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1-18-2012

LA MEXICANA MARKET, Respondent, Division of Nutrition and Wellness, WIC Program

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DEPARTMENT OF HEALTH

IN THE MATTER OF:) **Division of Nutrition and Wellness,**
) **WIC Program**
)
)
LA MEXICANA MARKET,) **Docket No. 17.03-114050J**
)
)
Respondent.)

INITIAL ORDER

This contested case came on to be heard on January 18, 2012, in Nashville, Tennessee before Administrative Judge Joyce Grimes Safley, assigned by the Secretary of State, Administrative Procedures Division, and sitting for the Commissioner of the Tennessee Department of Health. Ms. Mary Kennedy, Deputy General Counsel, Tennessee Department of Health, represented the State. The Respondent, La Mexicana Market, was represented by Mr. Dan R. Alexander, attorney, of the Nashville Bar.

The transcript for this hearing was filed on April 27, 2012. The parties submitted their respective “Proposed Findings of Fact and Conclusions of Law” on April 23, 2012 and April 24, 2012, respectively, making this matter ripe for consideration.¹

The subject of this hearing was whether Respondent La Mexicana Market should be disqualified from participation in the federal Special Supplemental Nutrition Program for Women, Infants, and Children (WIC) (hereinafter the “WIC

¹ It is noted that Initial Orders are due within ninety (90) days of the submission of the parties’ last filings in the case, which are usually the parties’ “Proposed Findings of Fact and Conclusions of Law”. See T.C.A. §4-5-314(g). The parties filed the hearing transcript on April 27, 2012. Accordingly, the case is now ready for consideration, and the Initial Order is due for issuance on or before July 27, 2012.

Program”) which is administered by the Tennessee Department of Health, Bureau of Health Services Administration, Nutrition Services Section, WIC Program.

The State WIC program charged Respondent La Mexicana Market with “a pattern of overcharging” for WIC transactions. The State WIC program also charged Respondent La Mexicana Market with failing “to properly transact and complete food instruments and cash value vouchers on the vendor’s premises” in order to abide by procedures of the WIC Program.

Specifically, the State WIC program asserts that Respondent La Mexicana Market should be disqualified from being a WIC vendor for three years because there were three occasions of alleged cashier errors during “grocery checkouts” over a seven (7) month time period. Respondent argues that the charged “errors” can be explained, corrected, and/or justified. Respondent also argues that the State WIC program did not follow federal regulations, its own regulations, and its WIC Vendor Agreement by not allowing Respondent La Mexicana Market to explain, justify, or correct any alleged errors; by not simply withholding or adjusting La Mexicana Market’s WIC reimbursement; and by not issuing “warnings” or “notifications” to La Mexicana Market after each alleged “compliance buy” errors.

Instead, according to the Respondent, the State WIC program decided not to notify La Mexicana Market of any errors following the first, second, third, or fourth secret “compliance buys”, waited several months, and proceeded to impose the onerous and extremely severe sanction of disqualifying La Mexicana Market from participating in WIC for three (3) years without allowing La Mexicana Market an opportunity to respond to such allegations.

After consideration of the testimony and evidence presented, the arguments of counsel, and the entire record in this matter, it is determined that the State did not prove, by a preponderance of the evidence, that Respondent violated WIC regulations in the three cashier/checkout transactions as charged. For reasons discussed below, the WIC “compliance transaction reports” were not deemed to be competent evidence. Further, even if there had been any minor “check-out” WIC violations on the *two* occasions actually recorded by the “WIC compliance buyer”, the State WIC program did not comply with federal and state rules regarding “warnings” or “notifications” to vendors; did not allow the vendor (La Mexicana Market) to explain, justify, or correct any alleged errors; and/or did not simply withhold or adjust the La Mexicana Market’s vendor reimbursement due to any alleged errors. Instead, the Department abused its discretion by seeking to disqualify a vendor from participating in the WIC program for three years, because of *two* alleged occasions of “checkout” errors.²

The Department prosecuted this case at great cost³, rather than warning or notifying La Mexicana Market, allowing the vendor to correct any alleged errors, or simply withholding payment on the alleged errors, with the three alleged “overcharge” errors (occurring over a seven month time) amounting to a few dollars total. Nor did the Department follow its own regulations and WIC vendor agreement procedures and “notify” La Mexicana Market of any alleged errors in processing the WIC instruments on the three occasions at issue.

² The State WIC program alleged “three” errors by cashier’s processing the WIC instruments, however, one of the “errors” cited by the State WIC program as part of the “three” violations is negated by the “compliance buyer” noting on the report that the “Chinese Lady ask (sic) me to stay to complete the FI and CVV.”

³ Considering attorney time spent in litigating this case, court reporter fees, witnesses’ time, etc.

To allow the Department to shut down Respondent's WIC business for three years, which will likely result in Respondent's losing its SNAP (Supplemental Nutrition Assistance Program or "Food Stamp") business, is a draconian approach which would have a severe impact on Respondent's business.

Accordingly, the State did not meet its burden of proof in showing that such alleged "overcharge" errors actually occurred. Nor did the State meet its burden of proof in showing that it followed applicable federal and state regulations, and the State WIC VENDOR HANDBOOK, by promptly notifying Respondent of alleged "processing errors," and allowing Respondent to respond.

For all the above reasons, after considering the evidence presented, the arguments of counsel, and the entire record in this matter, this case is **DISMISSED**.

WITNESSES

The State called the following witnesses: (1) Jerry Orenstein, (2) Billy Dodson, (3) Ivon Reyes, and (4) Sabrina Sasser. Respondent called Karen Pang as its witness.⁴

FINDINGS OF FACT

1. In order to properly understand the facts in this case, it is necessary to define WIC terms and reference WIC regulations and procedures outlined in the TENNESSEE DEPARTMENT OF HEALTH WIC VENDOR HANDBOOK. Accordingly, WIC definitions, the TENNESSEE WIC VENDOR HANDBOOK, and certain federal and state regulations are set forth in the "Findings of Fact" section of this order.

