

**STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
FOR THE DEPARTMENT OF COMMUNITY HEALTH
P.O. Box 30763, Lansing, MI 48909
(517) 335-2484; Fax: (517) 373-4147**

IN THE MATTER OF:

Docket No: 2013-70658 TER

Frank's Quick Stop, #6606,

Vendor/Appellant

FINAL DECISION

This matter is before the Michigan Administrative Hearing System on an appeal filed on behalf of Frank's Quick Stop ("Vendor") from a Notice of Termination and Disqualification from the WIC Program for a period of three years, running from the date the termination becomes effective. On August 10, 2012, the Department of Community Health ("Department") sent the Vendor the Notice of Termination and Disqualification. On August 20, 2012, the Vendor's appeal was received by the Michigan Administrative Hearing System.

The matter was set for hearing pursuant to the Administrative Hearing Procedures for Vendors (7 CFR 246), and the Michigan Department of Community Health State Plan [Vendor Management and WIC Vendor Sanction Policy].

On February 19, 2013, a hearing in this matter was convened. Santiago Rios, Assistant Attorney General, represented the Department. The Appellant was represented by attorney Peter Abbo.

EXHIBITS

Department's Exhibit 1-10

ISSUE

Did the Department properly propose termination of the WIC contract with the Vendor and disqualification of the Vendor from participation with the WIC Program for three years?

FINDINGS OF FACT

The Administrative Law Judge, based upon the competent, material and substantial evidence on the whole record, finds as material fact:

1. The Vendor is party to an agreement with the Department pertaining to WIC. The agreement between the parties is referred to as the contract.

2. The contract between the Department and the Vendor was in effect and operational at all times pertinent to this Order, beginning July 1, 2011, through June 30, 2014. The contract references a WIC vendor sanction policy. (Exhibit 3)
3. The Department has adopted a state plan as required by federal regulations to govern WIC program's operations and administration. This state plan describes how the state intends to operate the WIC program and provides for sanctions against vendors who do not comply with contracts they have entered into with the state to effectuate the WIC program.
4. On July 17, 2011, April Mack, of Mack Investigative Services, under the direction of the Department's WIC program, conducted an undercover WIC compliance buy at the Vendor's place of business. Ms. Mack purchased the following items with the following shelf prices: Welch's Grape Juice 64 fl oz \$4.49, General Mills Kix 12 oz \$4.79, Jif Creamy Peanut Butter 18 oz \$2.99 and Home Pride Wheat bread 20 oz \$1.89. The items purchased, except the Home Pride Wheat bread, are items authorized by the WIC program for purchase. The purchase total was \$14.16. (Exhibits 7A and 7B)
5. On July 17, 2011, the Vendor through the WIC EBT system completed an electronic transaction with the WIC program and received \$15.47 in WIC reimbursement. The Vendor gave Ms. Mack a WIC EBT system receipt which detailed the WIC items purchased, the marked item price(s) and the amount charged to and received from the WIC program. (Exhibit 7A)
6. On December 18, 2011, April Mack, of Mack Investigative Services, under the direction of the Department's WIC program, conducted an undercover WIC compliance buy at the Vendor's place of business. Ms. Mack purchased the following items with the following marked prices: Nestle Punch Juicy Juice 64 fl oz \$4.49, Wonder Whole Wheat bread 16 oz \$2.90, Kellogg's Corn Flakes 12 oz \$3.99 and Kellogg's Apple Jacks 12 oz \$4.49. The items purchased, except the Kellogg's Apple Jacks, are items authorized by the WIC program for purchase. The purchase total was \$15.87. (Exhibits 8A and 8B)
7. On December 18, 2011, the Vendor through the WIC EBT system completed an electronic transaction with the WIC program and received \$16.17 in WIC reimbursement. The Vendor gave Ms. Mack a WIC EBT system receipt which detailed the WIC items purchased, the marked item price(s) and the amount charged to and received from the WIC program. (Exhibit 8A)
8. On May 20, 2012, April Mack, of Mack Investigative Services, under the direction of the Department's WIC program, conducted an undercover WIC compliance buy at the Vendor's place of business. Ms. Mack purchased the

following items with the following marked prices: General Mills Kix 12 oz \$4.79, Jif Creamy Peanut Butter 18 oz \$4.79, Kraft Colby Cheese 8 oz \$3.79 and Home Pride Wheat bread 1 lb 4 oz \$1.89. The items purchased, except the Home Pride Wheat bread, are items authorized by the WIC program for purchase. The purchase total was \$15.26. (Exhibits 9A and 9B)

