

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

In the Matter of Case Food Market
WIC Vendor No. W7796

**FINDINGS OF FACT,
CONCLUSIONS AND
RECOMMENDATIONS**

Administrative Law Judge Bruce H. Johnson conducted a hearing in this contested case proceeding beginning at 9:30 a.m. on August 6, 1999, in the Minnesota Room of the Minnesota Department of Health Service Center, St. Paul, Minnesota. The record closed at the end of the hearing.

Bobby J. Champion, Assistant Attorney General, 525 Park Street, Suite 500, St. Paul, Minnesota 55103, appeared at the hearing as attorney for the Minnesota Department of Health. Case Food Market was not represented by an attorney but rather appeared at the hearing through its owner, Hisham Al-Arabi, 933 Case Avenue, St. Paul, Minnesota 55106.

NOTICE

This Report is a recommendation, not a final decision. The Commissioner of the Minnesota Department of Health will make a final decision in this matter after reviewing the administrative record. The Commissioner may adopt, reject or modify these Recommendations. Under Minnesota law,^[1] the Commissioner may not make her final decision until after the parties have had access to this report for at least ten days. During that time, the Commissioner must give each party adversely affected by this report an opportunity to file exceptions and present argument to her. Parties should contact the office of Jan Malcolm, Commissioner of Health, 85 East 7th Place, Suite 400, St. Paul, Minnesota 55101, to find out how to file exceptions or present argument.

STATEMENT OF ISSUES

(1) Whether Case Food Market committed Class A violations by charging the WIC program for foods not received by a person presenting a WIC voucher to the store or, alternatively, by charging more money for items than its usual and customary charges for those items; and

(2) If so, whether the Department should disqualify Case Food Market from participating in the WIC program for three years.

Based on the evidence in the hearing record, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. The Special Supplemental Nutrition Program for Women, Infants and Children (WIC) Program is a program to provide pregnant women, nursing mothers, infants, and children up to the age of five with nutritional supplements and other health care services. The program is federally funded, managed by the state, and administered locally by approximately 70 WIC clinics throughout the state.^[2]

2. WIC clinics provide eligible women and children (participants) with WIC identification cards and vouchers that participants or their authorized proxies can redeem for specific kinds of food products.^[3] Program rules require participants and their proxies to sign the identification cards. The program then periodically issues vouchers to participants. Each voucher contains a unique identification number and lists the food items that the participant is entitled to receive.^[4] There are spaces on the vouchers for the vendor to record the price charged for the food items received by the participant, for the signature of the participant or proxy, and for the vendor's WIC stamp.^[5] A participant may choose to receive all or only some of the food items listed on the voucher, but the vendor may only charge the program for the food items that the participant actually receives.^[6]

3. To become a WIC vendor, a food store must execute a Retail Food Vendor Agreement — that is, a contract between the Department and the vendor that, among other things, describes the terms of the food store's participation in the program and establishes the penalties for failing to comply with various program requirements. The Department then issues the food store a WIC vendor stamp bearing a unique vendor number.^[7] The store is required to place its stamp on the WIC vouchers it receives from participants in order to receive payment.^[8] The Department periodically requires all of its WIC vendors to receive training on the program's various requirements.^[9]

4. Retail food vendor guarantee agreements^[10] require that transactions between vendors and individual participants occur in certain particular ways. For

example, a participant may only use a WIC voucher to obtain the kinds of food items listed on the voucher. In many cases, WIC-approved foods are limited to certain brands of food items — for example, only certain brands of cereals.^[11] Even though the voucher may specify that the participant can receive several different kinds of food items in the transaction, the vendor may only charge the program for the food items the participant chooses to receive and actually does receive.^[12] When the participant provides the requested food items, the vendor must first ring up the total price of the items before the participant signs the voucher.^[13] The vendor may not charge more for a food item than the price agreed upon in its retail food vendor guarantee agreement.^[14] The participant then presents the blank voucher to the vendor to record the total price on it. After the vendor records the total price, the participant must then sign the voucher, and the vendor must then compare the signature on the voucher with the signatures on the participant's WIC identification cards.^[15]

