.” § 1786(f)(26); *see also* § 246.12(l)(3). The State agency “must either provide

However, “[t]he State agency’s determination whether to notify a vendor in writing when an investigation reveals an initial violation for which a pattern of violations must be established in order to impose a sanction” is not subject to administrative review. *See* § 246.18(a)(1)(iii)(F). Nonetheless, the Court concludes that since the Department did not allege a pattern of Category I, II, or III violations in the Disqualification Notice, and did not amend its Notice to include a pattern violation, and did not properly establish a pattern of violations, the Department may not impose a sanction for any alleged pattern.¹⁴ Based upon the evidence presented, the Court concludes that the maximum sanction warranted in this case is probation for six (6) months. Accordingly,

IV. ORDER

IT IS HEREBY ORDERED THAT the Department’s decision to disqualify Babies Right Start from participation in the WIC Program is **REVERSED** and the action is **REMANDED** with directions that the Department place Babies Right Start on probation for six (6) months.

SO ORDERED THIS 3rd day of February, 2011.



JOHN B. GATTO, Judge

such notice to the vendor, or document in the vendor file the reason(s) for determining that such notice would compromise an investigation.” § 246.12(1)(3)(i).

¹⁴ Furthermore, the Department may not bring a subsequent action alleging a pattern of these violations since the doctrine of *res judicata* prevents the re-litigation of all claims which have already been adjudicated, *or which could have been adjudicated*, between identical parties or their privies in identical causes of action unless there was a change in circumstances. *See Citizens Exchange Bank of Pearson v. Kirkland*, 256 Ga. 71 (1986); *Norris v. Atlanta &c. R. Co.*, 254 Ga. 684, 684-85 (1985).