

**STATE OF WASHINGTON
DEPARTMENT OF HEALTH
ADJUDICATIVE SERVICE UNIT**

In the Matter of:)	
)	Master Case No. M2009-508
KLICKITAT TRADER,)	
)	FINDINGS OF FACT,
Applicant/Petitioner.)	CONCLUSIONS OF LAW
)	AND FINAL ORDER
_____)	

APPEARANCES:

Applicant, Klickitat Trader, per
Rolf Evenson, Owner

Department of Health Community Family Health, Community Wellness and
Prevention, Women, Infants and Children Program (WIC Program), by
Office of the Attorney General, per
Oscar E. Chaves, Assistant Attorney General

PRESIDING OFFICER: John F. Kuntz, Review Judge

A hearing was held in this matter on May 28, 2009, regarding the Applicant's
appeal of the WIC Program's decision to deny the WIC Retailer Application.

ISSUES

Whether the WIC Program's decision denying the Applicant's
WIC Retailer Application should be affirmed?

Was the Applicant's store average WIC check volume below the
amount required by WAC 246-790-070(9)(b)(i)?

SUMMARY OF THE PROCEEDINGS

The WIC Program presented the testimony of Stuart Brotherston. The
Respondent testified on his own behalf and presented the testimony of Marsha Martell.

FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND FINAL ORDER

The Presiding Officer admitted the following Program exhibits:

- Exhibit P-1: Copy of WIC Program's Retailer Listing and Volume Report for Klickitat Trader, Inc., from September 1, 2008 to March 31, 2009.
- Exhibit P-2: Copy of WIC Program's Retailer Evaluation Map for Klickitat, Washington.
- Exhibit P-3: Copy of WIC Program's letter to Mr. Evenson dated March 17, 2009.

The Presiding Officer admitted the following Applicant exhibits:

- Exhibit A-1: Rolf Evenson/Klickitat Trader letter dated May 25, 2009 (4 pages).
- Exhibit A-2: WIC Program letter to Rolf Evenson/Klickitat Trader dated April 17, 2009.
- Exhibit A-3: Washington State Department of Health WIC Program Retailer Listing & Volume Report, Report Dates May 1, 2008 to March 31, 2009, for Canyon Market, Klickitat, Washington (2 pages).
- Exhibit A-4: Copy of Code of Federal Regulations(CFR) Section 246.26 (cited 7 CFR 246.26).

I. FINDINGS OF FACT

Women, Infants and Children Program Criteria

1.1 The WIC Program is a federally funded program established in 1972.¹

The purpose of the program is to provide nutritious food to women, infants and children in specified risk categories. The WIC Program in the state of Washington is administered by the Department of Health.² The WIC Program selects retailers (known

¹ WAC 246-790-050(2).

² WAC 246-790-050(1).

as an “applicant retailer”)³ to provide WIC clients reasonable access to the nutrition provided by WIC foods.⁴

1.2 A retailer or business that is interested in participating in the WIC Program must apply for authorization.⁵ Applications are accepted during the open application period held before the start of each new contract cycle.⁶ Retailers that have no WIC history will be on probation for one year, or to the end of the contract period, whichever comes first.⁷

1.3 If the applicant meets the selection criteria required by the United States Department of Agriculture (USDA), the applicant receives training on the WIC Program requirements, and signs a contract with the WIC Program.⁸ A “contract” means a written legal document which encompasses WIC Program requirements that bind the contractor and the WIC Program.⁹ WIC contracts are for a maximum period of three years.¹⁰

1.4 Pursuant to 7 CFR 246-12(h)(3)(xxi), WIC Program authorization is not a right or property interest.¹¹ Authorization is discretionary and is based solely on the WIC’s determination of Program need and effective administration of the Program.¹²

³ “Applicant retailer” means any retailer, or person representing a retailer, requesting authorization to participate in the WIC program and who has submitted a completed request for authorization packet. See WAC 246-790-010(3).

⁴ WAC 246-790-070(9)(a).

⁵ WAC 246-790-070(1).

⁶ WAC 246-790-070(2).

⁷ WAC 246-790-070(9)(b)(ii).

⁸ WAC 246-790-010(3) and (4).

⁹ WAC 246-790-010(6).

¹⁰ WAC 246-790-080(3).

¹¹ WAC 246-790-070(8).

¹² WAC 246-790-070(8).

Klickitat Trader Application

1.5 The town of Klickitat is a small, unincorporated town located in Klickitat County, Washington. Klickitat County is one of the southernmost counties on the Washington-Oregon border. The town of Klickitat, like many other areas of the state, has a depressed economy. A sizeable portion of the town's inhabitants are under-employed or unemployed. Many of those individuals receive food stamps, WIC coupons, or both.