9. On May 20, 2012, the Vendor through the WIC EBT system completed an electronic transaction with the WIC program and received \$16.14 in WIC reimbursement. The Vendor gave Ms. Mack a WIC EBT system receipt which detailed the WIC items purchased, the marked item price(s) and the amount charged to and received from the WIC program. (Exhibit 9A)
10. On August 10, 2012, the Department sent the Vendor the Notice of Termination and Disqualification which detailed the Vendor's alleged July 2011, December 2011 and May 2012 overcharging for items not received by the client as well as the Department's intent to terminate the Vendor's WIC vendor contract and disqualify the Vendor from participation in the WIC program for three years. (Exhibit 1)
11. On August 20, 2012, the Vendor's appeal was received by the Michigan Administrative Hearing System.
12. Credible evidence was presented that the termination and disqualification of the Vendor from participation in the WIC program would not result in inadequate participant access to the program. (Exhibit 10)

CONCLUSIONS OF LAW

The WIC Program is funded by the U.S. Department of Agriculture and is operated in Michigan by the Michigan Department of Community Health under federal regulations. The WIC Program is designed to provide supplemental foods to pregnant women, lactating women, infants and children to prevent nutritional deficiencies.

The WIC Vendor contract contains several Vendor responsibility provisions that require accurate scanning of UPC codes, pricing and providing only WIC authorized foods for WIC benefits:

5. Provide only currently authorized WIC foods in exchange for valid food benefits issued by any authorized Local or State Agency as designated by the Department, according to Federal and State requirements as follows:

[A. and B. omitted by ALJ]

C. Provide only WIC authorized supplemental foods to WIC clients in exchange for WIC food benefits.

[D. through L. omitted by ALJ]

M. Never substitute a non-WIC food item for a WIC authorized item.

[rest of list omitted by ALJ]

7. Accept food instruments and redeem WIC food benefits in accordance with the procedures as set forth in the most recent publication of the "Michigan WIC Program Vendor Guidebook, the Michigan WIC EBT Manual including any revisions or supplements issued by the Department, and as set forth below:

- A. Vendor must allow only those food items specifically listed on the client's WIC EBT shopping list.
- B. WIC clients must receive the food item that corresponds specifically to the UPC code scanned by the vendor during the transaction.
- C. Vendor must scan (or manually enter) the actual UPC code that is affixed to the item actually being purchased by the WIC client.
- D. Vendor is prohibited from scanning any UPC code that is not affixed to the actual item being purchased by the WIC client, or any UPC code as a substitute, replacement or otherwise not actually affixed to the actual item being purchased by the WIC client.
- E. Vendor must assure that the price fixed to the scanned UPC code in the point of sale device is not greater than the price displayed on the package, container, shelf or other signage in the store for the purchased item. This may be verified by a Department representative scanning the actual UPC code affixed to a WIC approved item and comparing that to the price marked on the package, container, shelf or other signage of that same item.

8. Maintain process for WIC foods which are competitive as determined by the Department.

9. Provide each WIC food item at the "current shelf price" or at less than the "current shelf price" charged to other customers, and charge the WIC Program for only those food items actually received by the client. The "current shelf price" (UPC based) is the price marked on the item, shelf, container, or sign or "sale price" offered to non-WIC customers.