⁴ Ms. Pang was the party representative for Respondent. She is a co-owner of La Mexicana Market. Ms. Mun Lee, the market's other owner was also present. However, because Ms. Lee has difficulty with the English language, she was not called as a witness.

2. The federal WIC program is a special, supplemental nutrition program for Women, Infants, and Children. The purpose of the program is to provide supplemental foods and nutrition education (including breastfeeding promotion and support) through payment of cash grants to State agencies which administer the Program at no cost to eligible persons.⁵ The Program is meant to serve as an adjunct to good health care during critical times of infants' and children' growth and development. See 7 C.F.R. §246.1. The program is supplementary to the USDA's "SNAP" program (Supplemental Nutrition Assistance Program, formerly known as the "Food Stamp program".)

3. The WIC program is a federal program operated by the United States Department of Agriculture.

4. Each state is responsible for administering the federal WIC program in its state. See 7 C.F.R. §246.3. Accordingly, the Tennessee Department of Health is responsible for administering the WIC program in the state of Tennessee.

5. United States Department of Agriculture regulations set forth in the Code of Federal Regulations (C.F.R.), 7 C.F.R. §246.1, *et seq.*, govern the WIC program in Tennessee. The WIC program in Tennessee is also governed by RULES OF THE TENNESSEE DEPARTMENT OF HEALTH, BUREAU OF HEALTH SERVICES ADMINISTRATION, NUTRITION SERVICES SECTION, TENN. COMP. R. & REGS. CH. 1200-15-2, and the TENNESSEE WIC VENDOR HANDBOOK.

6. After a health professional completes a nutritional/medical assessment on eligible participants (pregnant women, a postpartum women,

⁵ State WIC programs may also administer the WIC program through "local agencies" such as local health departments.

women who are breastfeeding, and/or infants and children) the health professional prescribes a specific “food package” which is “individualized” to the particular WIC participant’s nutritional needs.

7. The WIC participant or recipient will be given Cash Value Vouchers (CVV’s) and WIC Food Instruments (FI’s) to purchase food at WIC vendors.

8. Cash Value Vouchers (CVV) are “WIC vouchers or checks” with a fixed-dollar amount used to buy fresh or frozen fruits and vegetables.

9. A WIC Food Instrument (“FI”) is a negotiable check which has the foods approved for purchase (the “individualized food package”) listed on the instrument or check.

10. At the Vendor’s (grocery’s or market’s) “check-out”, the Vendor’s cashier must: (1) check the FI or CVV to ascertain that it is for the proper date or the valid month; (2) Separate the foods which are to be purchased with the FI or CVV from any other items being purchased; (3) Review the approved foods in that individual’s WIC package which are listed on left side of the front of the Food Instrument⁶; (4) Review the dollar amount and food description on the left side of the front of the Cash Value Voucher (which indicates the dollar amount of eligible fruits and vegetables that can be purchased without the participant making additional payment); (5) Compare the foods presented by the WIC recipient at check-out with the eligible foods listed on the Food Instrument to the foods presented for checkout; (6) Ensure that no “excluded foods” or “ineligible items” are purchased using the WIC Food Instrument or the WIC Cash Value Voucher; (7) Give no change if the full value of the WIC Cash Value Voucher is not used; (8)

⁶ It is noted that the “approved foods” or “WIC package foods” listed on WIC Food Instruments are not uniform. Rather, the “WIC package foods” vary from WIC recipient to WIC recipient based upon the individualized “food package” prescribed for that particular recipient.

Total the dollar amount of the “approved foods” without charging sales tax; (9) At “below 50% Vendors”, allow applicable “customer courtesies” such as bonus cards, coupons, and “buy-one-get-one-free offers”⁷; (10) Complete the right side of the front of the WIC Food Instrument in ink by writing in the month, date and year; (11) Write in the dollar amount in the WIC transaction, which must be less than the maximum value of the Food Instrument; (12) Remove any sales tax from WIC items; (13) Have the WIC recipient or participant sign the Food Instrument or Cash Value Voucher signature line; (14) Match the signature on the Food Instrument or Cash Value Voucher with the signature in the WIC FI/CVV “folder”; (15) Ask for a driver’s license or other ID if the signatures are “questionable matches”; and (16) Stamp the Food Instrument with the authorized WIC vendor stamp, either at the time of the transaction or after the transaction. See TENNESSEE WIC VENDOR HANDBOOK.

11. Respondent LA MEXICANA MARKET is a relatively small market located in Nashville, Tennessee. It is not part of a large supermarket “chain”. The La Mexicana Market has been in business since December, 2001. Four individual partners own La Mexicana Market. Its estimated sales are: 40% cash/personal checks, 25% Food Stamps (SNAP), 15% WIC instruments, and 20% Debit/Credit Cards.

12. Respondent La Mexicana Market entered into a 2008-2009 Vendor Agreement (“Vendor Agreement”) with the WIC program beginning on October 1, 2008 and ending on September 30, 2010, and entered a 2010 Vendor Agreement

⁷ “Below 50% Vendors” are those Vendors who have less than 50% of their total business comprised of WIC sales.

("Vendor Agreement") with the WIC program beginning on October 1, 2010, and ending on September 30, 2012.

13. Pursuant to the Vendor Agreements, the parties agreed that the provisions in the Vendor Handbooks ("Vendor Handbooks") were incorporated by reference into the Vendor Agreements.

14. Pursuant to the Vendor Agreements, the Respondent also agreed that it is responsible for its owners, officers, managers, agents, and employees who commit vendor violations.

15. The State of Tennessee, in accordance with Federal WIC regulations, is required to monitor WIC Vendors in Tennessee to ensure that Vendors are in compliance with the requirements of state and federal law.

16. Such "monitoring" of WIC Vendors in Tennessee may be accomplished in three ways: "routine monitoring,"⁸ "compliance buys,"⁹ and "audits" of computer reports generated from WIC transactions.