5. Case Food Market, which is owned by Mr. Hisham Al-Arabi, is a small grocery store located at 933 Case Avenue in St. Paul.^[16] There was a Retail Food Vendor Agreement in effect between Case Food Market and the Department between May 1, 1998, and April 30, 1999.^[17]

6. In February of 1999, the Department decided to conduct random compliance buys, using undercover agents, at WIC vendors in Ramsey County.^[18] The Department's employees and agents conducted those compliance buys according to predetermined standard operating procedures, which included the following: An undercover agent and the Department's compliance manager would drive to a location about two blocks from the WIC vendor and park their car. The investigator would then turn over to the compliance manager any WIC vouchers, food stamps, or cash that might be in his or her possession. Next, the compliance manager would give the investigator one WIC identification card with a fictitious identity. The investigator had previously written the signature of the fictitious person on the identification card. The compliance manager would also give the investigator one WIC voucher that could be redeemed for the foods specified on it. The compliance manager would then record the time when the investigator left the car to go to the WIC vendor's store.^[19]

7. The Department also established standard operating procedures to govern what an investigator would do after entering a WIC vendor's store. After entering the store, the investigator would proceed to collect food items, and bring them to the cashier to be rung up. The foods that the investigator would bring to the cashier would commonly include some items that were not specifically approved by the WIC program, and the investigator would commonly omit some food items described on the WIC voucher. The investigator would then present the WIC voucher in his or her possession to the cashier. It was then the responsibility of the cashier to record the total price on the voucher of the foods presented for purchase before returning the voucher for the investigator's signature. The investigator would not produce the WIC identification card for comparison of signatures unless requested. After signing the WIC voucher and returning it to the cashier, the investigator would allow the cashier to bag the groceries and then would leave the store, proceeding directly to the car where the compliance manager was waiting.^[20]

8. The Department's standard operating procedures for compliance buys also covered what would occur when the investigator returned to the car with the bag or bags of groceries. The compliance manager would record the time when the investigator returned to the car. He or she would then prepare a written inventory of the food items that the investigator had brought back from the store and place a slip of paper in each bag of groceries identifying the WIC vendor from which the items had been purchased. The investigator and the compliance manager would then complete a written report of the results of their investigation.^[21] The food items were kept separate from any food items that may have been purchased from other vendors on the same day. At the end of the day, the compliance manager and the investigator would bring the food items to a charitable institution for donation. There, the food items were inventoried again, photographed, and then donated.^[22]

9. As part of the Department's compliance program, an undercover investigator employed by the Department conducted a compliance buy at Case Food Market on February 4, 1999. The investigator and the Department's compliance manager followed all of the standard operating procedures described in Findings Nos. 6, 7 and 8. During that first compliance buy, the investigator brought the following food items to the cashier: a gallon of milk, a dozen eggs, two packages of cereal totaling 36 ounces or less, and two 46-ounce cans of fruit juice.^[23] The items purchased did not include one pound of WIC-approved domestic cheese, which the voucher indicated could have been purchased. Additionally, the two boxes of cereal that the investigator presented for purchase were not WIC-approved food items.^[24] During the first compliance buy, the cashier at Case Food Market entered a total price of \$27.52 for the food items on the WIC voucher before returning it to the investigator for signature. The cashier did compare the investigator's signature on the WIC voucher with the signatures on the investigator's WIC identification card.^[25]

10. The WIC voucher used in the first compliance buy was processed for payment by the Department's bank and returned to the compliance manager.^[26] Based on the prices that the compliance manager obtained during a later monitoring visit and recorded on a Compliance Monitoring Price Checklist,^[27] the dollar food value totaled \$18.75, \$8.77 less than the amount for which Case Food Market had redeemed the voucher.^[28] The amount by which Case Food Market overcharged the Department in the first compliance buy greatly exceeded the price of the cheese that the investigator did not purchase.^[29]

11. On February 22, 1999, after the Department had made the first compliance buy, the compliance manager made a monitoring visit to Case Food Market in order to prepare a compliance monitoring price check worksheet, to inform the store of the rule violations that had occurred during the first compliance buy, and also to determine whether the store was complying with other program requirements.^[30] During that visit, the compliance manager discussed the violations that the Department had found with the store cashier who was then on duty.^[31]

12. By letter dated March 10, 1999,^[32] the Department notified Mr. Al-Arabi, Case Food Market's owner, of one Class C and two Class B violations that had

occurred during the compliance buy on February 4, 1999, and during the monitoring visit on February 22, 1999. The letter did not notify Mr. Al-Arabi of any Class A violations that may have occurred.

