

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS  
FOR THE DEPARTMENT OF HEALTH

In the Matter of Whitney's Market,  
WIC Vendor No. W7001

**ORDER DENYING MOTION TO  
POSTPONE RESPONDENT'S  
DISQUALIFICATION**

The above-captioned matter is pending before Administrative Law Judge Steve M. Mihalchick pursuant to a Notice of and Order for Hearing issued by Anne M. Barry, Commissioner of Health, on February 25, 1997. The hearing is to determine whether sanctions should be imposed on the vendor license held by Respondent, Whitney's Market, to participate in the Women, Infants and Children program (WIC). Pursuant to Minn. R. 4617.0085, subp. 1, a vendor is disqualified from participation in the WIC program fifteen days after the notice of disqualification. On February 28, 1997, Respondent filed a motion to postpone disqualification until a hearing decision is rendered. The Minnesota Department of Health (Department) filed its response on March 3, 1997. The record on this motion closed following argument on the motion at the start of the hearing on March 4, 1997.

Phillip S. Resnick, Resnick & Seiler, Attorneys at Law, 1925 Rand Tower, 627 Marquette Avenue South, Minneapolis, Minnesota 55402, appeared on behalf of Respondent. Wendy Willson Legge, Assistant Attorney General, 525 Park Street, Suite 500, St. Paul, Minnesota 55103-2106, appeared on behalf of the Department.

Based upon all of the files, records, and proceedings herein, and for the reasons set forth in the Memorandum attached hereto,

IT IS HEREBY ORDERED as follows:

Respondent's Motion to postpone disqualification until after resolution of this appeal is DENIED.

Dated this 7th day of March, 1997.

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STEVE M. MIHALCHICK  
Administrative Law Judge

## MEMORANDUM

Respondent asserts that the Department is acting improperly by disqualifying Respondent from participating as a WIC vendor pending the appeal in this matter. The Department maintains that the promulgated rule governing disqualification requires this action in this case. The rule states, in pertinent part:

Disqualification is effective 15 days after the date of a notice of disqualification except when the vendor appeals the disqualification and the vendor is the only vendor in the clinic area. If the vendor appeals a sanction and is the only vendor in the clinic area, disqualification must begin 15 days following the day a decision under the appeal upholds the disqualification.

Minn. R. 4617.0085, subp. 1.

Disqualification will preclude acceptance of WIC vouchers as payment for food purchased from Respondent's store. Respondent maintains that it will suffer an economic loss of \$2,000 per month if it is disqualified.<sup>[1]</sup> Imposing this loss prior to a hearing is characterized by Respondent as a governmental taking of property without due process. The Department asserted that constitutional issues are outside the authority of the administrative law judge.

Administrative law judges (ALJs) are limited in their authority by the scope of the authority held by the agency for which the ALJ is rendering a

recommendation. ***Peoples Natural Gas Co. v. Minnesota Public Utilities Commission***, 369 N.W.2d 530 (Minn. 1985). An ALJ cannot find a statute or rule unconstitutional. See ***Neeland v. Clearwater Memorial Hospital***, 257 N.W.2d 366, 368-69 (Minn. 1977)(facial attack on statute). However, an ALJ can apply constitutional standards to the facts of the matter upon which the ALJ is rendering a recommendation.<sup>[2]</sup> Just as a statute takes precedence over a rule, constitutional provisions govern over a rule where the two conflict. Minn. Stat. § 14.45 (1996).

Respondent asserts that since it would suffer an unreimbursed economic loss should it be disqualified, a prior hearing is required by procedural and substantive due process. Respondent's Memorandum, at 2 (*citing Mathews v. Eldridge*, 424 U.S. 319 (1976), and *Perry v. Sinderman*, 409 U.S. 593 (1972)). The cases cited by Respondent are significant, but both address the rights of persons who are the primary beneficiaries of government benefit programs. Respondent receives an economic benefit from its status as a WIC vendor, but the WIC program is not intended to assist food retailer.

Rather, the program is directed toward benefiting new mothers, infants, and children. See Minn. Stat. § 145.895 (1996).

The test to determine what process is required is set out by the Minnesota Court of Appeals as follows:

The sufficiency of a given procedure is to be tested against (1) the private interest at stake; (2) the risk of erroneous deprivation of that interest and the extent to which additional procedural safeguards would reduce that risk; and (3) the governmental interest, including administrative convenience. **Mathews v. Eldridge**, 424 U.S. 319, 335, 96 S.Ct. 893, 903, 47 L.Ed.2d 18 (1976).

**Good Neighbor Care Centers, Inc. v. Minnesota Department of Human Services**, 428 N.W.2d 397, 405 (Minn.App. 1988), *rev. denied*, October 19, 1988.

Where, as here, the benefit received by the litigant is only incidental to the purpose of the government program, the property right asserted is “significantly less compelling.” **Good Neighbor**, at 405 (*quoting Oberlander v. Perales*, 740 F.2d 116, 121 (2nd Cir. 1984)). The property right of Respondent in participating as a WIC vendor does not compel a predisqualification hearing.