17. A "compliance investigation" consisting of four (4) "compliance buys" was conducted by the State in Respondent's market, during the time period of August 6, 2010 through February 3, 2011.

18. The WIC VENDOR HANDBOOK (2010-2012) addresses approved food pricing by vendors; the procedure to be followed by the WIC Program if a food item is "over-priced"; the procedure to be followed by the WIC Program if the

⁸ "Routine Monitoring" is defined by 7 C.F.R. §246.2 as: "overt, on-site monitoring during which [WIC] program representatives identify themselves to vendor personnel."

⁹ A "Compliance Buy" is defined by 7 C.F.R. §246.2 as:

a covert, on-site investigation in which a representative of the [WIC] Program poses as a participant, parent or caretaker of an infant or child participant, or proxy, transacts one or more food instruments or cash-value vouchers, and does not reveal during the visit that he or she is a program representative.

vendor commits an “error”, either intentional or unintentional, that affects the payment of a WIC Food Instrument or Cash Value Voucher; and the procedure to be followed by the WIC Program when a vendor is found to have a “pattern of overcharging as the result of a compliance investigation.”

19. The WIC VENDOR HANDBOOK mandates that vendors must submit a WIC “Grocer Price List” to the State WIC Program which shows the Grocer’s highest regular shelf prices on select groups of approved foods. The foods on the “Grocer Price List” are not broken down into different varieties of fruits or vegetables.

20. The WIC VENDOR HANDBOOK also requires that a vendor’s maximum reported price for commonly issued food packages shall be no greater than fifteen percent (15%) above the average package prices reported for all authorized vendors in that particular vendor’s “peer group” of vendors.

21. The WIC VENDOR HANDBOOK sets out the procedure which the State WIC Program must follow if “one or more of the food packages exceed the fifteen percent (15%) average”. Specifically, page 28 of the WIC VENDOR HANDBOOK states:

When one or more of the food packages exceed the fifteen percent (15%) average, ***the vendor shall be given opportunity to justify. They shall be given the opportunity to lower their prices if determined necessary. Failure to comply with the request to lower prices shall result in disqualification.***

(Emphasis added.)

22. In this case, the State WIC Program failed to follow its own procedure. The State did not notify Respondent La Mexicana Market of any “overcharges,” nor did it give Respondent La Mexicana Market the opportunity to justify, correct, or explain its prices on alleged “overcharges”. Furthermore, the

State WIC Program did not request that Respondent La Mexicana Market lower its prices pursuant to the HANDBOOK's instructions, prior to the State WIC Program's advising La Mexicana Market that the Program was disqualifying La Mexicana Market from the WIC program.

23. The WIC VENDOR HANDBOOK also sets out the procedure which the State must follow if the Vendor commits "an error, either intentional or unintentional, that affects the payment of a F[ood] I[instrument] or a C[ash] V[alue] [Voucher]." Specifically, page 28 of the WIC VENDOR HANDBOOK mandates the following:

[A] FI [Food Instrument] or CVV[Cash Value Voucher] ***shall be denied or a request for reimbursement of a previous payment made*** when it is determined that the vendor has committed an error, either intentional or unintentional, that affects the payment of a FI or CVV. In these situations, ***a vendor shall be given an opportunity to justify or correct the error.*** The WIC program's decision whether to uphold a claim is considered final and vendors may not appeal payment disputes.

(Emphasis added.)

24. Again, the State WIC Program failed to follow its own WIC VENDOR HANDBOOK's procedure with regard to Respondent La Mexicana Market. The State WIC Program did not "deny" La Mexicana Market payment, nor did the State WIC Program request "reimbursement for a previous payment made." The State WIC Program did not give La Mexicana Market an opportunity to "justify or correct" any alleged "errors" prior to informing La Mexicana Market that it was disqualified from the WIC program for a three (3) year time period.

25. When a vendor is suspected of having a pattern of "overcharging" as a result of a compliance investigation, the TENNESSEE WIC VENDOR HANDBOOK dictates that:

A request for reimbursement shall be made when a vendor is found to have a pattern of overcharging as the result of a compliance investigation.

(Emphasis added.)

26. The TENNESSEE WIC VENDOR HANDBOOK goes on to explain that:

The investigation will consist of a series of covert compliance buys or the results of an inventory audit. The pattern can include charging Program participants more for approved foods than non-Program participants, charging for non-approved foods, or charging more than the current shelf price for approved foods. **When questioned by the WIC program, the vendor shall have the opportunity to justify or correct the claim.**

(Emphasis added.)

27. The TENNESSEE WIC VENDOR HANDBOOK instructs vendors to make reimbursements payable to the Tennessee WIC Program. Page 29 of the TENNESSEE WIC VENDOR HANDBOOK details the procedures to be followed by the State WIC program and vendors if the vendor charges more than the maximum amount to be charged for a Food Instrument (FI) based on the vendor's reported prices; price adjustments to be made if the vendor charged for "non-approved food" or "excessive quantities of approved food"; the return (non-payment) by the WIC program's Bank of Food Instruments and Cash Value Vouchers which exceed the maximum amount allowed; and price adjustments to be made for Food Instruments redeemed over the vendor's reported prices.

28. The TENNESSEE WIC VENDOR HANDBOOK, in addressing possible vendor errors listed in the paragraph above, states that the amount to be paid on FI's and/or "CVV's "**shall** be adjusted", "**shall** be replaced and the dollar amount adjusted", and "reimbursements **shall** be requested from grocery vendors."

29. Finally, the TENNESSEE WIC VENDOR HANDBOOK cautions that:

Failure of vendors to make these reimbursements will result in termination of the Vendor Agreement. [...]

