

**STATE OF WASHINGTON
DEPARTMENT OF HEALTH
OFFICE OF PROFESSIONAL STANDARDS**

In the Matter of WIC Vendor)	
Status of:)	Docket No. 98-01-C-1024WV
)	
ROSAUERS)	FINDINGS OF FACT,
SUPERMARKETS, INC.,)	CONCLUSIONS OF LAW,
)	AND FINAL ORDER
Respondent.)	
_____)	

A hearing was held before Health Law Judge Arthur E. DeBusschere, Presiding Officer for the Department of Health, on January 28, 1998. The hearing was held at W. 1116 Riverside, the Offices of the Attorney General, Conference Room 1, Spokane, Washington. Rebecca Waite, Program Manager, appeared on behalf of the Woman, Infants and Children Program, Department of Health (the WIC Program).

C.J. McElderry and Mike Shirts appeared for Rosauers Supermarkets, Inc. (the Respondent). The hearing was recorded by Delores Dee Maloney, Court Reporter.

I. PROCEDURAL HISTORY

1.1 In a letter dated January 7, 1998, the Program Manager denied the Respondent's request for payment of WIC checks accepted by Super 1 Foods in Colville, Washington between December 19, 1997, and December 22, 1997. Exhibit G.

12 On January 8, 1998, the Respondent appealed the denied payment on WIC checks, pursuant to WAC 246-790-120. Exhibit H.

13 On January 27, 1998, the Health Law Judge conducted by telephone a prehearing conference and, during the hearing, reported on the record the results of the prehearing conference. On January 28, 1998, the Health Law Judge conducted the

hearing, admitted Exhibits A-O, heard testimony, considered arguments from the parties and hereby issues the following:

II. THE ISSUES, WITNESSES AND EXHIBITS

2.1 Issue. Whether the WIC Program was authorized to reimburse WIC Program checks honored by the Respondent at Super 1 Foods in Colville, Washington between the dates December 19, 1997, and December 22, 1997?

2.2 Witnesses. Rebecca Waite and Susan Evans testified for the WIC Program. Kenneth D. Broderius and C.J. (Candy) McElderry testified for the Respondent.

2.3 Exhibits. The Health Law Judge admitted the following exhibits:

- Exhibit A: Federal Regulations (four pages, double sided);
- Exhibit B: WAC 246-790 (four pages, double sided);
- Exhibit C: WIC Authorization Packet (eleven pages, double sided);
- Exhibit D: Retailer Authorization Request Log (one page);
- Exhibit E: Rosauers' Request for Authorization (one page, double sided);
- Exhibit F: Memorandum of Conversation (one page);
- Exhibit G: January 7, 1998 Letter from Rebecca Waite to Ken Broderius (one page);
- Exhibit H: January 8, 1998 Letter from C.J. McElderry to Department of Health (one page);
- Exhibit I: Same document as Exhibit G immediately above
- Exhibit J: December 30, 1997 Memo from Susan Evans to C.J. McElderry (one page);
- Exhibit K: December 18, 1997 Letter from Susan Evans to C. J. McElderry (one page);
- Exhibit L: December 10, 1997 Letter from Eileen M. Hendon to Susan Evans (one page);
- Exhibit M: December 3, 1997 Letter from Susan Evans to Eileen (one page);

- Exhibit N: Short Form Contract Amendment, Contract No. 1650-W04079(1), (one page, double sided); and
- Exhibit O: December 30, 1997 Letter from C.J. McElderry to Susan Evans (one page).

III. FINDINGS OF FACTS

3.1 The Washington State Department of Health administers the WIC Program and distributes benefits through local agencies in accordance with federal rules. The purpose of the WIC Program is for the health and growth of children in their most critical stages of growth. The participants (the clients) are low income children who have nutritionally related medical conditions which are the basis for their eligibility in this program. The WIC Program provides food products which have a nutritional value and are supplemental. Local health providers (the clinics) across the state issue the WIC checks which are used by the clients to purchase food at local retailers participating in the WIC program. The WIC Program has a partnership with retailers across the state so that the clients can choose where to redeem their WIC checks.