13. On March 30, 1999, the Department conducted a second compliance buy at Case Food Market. Again, the investigator and the compliance manager followed all of the standard operating procedures described in Findings Nos. 6, 7, and 8. During the second compliance buy, a Second WIC Investigator brought the following food items to the cashier: a gallon of milk, a dozen eggs, two packages of cereal totaling 36 ounces or less, and two 46-ounce cans of Hawaiian Punch.^[33] The investigator did not purchase cheese, and among the other food items that the investigator presented to the cashier, only the milk and eggs were WIC-approved foods.^[34] The cashier at Case Food Market did not enter a total price on the WIC voucher before returning it to the investigator for signature,^[35] and this time the cashier did not compare the investigator's signature on the WIC voucher with the signatures on the investigator's WIC identification card.^[36]

14. The WIC voucher used in the second compliance buy was thereafter processed for payment by the Department's bank and returned to the compliance manager.^[37] When returned, a price of \$27.52 was recorded on the second voucher.^[38] Assuming that the purchaser had received all of the food items listed on the voucher, the store's owner, Mr. Al-Arabi, had recorded that amount on the voucher later in the evening after the sale.^[39] Based on the prices that the compliance manager had obtained during his monitoring visit,^[40] the dollar food value of the food purchased during the second compliance buy totaled \$20.06 — \$7.46 less than the \$27.52 that Mr. Al-Arabi had recorded on the voucher.^[41] Again, the amount by which Case Food Market overcharged the Department in the second compliance buy greatly exceeded the price of the cheese that the investigator did not purchase.

15. On April 30, 1999, the Department notified Case Food Market by letter that it was disqualifying the store from participating in the WIC program for a period of three years, effective May 14, 1999. The reasons that the Department gave for the disqualification were that Case Food Market had charged the program for cheese that the investigator had not actually received during the second compliance buy and that the store had charged more money for the food items purchased than its usual and customary charges.^[42] The Department did not take any action against Case Food Market for any of the other violations that it found as a result of the first and second compliance buys.^[43]

16. On May 20, 1999, Case Food Market appealed its disqualification from the WIC program.^[44]

17. Although there are no other WIC vendors in Case Food Market's immediate neighborhood, there are several other WIC vendors in the general vicinity of Case Food Market — vendors that are accessible to WIC recipients using public transportation.^[45] Because of this, the Department found that disqualifying Case Food

Market from participating in the WIC program would not create undue hardship for WIC recipients.^[46]

18. These Findings are based on all of the evidence in the record. Citations to portions of the record are not intended to be exclusive references.

19. The Administrative Law Judge adopts as Findings any Conclusions that are more appropriately described as Findings.

Based upon these Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. Both Minnesota and federal law^[47] give the Administrative Law Judge and the Commissioner of Health authority to consider and rule on the issues in this contested case proceeding.^[48]

2. The Notice of and Order for Hearing were proper in all respects, and the Department has complied with all of the law's other substantive and procedural requirements.

3. The Department has the burden of proving by a preponderance of the evidence that Case Food Market committed two or more Class A violations of its retail food vendor agreement and of WIC program rules that justify suspending Case Food Market from participating in the WIC program for a period of three years.^[49]

4. The criteria for establishing which violations of WIC program rules may result in disqualifying Case Food Market from the WIC program and for establishing how long any such disqualification must be for particular violations of program rules are the criteria described in Case Food Market's most recent retail food vendor guarantee agreement.^[50]

5. Section XI, Part A, of the retail food vendor agreement between the Department and Case Food Market that was in effect on February 4 and March 30, 1999, provides that the Commissioner shall disqualify the Vendor for the maximum period authorized by federal regulations^[51] if the Vendor commits more than one Class A violation.^[52]

6. The fact that Case Food Market charged the Department for cheese that the investigator did not actually receive during both compliance buys can be inferred from the fact that the amount by which Case Food Market overcharged the Department exceeded the price that the store was charging for cheese. Case Food Market therefore charged the WIC Program for foods not received by a WIC participant on April 2, 1999.