30. The State WIC program did not follow its own HANDBOOK procedures in the La Mexicana Market case. It did not notify Respondent La Mexicana Market of its alleged “over-charge” errors nor did the State WIC program request reimbursement or make a price adjustment. The State WIC program did not deny payment. Rather, the State WIC program simply sent La Mexicana Market a letter dated April 11, 2011 which informed La Mexicana Market that it was being disqualified from participating as a WIC vendor for three (3) years. La Mexicana Market was not afforded the opportunity to respond or make any reimbursement.

31. The WIC VENDOR HANDBOOK references 7 C.F.R. §246 and states:

Vendor Sanction Procedures are based on the federal regulations in 7 CFR Part 246 for violations of the WIC Vendor Agreement. Except as noted as follows, the WIC program ***shall notify a vendor in writing when an investigation to determine a vendor’s compliance with their agreement first reveals an act of noncompliance.*** This applies to situations for which a pattern or (sic) non-compliance must be established in order to sanction a vendor for violating their agreement. ***This notification shall occur before another such act of non-compliance is documented.***

(Emphasis added.)

32. The State WIC Program did not notify La Mexicana Market in writing when the first “compliance buy” revealed an alleged act of “non-compliance”. Nor did the State WIC Program give any notification to Respondent La Mexicana Market before the State made any additional “compliance buys” which “documented” other alleged acts of “non-compliance.”

33. At all relevant times, the State WIC program decided which vendors were subject to “under-cover” compliance buys based upon “Potential High Risk Vendor Reports”.

34. Such “Potential High Risk Vendor Reports” were generated from data collected by the State on its WIC vendors. “Potential High Risk Vendors” were identified from the reports if such vendors: (1) had higher than average amounts of WIC redemptions compared to other vendors in their peer group and area; (2) had an increase or a decrease Food Instrument or Cash Value Voucher redemptions; and (3) had no or low variance in dollar amounts for redeemed Food Instruments and Cash Value Vouchers.

35. The State determined that La Mexicana Market was a “Potential High Risk Vendor” from the computer data reports which were generated.

36. Mr. Billy Dodson, with the State’s WIC Management section, emphasized that the computer reports identify “possible” or “potential” vendors who may be at risk of violating WIC rules. Such reports do not identify “actual” WIC violators.

37. Ms. Ivon Reyes, an employee of the Metropolitan-Davidson County Health Department WIC program performed “undercover” or “covert” compliance buys at La Mexicana Market.

38. The State’s action to disqualify La Mexicana Market from participating in the WIC vendor program is based solely upon Ms. Reyes’ “compliance transaction reports.”

39. Ms. Reyes made four “compliance buy” trips to La Mexicana Market on: August 6, 2010; September 15, 2010; September 29, 2010; and February 3,

2011. The “compliance buys” were performed over a seven month time period. Compliance buyer Reyes used the alias “Elizabeth Mora” in making the covert “compliance buys” at La Mexicana Market.

40. Ms. Reyes reported that during the August 6, 2010 “compliance buy” the Food Instrument was not completed in front of her by La Mexicana Market’s cashier, nor was the Cash Value Voucher completed in front of her. She recorded on the “compliance transaction report” that she purchased “juice, tortillas, beans, eggs, milk and cheese” with her alias FI. She purchased “grapes and apples” with her CVV (Cash Value Voucher). Ms. Reyes calculated the total purchase price with the Food Instrument as “\$29.03”. She based her calculations using “prices that were either on the products or were on the aisle where the item was located.”

41. The purchase price total entered by La Mexicana Market on the redeemed Food Instrument was \$31.03. There was a two dollar (\$2.00) difference in the amount which the Tennessee WIC program calculated the total purchase price on the Food Instrument, and the amount which La Mexicana Market calculated as the total purchase price on the FI submitted for redemption.

42. While the “compliance buyer,” Ms. Reyes, recorded the prices which she believed applied to the foods she purchased with the WIC Food Instrument and the Cash Value Voucher, the “compliance report” was altered or changed by Ms. Sabrina Sasser, a supervisor at the Tennessee Department of Health WIC program.

43. WIC Supervisor Sasser was responsible for reviewing “compliance buy reports” and determining whether vendor violations occurred.

44. On at least one item recorded on the August 6, 2010 “Compliance Transaction Report,” (cheese) Ms. Reyes admitted that she did not know what the purchase price was at the time of the purchase. *Ms. Sasser* later hand-wrote in the amount which *Ms. Sasser* believed to be the correct purchase amount.¹⁰

45. *Ms. Sasser* “corrected” or altered several of the prices recorded by *Ms. Reyes* by marking through *Ms. Reyes*’ hand-written price(s), and hand-writing in the amount which *Ms. Sasser* believed was the “correct amount” charged by La Mexicana Market.¹¹

46. *Ms. Sasser* was not actually present during the “compliance buy” and did not see the prices posted in the store by the vendor; however, *Ms. Sasser* used La Mexicana Market’s “GPR [Grocer Price Report]” to calculate what she believed the actual “purchase prices” should have been, and inserted the GPR prices to replace the amount recorded by the compliance buyer, *Ms. Reyes*.

47. At all pertinent times, Respondent La Mexicana Market did not tag individual food items with barcode tags. Nor did it have a computerized “scanner” to scan individual products. Instead, the cashier at La Mexicana Market manually entered the cost of food products into the cash register.

48. As a result of WIC Supervisor *Sasser*’s review and alterations of the August 6, 2010 “WIC Compliance Transaction Report,” the Tennessee WIC program determined that La Mexicana Market had “overcharged” in the amount of \$2.00.

¹⁰ *Ms. Reyes* left the price section in the “compliance transaction report” for the purchased “cheese” blank. *Ms. Sasser* later hand-wrote in the amount of \$3.59. Respondent’s GPR noted that the maximum it can charge for “cheese” is \$5.99. *Ms. Reyes* conceded that the \$5.99 amount charged by La Mexicana Market could be correct, depending on the brand and type of cheese.

¹¹ It is noted that no sales receipts from La Mexicana Market were attached to any of the “compliance transaction reports” submitted to the WIC program by *Ms. Reyes*.