3.2 To become authorized, the retailers are required to submit an application, which is screened within a selection criteria. A contract is signed between the retailer and the WIC Program. The WIC checks are issued to the specific store that the client elects and, in some cases, the WIC checks are issued every month. In other cases they are issued two months in advance. Usually the WIC Program needs 30 to 90 days for a retailer to receive authorization to accept WIC checks, but on rare occasions it has given authorization in less than 30 days.

3.3 Rosauers Supermarkets, the Respondent, contracted with the WIC Program as a retailer to provide the food products. The WIC Program has had a long

term and good relationship with the Respondent. In the beginning of December 1997, the Respondent purchased a store, Super 1 Foods #35 (Super 1 Foods), located in Colville, Washington.

3.4 On December 3, 1997, the Respondent contacted the WIC Program of the pending change in ownership of Super 1 Foods which had been authorized to accept WIC checks by the previous owner. Prior to December 1997, the Respondent had not known that it would be purchasing the store in Colville. The Respondent was very anxious to maintain this authorization status when the change in ownership actually occurred. At that time, the Respondent did not know when the actual change of ownership would occur. On December 3, 1997, the WIC Program sent an application packet to the Respondent.

3.5 On December 12, 1997, the WIC Program received from Respondent a completed Request for Authorization Form. The form had a statement which stated that the applicant understood that the store was liable for any checks that were honored without authorization. Exhibit F.

3.6 The WIC Program informed the Respondent that everything was in order except that a prior on-site visit had to occur. The Respondent was also informed that the WIC inspector had some family problems, but would be there shortly. Super 1 Foods had been recently inspected and had met the stocking levels required by the WIC Program. Although the WIC Program knew the size of the store and was fairly certain that there was good service, the WIC Program informed the Respondent that it could not receive authorization to accept WIC checks until an on-site visit of the store had been completed.

3.7 There were conversations between the Respondent and the WIC Program about the adequate stock supplies at the store. The Respondent gave assurance that the stock levels were adequate; it would be the same store doing business as before; and would have the same employees. The Respondent asked the Department if it could check with the clinic issuing the WIC checks to see if there were any complaints about the stock levels being inadequate. The WIC Program does monitor the retailers by checking up on complaints received at the clinics from clients. This was not done, because the WIC Program was relying on the on-site visit that was scheduled to occur at any time.

3.8 On December 18, 1997, the WIC Program decided to send the Short Form Contract Amendment (the Contract Amendment) to the Respondent even though the on-site visit had not occurred. The WIC Program hoped that the on-site visit would occur while the Contract Amendment was being signed. The Contract Amendment amended the existing contract between the Respondent and the WIC Program for purposes of adding the outlet, Super 1 Foods. The Contract Amendment provided that all other terms in the contract remained in full force and effect. The Contract Amendment did not state the effective dates or period of authorization for Super 1 Foods.

3.9 Before the WIC Program sent the Contract Amendment on December 18, 1997, the Respondent asked to fax it so that it could be signed and faxed immediately back. This would expedite the signing process and the original Contract Amendment would follow in the mail. The WIC Program refused stating that it had to follow regulations and deal with the original signatures. Although the WIC Program would not

send the Contract Amendment by overnight carrier, it did assist the Respondent in arranging for the Contract Amendment to be returned by overnight carrier. The Contract Amendment arrived by mail on December 22, 1997. The Respondent signed the Contract Amendment and sent it back by overnight carrier. It was signed by the WIC Program on December 23, 1997.