7. In its retail food vendor agreement, Case Food Market agreed that it would be "fully accountable for the actions of its controlling persons, employees, and agents" with respect to the requirements in that agreement.^[53]

8. During the period from February 4, 1999, through March 30, 1999, Case Food Market demonstrated a pattern of inattention to WIC program requirements and a pattern of not making certain that its employees were properly trained about WIC program requirements.

9. Nothing in WIC program rules or in Case Food Market's retail food vendor agreement requires the Department to prove intent as an element of a violation of the provisions of that agreement. But the Administrative Law Judge does conclude that Case Food Market's violations of the agreement were caused by its inattention to

WIC program requirements and by inadequate training of its employees and were not intentional.

10. The Administrative Law Judge adopts as Conclusions any Findings that are more appropriately described as Conclusions.

11. The Memorandum that follows explains the reasons for these Conclusions, and the Administrative Law Judge therefore incorporates that Memorandum into these Conclusions.

Based upon these Conclusions, and for the reasons explained in the accompanying Memorandum, the Administrative Law Judge makes the following:

RECOMMENDATIONS

The Administrative Law Judge recommends:

- (1) That the Commissioner DENY Case Food Market's appeal of its disqualification from participation in the WIC program; and
- (2) That the Commissioner UPHOLD the Department's disqualification of Case Food Market from participating in the WIC Program for a period of three years, effective May 14, 1999.
- (3) That the Commissioner also UPHOLD the Department's disapproval of Case Food Market's application to be re-authorized as a WIC vendor.

Dated this 12th day of August 1999.

S/ Bruce H. Johnson
BRUCE H. JOHNSON
Administrative Law Judge

Reported: Tape Recorded (two tapes); No Transcript Prepared.

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NOTICE

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Under Minnesota law,^[54] the Commissioner of Health is required to serve her final decision upon each party and the Administrative Law Judge by first-class mail.

MEMORANDUM

Case Food Market does not deny that it overcharged the Department for the food that the undercover investigators actually received during both compliance buys, or that it charged the Department for the price of cheese that the undercover investigators never received. Rather, it argues that the overcharges occurred by mistake and by making incorrect assumptions about what had actually been purchased.

Considering all of the evidence, the Administrative Law Judge is persuaded that Case Food Market's charging the Department for cheese that the undercover agent did not receive was unintentional. But there are two reasons why the fact the violation was unintentional should not change the outcome here. First, neither the retail food vendor guarantee agreement nor the law requires that a violation of that agreement be intentional in order for the Commissioner to disqualify the vendor from participating in the WIC program. Second and perhaps more important, even if this violation was unintentional, it was clearly part of a pattern of inattention to WIC program requirements on the part of Case Food Market over the last several months. The fact that Case Food Market committed several other violations of program establishes that pattern of inadvertence. The evidence also established that Case Food Market has not been doing an adequate job of making certain that its employees follow WIC program rules. Unintentional violations of program requirements can impair the integrity and usefulness of the WIC program as much as intentional ones, especially when there is a pattern of repeated unintentional violations.

By letter dated March 10, 1999,^[55] the Department notified Mr. Al-Arabi, Case Food Market's owner, of one Class C and two Class B violations that had occurred during the first compliance buy on February 4, 1999, and during the monitoring visit on February 22, 1999. The letter did not notify Mr. Al-Arabi of the Class A violation that had occurred on February 4, 1999 — namely, that Case Food Market had either charged the WIC program for foods not received by a person presenting a WIC voucher to the store or, alternatively, had charged more money for items than its usual and customary charges for those items. Mr. Chiat testified that because a Class A violation automatically results in a disqualification, it has been the Department's practice not to give written notice that Class A violations had occurred. Mr. Al-Arabi expressed his opinion that this practice was unfair and unreasonable. Although the Department's failure to notify Case Food Market of its first Class A violation does not affect the legal outcome here, the Administrative Law Judge suggests that a better practice might be to provide such notice, since it might help prevent a subsequent Class A violation and in that way affect the period of disqualification.