The risk of erroneous deprivation runs to the questions of whether the correct vendor was identified in the notice, whether the acts alleged occurred, and whether appropriate procedures were followed in bringing the disqualification against Respondent. The only issues raised by Respondent question the procedure followed by the Department. In **Good Neighbor**, the opportunity to contact agency staff to clarify questionable facts prior to a deprivation was held to be sufficient prior process. The fifteen-day period between notice and disqualification provides the same opportunity to clarify mistakes in this matter. The federal regulations that govern the WIC program require a fifteen-day period between notice and disqualification. 7 C.F.R. § 246.18(a)(3)(1996). The risk of erroneous deprivation of Respondent’s opportunity to participate as a WIC vendor is low.

The final factor to consider is the governmental interest at stake. Halting violations of the law governing nursing home rates was characterized as “compelling” by the Minnesota Court of Appeals. **Good Neighbor**, at 405. Protecting the interests of WIC participants by ensuring the standard of food purchased and ensuring that the funds allocated to the program are properly spent are compelling government interests. Disqualifying a vendor where the evidence suggests improper food was sold and WIC was overcharged ensures that such improper conduct cannot continue pending a hearing. With a limited property interest, low risk of erroneous deprivation, and a compelling government interest in stopping the alleged conduct, the process afforded Respondent prior to the disqualification is all that is due.

Respondent suggests that prehearing disqualification is not in compliance with federal guidelines governing administration of the WIC program. The Department cites the pertinent portion of 7 C.F.R. § 246.18(a)(3)(1996) which states:

The State agency may take adverse action against a vendor after the 15-day advance notification period mandated by paragraph (b)(1) of this section has elapsed. In deciding whether or not to postpone adverse action until a hearing decision is rendered, the State agency shall consider whether participants would be unduly inconvenienced and may consider other relevant criteria, determined by the State agency.

The Department maintains that the rule adopted to administer disqualifications conforms to the standards in the federal rule. Minn. R. 4617.0085, subp. 1, postpones disqualifications pending resolution of an appeal where the vendor is the only outlet for WIC purchases in the area. These standards conform to the only stated criterion in the federal rule, “whether participants would be unduly inconvenienced.” 7 C.F.R. § 246.18(a)(3). Any other criteria are left up to the State agency to determine and are not required by the federal rule. The Department could have adopted a more lenient policy, but was not required to do so by the federal regulation. There is no abuse of discretion by a State agency in following a duly promulgated rule.

As applied in this matter, there are no constitutional or statutory infirmities in the process afforded Respondent. Respondent does not meet the rule standard for postponing disqualification, pending resolution of this appeal. There is no basis for issuance of an order postponing disqualification of Respondent’s WIC vendor license.

S.M.M.

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<sup>[1]</sup> Respondent’s evidence of this loss consists of the unsupported averment of its counsel. See Affidavit of Phillip Resnick. Ordinarily, such averments would be insufficient to demonstrate the fact alleged. Since this motion is decided upon other grounds, there is no reason to reject the motion for failure to properly show an economic loss.

<sup>[2]</sup> The Supreme Court has set out the differences between constitutional attacks that are facial and “as applied” in administrative hearings as follows:

We note at the outset that a distinction must be drawn between an attack on the facial constitutionality of a zoning ordinance and an attack on the constitutionality of a zoning ordinance merely as it applies to a particular litigant’s property. Compare *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303, 54 A.L.R. 1016 (1926), with *Nectow v. Cambridge*, 277 U.S. 183, 48 S.Ct. 447, 72 L.Ed. 842 (1928); Annotation, 136 A.L.R. 1378, 1384 (1942). If the facial constitutionality of the ordinance

is challenged, we will address the constitutional issues raised. If, however, the challenge relates only to the constitutionality of the ordinance, as applied, the aggrieved party must first exhaust available remedies before we will consider the constitutional claims ripe for our review. See, **State Dept. of Nat. Resources v. Olson**, 275 N.W.2d 585 (Minn. 1979).

**Pine County v. State, Dept. of Natural Resources**, 280 N.W.2d 625, 629 (Minn. 1979).

As the Minnesota Court of Appeals has stated:

If and when the Board chooses to apply or enforce its interpretation of the rule in a manner that interferes with or impairs, or threatens to interfere with or impair the legal rights or privileges of the MEA, the MEA may then challenge the validity of the rule in a declaratory judgment action. If the MEA is to challenge the reasonableness of the rule as applied, it may make that challenge in a contested case hearing when the agency seeks to enforce the rule. See **Minnesota Ass'n of Homes for the Aging**, 385 N.W.2d at 68 (contested case hearing, rather than declaratory judgment action, is proper method to challenge rule as applied).

**Minnesota Educ. Ass'n v. Minnesota State Bd. of Educ.**, 499 N.W.2d 846, 850 (Minn.App. 1993).