1.6 Klickitat Trader, the Applicant, filed an application to become a WIC Retailer or WIC vendor for the town of Klickitat. There are two markets or stores in the town of Klickitat: (1) the Applicant's; and (2) Canyon Market. The two markets appear to be in close physical proximity to one another.¹³

1.7 Based on information contained in the WIC Program's Retailer Listing & Volume Report, the Applicant filed an application prior to September 2008, and was granted a contract for a probationary period from September 1, 2008 to March 31, 2009.¹⁴ A review of that report shows that the Applicant received no more than nine WIC checks for any of the six months during the September 2008-March 2009 probationary period.

1.8 The Program's Retailer Listing & Volume Report for Canyon Market shows that Canyon Market filed a WIC retailer application prior to May 2008, and received a

¹³ See Exhibit P-2.

¹⁴ Exhibit P-1.

contract for the period May 1, 2008 to March 31, 2009.¹⁵ The Canyon Market report does not reveal how many WIC checks it received in any one month. On April 17, 2009, the Applicant requested a copy of the Canyon Market report in preparation of its current appeal.¹⁶ The WIC Program provided a copy of the report, but it redacted the information regarding the number of checks. The WIC Program advised the Applicant that federal law prevented it from revealing the information.¹⁷

1.9 Marsha Martell is employed by the Applicant on a part-time basis.¹⁸ She contacted Stuart Brotherston of the WIC Program in February 2009, regarding the status of the Applicant's WIC application. During his conversation with Ms. Martell, Mr. Brotherston provided the Applicant a verbal commitment, guaranteeing that the Applicant would receive its WIC reauthorization to provide WIC services in Klickitat. At the hearing, Mr. Brotherston explained that he did not provide an unconditional guarantee to Ms. Martel. Rather, he gave her a conditional guarantee, which was in the event Canyon Market did not receive a WIC contract, than the Applicant would receive one.

1.10 Given the size of the town of Klickitat, the Applicant heard rumors that Canyon Market was paying its employees "under the table." Based on this information, the Applicant filed a complaint with the Washington State Department of Labor & Industries and other government agencies. As of the date of the Applicant's WIC

¹⁵ Exhibit A-3.

¹⁶ Exhibit A-2.

¹⁷ Exhibits A-2 and A-4.

¹⁸ Ms. Martell previously owned Klickitat Trader, but sold it to current owner Rolf Evenson prior to this appeal.

appeal hearing, no investigative report or final government agency decision (such as Labor & Industries) exists to confirm or dispute this “under the table” information.

1.11 If the WIC Program decides to deny an applicant’s WIC contract, that decision may have an economic impact on the applicant. People receiving food stamps and WIC coupons tend to shop at the store which is authorized to accept both governmental benefits. To the extent that an applicant’s store is not authorized to accept WIC coupons, individuals with both food stamp benefits and WIC coupons may chose not to shop at that store. Given the proximity of the Canyon Market store to the Applicant’s store, that suggests people receiving governmental benefits (food stamps and WIC coupons) will shop at the Canyon Market. The loss of those clients may seriously impact the financial stability of the Applicant’s store. What financial impact will result depends on a variety of factors.

1.12 The Applicant’s store may suffer financial consequences or may not be able to survive as a result of the WIC Program’s decision to deny the Applicant’s WIC application for a contract. While the Applicant’s store may suffer financial consequences or be unable to survive unless it is awarded the WIC contract, the Applicant did not provide any documentary evidence to support that assertion.

II. CONCLUSIONS OF LAW

2.1 The Secretary of Health (and on delegated authority, the Presiding Officer), has jurisdiction over the Applicant and the subject matter of this proceeding.

2.2 The order in this matter is based on the kind of evidence upon which reasonably prudent persons are accustomed to rely in the conduct of their affairs. See

WAC 246-10-606(1). In all cases involving an application for a license, *the burden shall be on the applicant* to establish that the application meets all applicable criteria.

See WAC 246-310-606(2) (Emphasis added). The burden of proof is a preponderance of the evidence. See WAC 246-10-606(3).

2.3 Chapter 246-790 WAC contains the regulations by which the WIC Program manages the special supplemental nutrition program for women, infants, and children. RCW 246-790-070 specifically addresses criteria for WIC retailers. The relevant portions state:

How do I become a WIC retailer?

(1) Retailers interested in participating in the WIC program must apply for authorization.

...

(8) Per 7 CFR 246.12(h)(3)(xxi), WIC program authorization is not a right or property interest. Authorization is discretionary and is based solely on the WIC program's determination of program need and effective administration of the program.

(9) The WIC program bases selection of authorized retailers on the following:

(a) Program need. The program mission is to improve the lifelong health and nutrition of women, infants, and children in Washington state. Meeting this mission is the foundation for selection of authorized retailers. Retailers are selected to provide clients reasonable access to the nutrition provided by WIC foods.

(b) Check volume.

(i) Retailers applying for reauthorization must take an average of at least forty checks per month in a six-month period.

(ii) Retailers with no WIC history will be on probation for one year or to the end of the contract period, whichever comes first. The WIC program will evaluate the retailer's check volume at the

end of the probationary period and may take action to end the contract.

...
(11) The WIC program must deny a retailer authorization for failure to meet any of the stated criteria.