B. H. J.

^[1] Minnesota Statutes, section 14.61 (1998). (Unless otherwise specified, citations to Minnesota Statutes refer to the 1998 edition.)

[2] Testimony of Rick Chiat; Exhibit 3.

[3] Testimony of Rick Chiat; Exhibit 3.

[4] Exhibits 8 and 12.

[5] Testimony of Freddie Marsh-Lott; Exhibits 8 and 12.

[6] Testimony of Freddie Marsh-Lott; Exhibit 3, p. 5; Exhibit 4, paragraph III-B.

[7] Exhibit 1.

[8] Exhibit 3, p. 6.

[9] Testimony of Rick Chiat.

[10] Exhibit 4.

[11] See Exhibit 3, p. 41.

[12] Exhibit 4, paragraph III-B.

[13] Exhibit 4, paragraph III-N.

[14] Exhibit 4, paragraph III-F.

[15] Exhibit 4, paragraph III-N.

[16] Testimony of Hashim Al-Arabi.

[17] Exhibit 4.

[18] Testimony of Freddie Marsh-Lott.

[19] Testimony of First WIC Investigator. To avoid the disclosure of information that is not public, the Administrative Law Judge will not refer to the Department's undercover investigators by name. The investigator who testified about a February 4, 1999, compliance check will be referred to as the "First WIC Investigator." And the investigator who testified about a March 30, 1999, compliance check will be referred to as the "Second WIC Investigator."

[20] Testimony of First WIC Investigator.

[21] Exhibit 7, for example.

[22] Testimony of First WIC Investigator and Freddie Marsh-Lott.

[23] Testimony of Tracy Harrell; Exhibit 4.

[24] Testimony of First WIC Investigator; Exhibit 7.

[25] Testimony of First WIC Investigator; Exhibit 7.

[26] Exhibits 5 and 8.

[27] Testimony of Freddie Marsh-Lott; Exhibit 18.

[28] Exhibit 16.

[29] Case Food Market had priced its cheese at \$3.99 per pound. See Exhibit 18.

[30] Exhibits 18, 19, and 21; testimony of Freddie-Marsh Lott.

[31] Testimony of Freddie Marsh-Lott.

[32] Exhibit 15.

[33] Testimony of Second WIC Investigator; Exhibit 11.

[34] Exhibits 11 and 3.

[35] Testimony of Second WIC Investigator.

- [\[36\]](#) Testimony of Second WIC Investigator.
- [\[37\]](#) Exhibits 5 and 12.
- [\[38\]](#) Exhibit 12.
- [\[39\]](#) Testimony of Hisham Al-Arabi.
- [\[40\]](#) Exhibit 18.
- [\[41\]](#) Exhibit 17.
- [\[42\]](#) Exhibit 24.
- [\[43\]](#) Testimony of Freddie Marsh-Lott.
- [\[44\]](#) Exhibit 25.
- [\[45\]](#) Exhibits 23, 26, and 27; testimony of Rick Chiat.
- [\[46\]](#) Testimony of Rick Chiat.
- [\[47\]](#) Minnesota Statutes, sections 14.50 and 363.01.
- [\[48\]](#) Minnesota Statutes, sections 14.57 and 14.69; Title 7, Code of Federal Regulations, section 246.18; and Minnesota Rules, part 4617.0100.
- [\[49\]](#) Minnesota Rules, part 4617.0085, subpart 2. C. (6) and (8).
- [\[50\]](#) Exhibit 4, paragraph XI.
- [\[51\]](#) Title 7, Code of Federal Regulations, section 246.12 (k)(1)(ii) establishes three years as the maximum period of disqualification.
- [\[52\]](#) Exhibit 4, paragraph XI-A.
- [\[53\]](#) Exhibit 4, paragraph XIV.
- [\[54\]](#) Minnesota Statutes, section 14.62, subdivision 1.
- [\[55\]](#) Exhibit 15.