[rest of list omitted by ALJ]

(Exhibit 3, pages 3-5)

The WIC Vendor Sanction Policy, specifically referenced in the Vendor contract sets out the violations requiring a mandatory sanction under federal regulations at 7 CFR 246.12:

<u>Violation</u>	<u>Number of Incidences of the Violation Which Will Result in the Indicated Sanction</u>	<u>Sanction and Length of Disqualification</u>
1. Overcharging, which is defined as charging the WIC Program more for supplemental food than non-WIC customers or charging the WIC Program more than current shelf price.	3	Termination of contract and three year disqualification.
2. Charging the WIC Program for food (by UPC code) not received by the client.	3	Termination of contract and three year disqualification.

[rest of list omitted by ALJ]

(Exhibit 5, page 6)

Federal Regulations at 7 CFR 246.12 requires disqualification and termination:

- (l) Retail food delivery systems: Vendor sanctions—
 - (1)Mandatory vendor sanctions—

[i and ii omitted by ALL]

- (iii) Three-year disqualification. The State agency must disqualify a vendor for three years for:
 - (A) One incidence of the sale of alcohol or alcoholic beverages or tobacco products in exchange for food instruments;

- (B) 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;
- (C) A pattern of vendor overcharges;
- (D) A pattern of receiving, transacting and/or redeeming food instruments outside of authorized channels, including the use of an unauthorized vendor and/or an unauthorized person; or
- (E) A pattern of charging for supplemental food not received by the participant; or
- (F) A pattern of providing credit or non-food items, other than alcohol, alcoholic beverages, tobacco products, cash, firearms, ammunition, explosives, or controlled substances as defined in 21 U.S.C. 802, in exchange for food instruments.

[rest of list omitted by ALJ]

The Vendor's attorney of record appeared for the hearing. The Department's counsel offered Exhibits 1 through 10 and these exhibits were admitted to the record.

In this case, there is uncontested credible evidence of three (3) incidences of the Vendor submitting WIC EBT information for payment on which the total dollar amount for purchases made on the purchase dates exceeded the actual marked shelf price purchase price and the Vendor charged the WIC program for food not received by the participant. Ms. Mack, an undercover investigator under contract with the Department, went to the Vendor's place of business and made compliance purchases on July 17, 2011, December 18, 2011, and May 20, 2012.

On July 17, 2011, April Mack, of Mack Investigative Services, under the direction of the Department's WIC program, conducted an undercover WIC compliance buy at the Vendor's place of business. Ms. Mack purchased the following items with the following shelf prices: Welch's Grape Juice 64 fl oz \$4.49, General Mills Kix 12 oz \$4.79, Jif Creamy Peanut Butter 18 oz \$2.99 and Home Pride Wheat bread 20 oz \$1.89. The items purchased, except the Home Pride Wheat bread, are items authorized by the WIC program for purchase. The purchase total was \$14.16. (Exhibits 7A and 7B)

On July 17, 2011, the Vendor through the WIC EBT system completed an electronic transaction with the WIC program and received \$15.47 in WIC reimbursement. The Vendor gave Ms. Mack a WIC EBT system receipt which detailed the WIC items purchased, the marked item price(s) and the amount charged to and received from the WIC program. (Exhibit 7A) The evidence presented shows that the Vendor over charged the WIC program

\$1.31 and allowed the purchase of an unauthorized item.

On December 18, 2011, April Mack, of Mack Investigative Services, under the direction of the Department's WIC program, conducted an undercover WIC compliance buy at the Vendor's place of business. Ms. Mack purchased the following items with the following marked prices: Nestle Punch Juicy 64 fl oz \$4.49, Wonder Whole Wheat bread 16 oz \$2.90, Kellogg's Corn Flakes 12 oz \$3.99 and Kellogg's Apple Jacks 12 oz \$4.49. The items purchased, except the Kellogg's Apple Jacks, are items authorized by the WIC program for purchase. The purchase total was \$15.87. (Exhibits 8A and 8B)

December 18, 2011, the Vendor through the WIC EBT system completed an electronic transaction with the WIC program and received \$16.17 in WIC reimbursement. The Vendor gave Ms. Mack a WIC EBT system receipt which detailed the WIC items purchased, the marked item price(s) and the amount charged to and received from the WIC program. (Exhibit 8A) The evidence presented shows that the Vendor overcharged the WIC program \$0.30 and allowed the purchase of an unauthorized item.