49. The Tennessee WIC program did not notify La Mexicana Market of its determination that La Mexicana Market had “over-charged” in the amount of \$2.00. The Tennessee WIC program did not ask for reimbursement of the alleged “overcharge”, nor did it deny payment on the instrument or make a “claim”. Finally, the Tennessee WIC program did not notify La Mexicana Market and give La Mexicana Market an “opportunity to justify or correct the error.”

50. Mr. Jerry Orenstein, the Food Delivery Administrator for the Tennessee WIC program, testified on behalf of the State. When asked why the State WIC program had not notified La Mexicana Market of the alleged violations which occurred during the August 6, 2010 “compliance buy”, Mr. Orenstein referenced the TENNESSEE WIC PROGRAM VENDOR HANDBOOK, “Vendor Sanction Procedures” section. Mr. Orenstein stated that notification of La Mexicana Market of alleged violations from the August 6, 2010 “compliance buy” was not required because the Tennessee WIC program determined that “notifying the vendor would compromise its investigation.”

51. The TENNESSEE WIC VENDOR HANDBOOK lists four exceptions to its mandatory language that the WIC program “shall” notify vendors in writing of alleged violations, in order to allow the vendor to justify or correct “errors”. The exceptions to the WIC program notifying a vendor of alleged errors are:

- The WIC program determines that notifying the vendor would compromise its investigation.
- If the violation would involve a vendor’s redemptions exceeding its’ inventories.
- If the violation only requires one act of non-compliance before a sanction is to occur.¹²

¹² Examples of “one violation causing a mandatory disqualification” are: a vendor convicted of trafficking in food instruments or selling firearms, ammunition, explosives, or controlled substances, or one incidence of a vendor selling alcohol or alcoholic beverages or tobacco products in exchange for food instruments. See 7 C.P.R. §246.12.

◦There is a WIC Program sanction based on a SNAP (food stamp program) violation.

52. Mr. Orenstein testified that the Tennessee WIC program did not notify La Mexicana Market of any “errors” discovered during the August 6, 2010 “compliance buy” because: “We determine if warning a vendor would jeopardize our investigation, and in this instance we determined that it very well could.”

53. Mr. Orenstein offered no facts or evidence to support his statement that notification of Respondent La Mexicana Market was not required because it would jeopardize the WIC program’s investigation.

54. Mr. Orenstein also testified that sending a notification or a “warning” to La Mexicana Market “could have interfered possibly with the results of our investigation.”¹³ Neither Mr. Orenstein nor any other witness for the State offered any factual basis which would support that the State WIC Program actually considered sending notification to La Mexicana Market of the August 6, 2010 compliance buy “errors” as required by the Tennessee WIC Vendor Handbook.

55. On September 15, 2010, Ms. Reyes made her second undercover “compliance buy” at La Mexicana Market. The “compliance transaction report” was again completed by Ms. Reyes based upon her calculations of product prices from prices posted by La Mexicana Market with products or on aisles. Ms. Reyes calculated that she purchased \$7.87 in food items with her Food Instrument and \$5.77 with her Cash Value Voucher. She noted on the “compliance transaction report” that the “voucher was not completed” during the transaction.

¹³ It is noted that conclusory statements without a factual basis are not competent evidence. Further, stating that something possibly could happen does not fulfill the requirement for the “notification exception” that notification would jeopardize an investigation.

56. WIC Supervisor Sabrina Sasser reviewed the September 15, 2010 “Compliance Transaction Report” and again altered and made changes to Ms. Reyes’s hand-written prices. Ms. Reyes recorded that she purchased “tacos” with her FI; however, Ms. Sasser marked through “tacos” and wrote “tortillas”. Ms. Sasser was not present during the “compliance buy” and had no personal knowledge of the actual prices the “compliance buyer” purchased.

57. Ms. Reyes, the undercover “compliance buyer”, also noted that she had presented an ineligible item (32 oz. La Sabrosita juice) which was correctly refused by La Mexicana Market’s cashier, and an eligible juice (64 oz. of juice) was purchased instead.

58. Ms. Sasser, the WIC supervisor, determined that there was an “overpayment” of \$14.96 for the Food Instrument, and \$.16 (sixteen cents) difference for the Cash Value Voucher between the price of the redeemed food and the total price of the CVV, resulting in an “underpayment” to La Mexicana Market.

59. The State WIC program did not notify La Mexicana Market of any alleged “errors” or violations after the September 15, 2010 “compliance buy” revealed alleged “errors,” nor did it offer La Mexicana Market an opportunity to justify or correct such errors.

60. Thereafter, Ms. Reyes made an undercover “compliance buy” at La Mexicana Market on September 29, 2010, in which she noted “everything went good,” and there were no violations. Ms. Reyes noted that the La Mexicana Market cashier correctly refused an ineligible purchase of “coca cola”. Ms. Reyes stated: “The woman [cashier] did everything by the book.”

61. Again, WIC Supervisor Sasser marked through the prices recorded by Ms. Reyes on the September 29, 2010 “compliance transaction report”, and altered or “corrected” the recorded prices by marking through the recorded prices and replacing them with hand-written prices (which Ms. Sasser believed to be the “correct price”) rather than the price written by the undercover “compliance buyer.”

62. The State WIC program did not notify La Mexicana Market of any alleged “errors” or violations after the September 29, 2010 “compliance buy,” nor did it offer La Mexicana Market an opportunity to justify or correct such errors.

63. WIC Supervisor Sasser completed a “Compliance Investigation Results” Report on December 1, 2010. In the Report Ms. Sasser concluded that an “overcharge” of \$2.00 occurred during the first “compliance buy,” and the FI and CVV were not completed at the time of the transaction. Ms. Sasser determined that an “overcharge” of \$14.96 occurred during the second compliance buy, and the FI and CVV were not completed at that time. Ms. Sasser determined that no vendor violations occurred at the time of the third “compliance buy”.