2.4 The WIC regulations are clear regarding an applicant's interest in a WIC contract. The WIC Program's need outweighs the applicant's need.¹⁹ No applicant has a right or property interest in the WIC contract, including the Applicant. Here, the Applicant was provided a six-month probationary period to establish its check volume under WAC 246-790-070(9)(b)(ii). Finding of Fact 1.7. The Applicant was required to take an average of at least 40 WIC checks per month in the six-month period as required under WAC 246-790-070(9)(b)(i). Finding of Fact 1.7. The Applicant failed to do so. Because the Applicant failed to meet this stated WIC criteria, the WIC Program must deny the Applicant's authorization as required by WAC 246-790-070(11).

2.5 The Applicant raises two additional arguments that it believes prevented it from receiving a fair opportunity to obtain a WIC contract. The first argument was that Canyon Market did not play fair, given its illegal or unreported payment of employee salaries (payment to employees under the table). The second argument was that the WIC Program (through a phone conversation between Ms. Martell and Mr. Brotherston) promised to reauthorize the Applicant's WIC contract.

2.6 The Applicant's argument regarding Canyon Market's behavior is misplaced. Whether the Applicant qualifies for a WIC contract does not rely on what

¹⁹ Note that the Program is encouraged to consider the impact of authorization decision on small businesses. 7 CFR 246.12(g)(8). Such consideration does not outweigh the Program's needs.

other applicants do.²⁰ It relies on whether the Applicant can prove, by a preponderance of the evidence, that it met the chapter 246-790 WAC criteria. Because it did not average 40 checks per month in a six-month period, the Applicant cannot do so here.

2.7 Even if Canyon Market's behavior was relevant, the Applicant would be required to prove by a preponderance of the evidence, that the allegations regarding Canyon Market's behavior were true. The Applicant cannot do so, and presents no evidence to support those allegations. There are no reports by Labor & Industries or any other governmental agency that support the Applicant's allegations. The WIC Program is not required to find such reports, as WAC 246-10-606 clearly requires the Applicant to produce such evidence. Absent such evidence, the allegations cannot support the Applicant's WIC application.

2.8 The same problem exists for the Applicant's argument that Mr. Brotherston "promised" a WIC contract to the store. The Applicant is required to prove that Mr. Brotherston or other Program representatives provided such a promise. Ms. Martell obtained an unconditional promise during her conversation with Mr. Brotherston. Mr. Brotherston gave no unconditional promise to her, but did provide a conditional promise at best. The circumstances are insufficient as to which party is credible on this issue. As the Applicant has the burden to establish whether a promise was given, it must provide sufficient evidence to establish that promise. The Applicant fails to do so here.

²⁰ In its closing argument the WIC Program did explain that if Canyon Market is subsequently disqualified, nothing prevents the Applicant (the only other store in Klickitat) from reapplying for a WIC contract at that time.

2.9 However, even if the Applicant established that Mr. Brotherston or other Program representatives did promise Ms. Martell that the Applicant would be reauthorized for a WIC contract, such a promise is insufficient to reauthorize the Applicant's WIC contract. As provided in Paragraphs 2.3 and 2.4 above, the regulations clearly require the applicant prove it meets the applicable WIC criteria under WAC 246-790-070. The Applicant failed to do so. Any promise by a WIC Program representative, by itself, cannot overcome the regulatory requirements.

III. ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, the WIC Program's March 17, 2009 decision that denied the Klickitat Trader application for a contract to become a WIC retailer for the period 2009-2012 is AFFIRMED.

Dated this 4 day of June, 2009.

_____/s/_____
JOHN F. KUNTZ, Review Judge
Presiding Officer

NOTICE TO PARTIES

This order is subject to the reporting requirements of RCW 18.130.110, Section 1128E of the Social Security Act, and any other applicable interstate or national reporting requirements. If discipline is taken, it must be reported to the Healthcare Integrity Protection Data Bank.

Either party may file a **petition for reconsideration**. RCW 34.05.461(3); 34.05.470. The petition must be filed within 10 days of service of this order with:

Adjudicative Service Unit
P.O. Box 47879
Olympia, WA 98504-7879

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and a copy must be sent to:

Certificate of Need Program
P.O. Box 47852
Olympia, WA 98504-7852

The petition must state the specific grounds for reconsideration and what relief is requested. WAC 246-11-580. The petition is denied if the Presiding Officer does not respond in writing within 20 days of the filing of the petition.

A **petition for judicial review** must be filed and served within 30 days after service of this order. RCW 34.05.542. The procedures are identified in chapter 34.05 RCW, Part V, Judicial Review and Civil Enforcement. A petition for reconsideration is not required before seeking judicial review. If a petition for reconsideration is filed, the above 30-day period does not start until the petition is resolved. RCW 34.05.470(3).

The order is in effect while a petition for reconsideration or review is filed. "Filing" means actual receipt of the document by the Adjudicative Service Unit. RCW 34.05.010(6). This order is "served" the day it is deposited in the United States mail. RCW 34.05.010(19).

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