On May 20, 2012, April Mack, of Mack Investigative Services, under the direction of the Department's WIC program, conducted an undercover WIC compliance buy at the Vendor's place of business. Ms. Mack purchased the following items with the following marked prices: General Mills Kix 12 oz \$4.79, Jif Creamy Peanut Butter 18 oz \$4.79, Kraft Colby Cheese 8 oz \$3.79 and Home Pride Wheat bread 20 oz \$1.89. The items purchased, except the Home Pride Wheat bread, are items authorized by the WIC program for purchase. The purchase total was \$15.26. (Exhibits 9A and 9B)

On May 20, 2012, the Vendor through the WIC EBT system completed an electronic transaction with the WIC program and received \$16.14 in WIC reimbursement. The Vendor gave Ms. Mack a WIC EBT system receipt which detailed the WIC items purchased, the marked item price(s) and the amount charged to and received from the WIC program. (Exhibit 9A) The evidence presented shows that the Vendor over charged the WIC program \$0.88 and allowed the purchase of an unauthorized item.

The Department's substantial, uncontested, credible evidence established that three incidences of overcharging and charging the WIC program for food not received by the participant occurred. The arguments raised that the Vendor did not intend to overcharge and simply substituted other food items for WIC authorized food items are found to be without merit. The Vendor's intent is not relevant. The above cited WIC Vendor contract provisions regarding Vendor responsibility clearly state the requirements relating to accurate scanning of UPC codes, pricing, providing only WIC authorized foods for WIC benefits and prohibiting substitution of non-authorized WIC foods. The Federal regulations and the state plan Vendor Sanction Policy provide that sanctions are not discretionary for patterns of Vendor overcharging or charging for food not received by the participant. The contract termination and three year disqualification sanction is mandatory under the WIC Vendor Sanction Policy and the federal regulation.

The arguments that the Department should have sent warning notices to the Vendor and

could have charged a lesser violation with only a one year disqualification period are also without merit. Regarding violations requiring a mandatory sanction under the federal regulations at 7 CFR 246.12, the state plan Vendor Sanction Policy states that the Department may send a warning letter after the first incident of some violations in this section. (Exhibit 5, page 6) While the Department could have sent a warning letter after the first incident, there is no evidence the Department was required to do so. Regarding charging the Vendor with the lesser violation, 7 CFR 246.12 (l)(1)(xii) addresses multiple violations during a single investigation and specifies that the "State agency must disqualify the vendor for the period corresponding to the most serious mandatory violation." The mandatory sanction is the same for patterns of overcharging or charging for food not received by the participant, termination of contract and three year disqualification. The federal regulation does not allow for the discretion to charge the Vendor with a different, lesser violation that only has a one year disqualification period. The Department properly imposed the mandatory sanction for the Vendor's pattern of overcharging and charging for food not received by the participant.

Before it issues sanctions, the Department must make a determination whether adequate WIC participant access will be present if the Vendor is disqualified from WIC program participation. Some argument was raised regarding the potential hardship faced by participants when a one mile radius is utilized. However, the Department submitted credible evidence that it made an adequate participant access determination prior to issuing sanctions. (Testimony of Vendor Relations Manager) The Department's determination demonstrates that five WIC Vendors are located within a one-mile radius of the Vendor. (Exhibit 10)

DECISION AND ORDER

The Administrative Law Judge, based on the above findings of fact and conclusions of law, finds that the Department properly proposed the termination of the Vendor's WIC contract and the disqualification of the Vendor, from participation with the WIC Program for a period of one year.

IT IS THEREFORE ORDERED that:

Frank's Quick Stop WIC Vendor contract with the Department is TERMINATED.
Frank's Quick Stop is DISQUALIFIED from participation in the WIC program for a period of three (3) years.

Colleen Lack
Administrative Law Judge
for James K. Haveman, Director
Michigan Department of Community Health

Frank's Quick Stop
Docket No. 2012-70658 TER
Final Decision

cc: Arkan Jarjis
Peter Abbo
Luane G.
Stan Bien

Date Mailed: _____(CERTIFIED)