64. On the December 1, 2010 “Compliance Investigation Results” Report, Ms. Sasser noted that a “Warning Notice” was not sent to the vendor, with the explanation “suspicion of overcharge.” Ms. Sasser did not explain how or why a “warning notice” or “notification” would jeopardize the Tennessee WIC program’s investigation of La Mexicana Market.

65. On February 3, 2011, Ms. Reyes made her fourth undercover “compliance buy” at La Mexicana Market. A “compliance transaction report” was

again completed by Ms. Reyes based upon her calculations of product prices from prices posted by La Mexicana Market with products or on aisles. Ms. Reyes calculated that she purchased \$15.97 in products with her Food Instrument. Ms. Reyes also noted that the price for the apples she purchased with the CVV was \$2.99. La Mexicana Market charged \$3.94 for the apples. The CVV was \$6.00 in value.

66. At the hearing, Ms. Reyes conceded that different varieties of apples have varying prices, which could cause the purchase price for one variety of apples to be greater than another variety of apples.

67. Despite Ms. Reyes' notation on the report that "when leaving Chinese Lady ask (sic) me to stay to complete the FI and CVV", Ms. Reyes answered "no" to "food instrument completed", and wrote "FI and CVV not completed." Ms. Reyes noted on the "compliance transaction report": "FI and CVV not completed it (sic) all when leaving Chinese Lady ask (sic) me to stay to complete the FI and CVV."¹⁴

68. Ms. Sasser altered the \$15.07 total purchase price recorded by compliance buyer Reyes after the February 3, 2011 "compliance buy", and replaced it with a total purchase price of \$13.97.¹⁵ Ms. Sasser determined, based on her alteration of the total purchase price to \$13.97 that La Mexicana Market had "overcharged" \$2.00.

69. At the February 3, 2011 "compliance buy", Ms. Reyes purchased apples with her CVV. Ms. Reyes believed the total value of the apples purchased was \$2.99 and recorded that amount on the "Compliance Transaction Report". La

¹⁴ Ms. Karen Pang, one of the owners of La Mexicana Market testified that no Chinese women work at La Mexicana Market.

¹⁵Ms. Reyes incorrectly calculated the total purchase price from the recorded purchase amounts.

Mexicana Market's purchase price (redeemed CVV) was \$3.94. Based upon Ms. Reyes' belief that the apples' correct purchase price was \$2.99, Ms. Sasser, the WIC supervisor, determined that La Mexicana Market had "overcharged" by \$0.95 (ninety-five cents).

70. During her testimony, Ms. Sasser admitted that different varieties of apples may be priced differently; with some varieties being more expensive than others.

71. Ms. Sasser also admitted that she changed the September 15, 2010 "compliance transaction report" item recorded as "tacos" to "tortillas". She testified that she believed "that Ms. Reyes made an 'honest mistake.'"

72. Despite the fact that the covert "compliance buyer," Ms. Reyes, was asked to stay and complete the FI and CVV by La Mexicana Market's cashier on February 3, 2011, Ms. Sasser determined that La Mexicana Market had violated WIC rules for completing the FI and CVV during the visit.

73. The State's "compliance buyer", Ms. Reyes, conceded that she was not sure that the prices she wrote down on her "compliance buy" reports were "correct". She further testified that "someone at the State" made the changes to her compliance reports and crossed through her hand-writing without consulting her.

74. Ms. Sasser, WIC supervisor, admitted that Ms. Reyes had made "errors" in the "compliance transaction reports."

75. On April 11, 2011, over two months after the last "compliance buy" occurred on February 3, 2011, the State WIC program sent La Mexicana Market a certified letter from WIC's Food Delivery Administrator, Mr. Jerry Orenstein. The

letter from WIC advised La Mexicana Market that “the WIC program has concluded that you did not comply with your Vendor Agreement and the laws, policies and procedures governing the WIC program.” The letter went on to say, “As a result, you have been assessed a three (3) year disqualification for a pattern of overcharging.”

76. The April 11, 2011 letter also informed La Mexicana Market that “disqualification from WIC may result in disqualification as a retailer in the Supplemental Nutrition Assistance Program (SNAP).”

77. Forty percent (40%) of La Mexicana Market’s business is comprised of WIC and SNAP purchases.

78. Despite the fact that the April 11, 2011 WIC letter also referenced a “written warning” being required by federal regulations for violations of FI and CVV completion, no written warning was ever given to La Mexicana Market following the August 6, 2010; September 15, 2010; or February 3, 2011 “compliance buy” visits.

79. Prior to the State WIC program notifying La Mexicana Market that it was disqualified from WIC participation for three years, La Mexicana Market was given no opportunity to reimburse WIC or to explain, correct, or justify alleged overcharges or violations.

80. Tennessee WIC regulations do not state a time frame or a set amount of time in which alleged WIC violations must occur in order to establish a “pattern”.

81. Mr. Orenstein admitted, when questioned at the hearing, that when he sent La Mexicana Market the April 11, 2011 letter notifying them of its three

year “disqualification”, he summarily disqualified La Mexicana Market and withheld WIC benefits without any hearing or notice.

82. Mr. Orenstein also stated that “We [WIC] determined that there wasn’t sufficient reason for an appeal. Then we made a re-determination that we would offer a hearing.” The WIC program made the “re-determination” to offer La Mexicana Market a hearing after it was contacted by La Mexicana Market’s attorney.

83. The Tennessee WIC program notified its banking contractor to withhold WIC payments from La Mexicana Market “based on the fact that we were going to disqualify the vendor.”

84. However, several months later, following the WIC program being contacted by La Mexicana Market’s attorney, the WIC program informed La Mexicana Market, by letter of September 26, 2011: “The Tennessee Department of Health is rescinding the disqualification of your authorization as a WIC vendor...[.] You will receive a notice pursuant to your request for hearing in the near future.”

85. For months, the State WIC program withheld WIC payments to La Mexicana Market without a hearing on this matter, and only reinstated La Mexicana Market’s WIC participation at the behest of La Mexicana’s counsel.

86. At the hearing, Karen Pang (a co-owner of La Mexicana Market) explained some of the discrepancies between the prices charged by La Mexicana Market and the prices that WIC Supervisor Sasser believed were the “correct prices.” As an example, Ms. Pang explained that the cheese purchased and redeemed for \$3.59 had an actual price of \$5.99. Ms. Pang testified, credibly,

that there were no cheeses priced at \$3.59 at the time of purchase. Further, Ms. Pang explained that there was no notation on the GPR regarding the type of cheese or the amount of cheese (in ounces) purchased. If Ms. Reyes purchased a package of cheese which was actually priced \$5.99, there was no overcharge.

87. Ms. Sasser made changes in multiple compliance report prices without actually seeing the product or the price.

88. Ms. Pang testified, credibly, that “Gala apples” are more expensive than “Red Delicious apples”. Ms. Reyes, the “compliance buyer,” did not identify the *variety* of purchased apples in the report. If Ms. Reyes presented the more expensive variety of apples, La Mexicana Market’s purchase price was correct and there was no overcharge.

89. Ms. Pang testified, credibly, that La Mexicana Market does not sell “tacos”. La Mexicana Market sells “tortillas”. Ms. Reyes recording of a “tortillas” purchase was incorrectly changed by Ms. Sasser to a “taco” purchase.

90. The WIC program determined that there was an “overcharge” on a “cereal” purchase of “Honey Bunches of Oats.” Ms. Pang testified, credibly, that Honey Bunches cereal was correctly priced at \$5.99. However, Honey Bunches of Oats with Strawberries (in a nearly identical box) was priced at \$3.99. The State’s determination that there was a two dollar “overcharge” was not correct.

91. When asked what constitutes a “pattern” of vendor violations, Mr. Orenstein testified, “In this instance...three situations out of four.”¹⁶

¹⁶ He also testified that a “pattern was “two or more violations.”

92. At the end of the hearing, with regard to the explanations of the “overcharge” violations, the State acknowledged: “It might have been the wrong box of cereal. It might have been the wrong bag of apples.”

CONCLUSIONS OF LAW

1. TENN. COMP. R. & REG. CH. 1200-15-2, RULE 1200-15-2.01, *et seq.* and 7 C.F.R. §246.1, *et seq.* govern this case.

2. The description of the WIC program and the definitions of the WIC program, as set forth in the “Findings of Fact” section of this Initial Order, are incorporated by reference into this portion of the Initial Order. Additionally, the previously cited Federal and State regulations governing the WIC program, along with the procedures described in the TENNESSEE WIC VENDOR HANDBOOK, are incorporated by reference into the “Conclusions of Law” portion of this order.

3. 7 C.F.R. §246.2 defines WIC “vendor violations” as:

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.

4. 7 C.F.R. §246.2 defines WIC “vendor overcharge” as:

intentionally or unintentionally charging the State agency more for authorized supplemental foods than is permitted under the vendor agreement. ***It is not a vendor overcharge when a vendor submits a food instrument for redemption and the State agency makes a price adjustment to the food instrument.***

(Emphasis added.)

5. The Tennessee WIC program did not immediately notify La Mexicana Market of the alleged “errors” made after any of the compliance buys, nor did it allow La Mexicana Market to justify, explain, or correct any alleged “errors”. The

Tennessee WIC program did not allow La Mexicana Market to reimburse the WIC program for any “overcharges”. The Tennessee WIC program made no price adjustments for food instruments used at La Mexicana Market.

6. The Tennessee WIC program did not follow Federal and State Rules, or the TENNESSEE WIC VENDOR HANDBOOK procedures cited earlier in this order.

7. The Tennessee WIC Program, Tennessee Department of Health, relied upon four “compliance buy” visits and the accompanying “compliance transaction” reports as its sole basis for prosecuting Respondent La Mexicana Market and disqualifying La Mexicana Market from the WIC program.

8. Disturbingly, the Tennessee WIC program utilized “compliance buy” reports at which the “compliance buyer” did not ask for “price checks” or verify the actual purchase price of foods purchased with WIC instruments. The “compliance buyer” admitted that she did not know what some of the La Mexicana Market purchase prices actually were. In at least one “compliance transaction report,” the “compliance Buyer” left the “purchase price” blank because she did not know the purchase price. WIC Supervisor Sasser later filled in the blank “purchase price” with the amount Ms. Sasser believed to be the correct amount. Nor were any sales receipts attached to the “compliance transaction reports.”

9. One of the first and foremost requirements for admission of evidence is that recordings and testimony be based upon personal knowledge. It is fundamental that evidence must be competent evidence in order to be considered at trial, and exhibits must be authenticated.

10. In this case, the WIC Supervisor (Ms. Sasser), who did not actually make the “Compliance Buys” at La Mexicana Market or visit La Mexicana Market, made alterations and changes to the “Compliance Reports” originally authored by the “compliance buyer”, Ms. Reyes.

11. Ms. Reyes admitted that she did not know what some of the purchase prices actually were. WIC Supervisor Sasser changed food purchase prices listed in Ms. Reyes’ “compliance transaction reports” to those amounts which Ms. Sasser believed the purchase prices should be. Both Ms. Reyes and Ms. Sasser admitted that they could have made mistakes.

12. The “compliance transaction reports” introduced as exhibits at the hearing were unreliable, had contradictory information with alterations and “scratched out” prices, had notations made without personal knowledge (by Ms. Sasser), and were not competent evidence.

13. The State WIC program in this matter decided to charge La Mexicana Market with “overcharging” and “cashier errors” in three out of four visits (one visit had no “errors”) over a time period of seven (7) months, based upon evidence which was not competent or reliable. Based upon such unreliable, incompetent, and questionable reports, the State WIC program summarily disqualified Respondent La Mexicana Market’s WIC program participation for three years, without notifying La Mexicana Market of any alleged “errors” and without allowing La Mexicana Market an opportunity to justify, correct, or explain any “errors,” or reimburse any “over-charges.”

14. After the last “compliance visit” on February 3, 2011, the State WIC program waited over two months to issue a letter containing the “Notice of Disqualification” to La Mexicana Market.

15. WIC regulations state that a Vendor has no license or property interest in the WIC contract. *See* 7 C.F.R. §246.12 (h)(3)(xxi). Arguably, the State WIC program had no duty to notify La Mexicana Market under constitutional “Due Process” principles.

16. However, the Tennessee WIC Program entered into a contract or vendor agreement with La Mexicana Market. Each party to the WIC contract agreed to be bound by the terms of the WIC Vendor Agreement, which incorporated by reference the TENNESSEE WIC VENDOR HANDBOOK. Thus, the Tennessee WIC Program had a contractual duty to notify La Mexicana Market of any alleged “errors” or “violations” pursuant to the TENNESSEE WIC VENDOR HANDBOOK.

17. The Tennessee WIC Program violated the terms of the WIC Vendor Agreement and failed to follow its own rules, regulations, and the procedures set forth in the TENNESSEE WIC VENDOR HANDBOOK. The Tennessee WIC program determined that it would disqualify La Mexicana Market from participation in the WIC program based on three (3) unsubstantiated, incompetent, and unreliable “compliance transaction reports” which admittedly contained errors and were altered by someone without personal knowledge.

18. The Tennessee WIC program did not verify the information in the “compliance transaction reports”, or give La Mexicana an opportunity to respond to such charges prior to disqualifying La Mexicana Market from the WIC program

and notifying the WIC program bank to discontinue processing La Mexicana's WIC instruments.

19. The "compliance transaction reports" are not competent, reliable, or credible evidence, and are not given any weight in this proceeding.

20. The State WIC Program has failed to meet its burden of proof, by a preponderance of the evidence, that La Mexicana Market "overcharged" the Tennessee WIC program.

21. With regard to alleged cashier "processing errors," such as a cashier failing to complete a food instrument immediately prior to obtaining a signature from the "compliance buyer", the "compliance buyer" cited La Mexicana Market for such a violation, despite noting on the report that "when leaving Chinese Lady ask me to stay to complete the FI and CVV".

22. On the two other occasions that the "compliance buyer" recorded that La Mexicana Market's cashier failed to complete the entire WIC instrument in her presence, the State WIC Program failed to follow its own procedures and rules set forth in the TENNESSEE WIC VENDOR HANDBOOK regarding "notification" and "claims"¹⁷.

23. Tenn. R. & Reg. 1200-15-2-.08 states, in pertinent part:

(1) The Department **may** take actions such as disqualification, civil money penalties (CMP) in lieu of disqualification, for Program violations and non-compliance with the WIC Vendor Agreement as described in this section. The vendor **shall** be given the opportunity to appeal any adverse action following procedures in 1200-15-2-.10.

(Emphasis added.)

¹⁷ TENN. R. & REG. 1200-15-2-.08 defines "Claim" against a vendor as: "A request for reimbursement of Program funds realized by the Department resulting from the *detection of any questionable voucher redeemed by a vendor, suspected vendor overcharges, or other errors by the vendor, either intentional or unintentional...*]" (Emphasis added.)

24. While the State presented the three year disqualification of Respondent as a “mandatory” action it **must** take against Respondent La Mexicana Market for any “errors”, it is clear from TENN. R. & REG. 1200-15-2-.08(1) that any such actions by the State WIC Program are discretionary.

25. When TENN. R. & REG. 1200-15-2-.08 uses the term “may”, the language is not mandatory.

26. The intent regarding the “mandatory” or “permissive” nature of particular statutory or regulatory provisions is determined primarily from the language used. *Board of Commissioners Shelby Co. v. Taylor*, 1994 WL 420922 p. 4 (Tenn. Ct. App. 1994).

27. Words or phrases which are generally considered to make a statutory or regulatory provision “mandatory” include the words “shall” or “must”. *Id.* at 4.

28. Conversely, language is usually considered “permissive” if it is couched in permissive, directory, or discretionary wording using the words or phrases: “may,” “authorizes,” “power,” or “it is lawful.” *Id.* at 4. *See also Robinson v. Fulliton*, 140 S.W. 3d 312, 320 (Tenn. Ct. App. 2003), *perm. to app. denied*, (Tenn. 2003).

29. The Tennessee WIC program wishes to assign “violations” or “errors” to La Mexicana Market for two instances of its cashiers’ failure to follow the procedures set out in the WIC VENDOR HANDBOOK i.e., not completing the entire WIC instrument prior to obtaining the “compliance buyer’s” signature. However, the Tennessee WIC Program itself failed to follow the procedures set forth in the TENNESSEE WIC VENDOR HANDBOOK by not issuing a “claim”, not allowing La Mexicana Market to justify, correct, or explain, and by not notifying La Mexicana

Market any error which it was “first revealed” following a “compliance buy”. Finally, the Tennessee WIC program did not verify the information contained in the WIC “compliance transaction reports” nor did it afford La Mexicana Market an opportunity to correct any alleged errors or reimburse the WIC program for any alleged “overcharges.”

30. It is fundamentally unjust for the Tennessee WIC program to sanction La Mexicana Market for “errors” and “failing to follow WIC procedures”, when the Tennessee WIC program itself has made “errors” and failed to follow WIC procedures set forth in the TENNESSEE WIC VENDOR HANDBOOK with La Mexicana Market.

31. The Tennessee WIC Program has failed to meet its burden of proof in this matter, by a preponderance of the evidence, that La Mexicana Market has overcharged the WIC program, or that it should be sanctioned for two allegations of cashiers’ failure to process the entire WIC instrument in the presence of the “compliance buyer”.

For all the above reasons, this case is **DISMISSED**.

It is so ordered.

This order entered and effective this 19 day of June, 2012



Thomas G. Stovall, Director
Administrative Procedures Division