3.10 The Respondent took over ownership of Super 1 Foods on December 19, 1997. During the first weekend, the weekend of December 20-21, 1997, Ken D. Broderius, the new store manager faced a difficult situation. When WIC clients came in the store during the day on Friday, December 19, 1997, he did not accept the WIC checks and directed them to go back to the clinic to have them reissued. That Friday night after the clinic was closed, WIC clients continued to come to the store for food purchases. The clients were upset because they could not go back to the clinic, which had closed for the weekend, to have their checks reissued to them. Mr. Broderius had concerns about the welfare of the clients' children. He testified that there was one person who became hysterical and emotionally upset about the fact that she could not purchase the food products. Mr. Broderius decided let her go through, gave her the items (the infant formula and the food) that she was supposed to get, but he did not accept the check. Mr. Broderius contacted his supervisor the next morning and, as a result, he decided to accept the WIC checks Saturday and Sunday. The Respondent continued to honor the checks, waiting for the on-site visit to occur. To date, the on-site visit has not occurred.

3.11 Instead of further waiting for the on-site visit to occur, the WIC Program decided to accept the assurances in writing from the Respondent that it met minimum

stock supplies. Ms. Evans from the WIC Program telephoned Ms. McElderry on the December 30, 1997, and asked her to fax a signed statement that Super 1 Foods had adequate stock levels. The clinic had also informed the WIC Program that this was the case. When Ms. Evans received the verbal assurance from Ms. McElderry, Ms. Evans stated that the authorization was effective immediately. Ms. Evans testified that it is standard procedure to telephone the owner to inform him of the authorization so he can start accepting checks. The WIC Program would then follow up with an award letter.

3.12 In a letter dated December 30, 1997, the WIC Program notified the Respondent that it had been granted authorization for Super 1 Foods. The letter enclosed the Contract Amendment that had been signed by the parties earlier in the week. The letter did not state the effective date of the authorization. Exhibit J.

3.13 During the prehearing conference on January 27, 1998, the WIC Program informed the Respondent that the effective date for authorization was December 23, 1997 and not December 30, 1997 when the WIC Program verbally notified the Respondent that it had authorization. Prior to the prehearing conference, the Respondent had the understanding that the checks it accepted from December 19, 1997 to December 29, 1997, could not be processed because it received verbal authorization on December 30, 1997, from the WIC Program that it had authorization, effective immediately. After the prehearing conference, the Respondent was then able to submit for processing the checks it accepted from December 23, 1997, through December 30, 1997. During the period from December 19, 1997, through December 22, 1997, the WIC checks accepted by the Respondent at Super 1 Foods totaled \$526.03.

IV. ARGUMENTS OF THE PARTIES

4.1 The WIC Program's Argument. The WIC Program argued that the checks honored by the Respondent at Super 1 Foods from December 19, 1997, to December 22, 1997, were accepted by the Respondent without authorization and thus the checks cannot be processed and cashed by the Respondent. The WIC Program appreciated the customer service the Respondent provided to the clients over a difficult weekend and recognized the difficulties the Respondent had in facing a parent expecting to be able to purchase infant formula. Nevertheless, the WIC Program argued that it did not have the authority to authorize this retailer prior to the contract being signed by the WIC Program on December 23, 1997. The WIC Program maintained that the Department of Health has a policy not to accept signed contracts by fax, but pointed out that this is a policy and not a regulation. The WIC Program argued that the Respondent could have limited its liabilities over the weekend by giving out a partial amount of food or it could have contacted a local church to obtain the food and formula. The WIC Program recognized that the Respondent made a good faith effort to hold the checks accepted before the verbal authorization given on December 30, 1997, and that the Respondent did not try to process them.

4.2 The Respondent's Argument. The Respondent argued that the authorization be made retroactive to December 18, 1997, when it was issued. The Respondent maintained that no new information was received by the WIC Program. No on-site visit has occurred after the change in ownership of Super 1 Foods. The Respondent maintained that the authorization could have occurred before December 18, 1997, and that the contract signing had been unnecessarily delayed. The

Respondent argued that faxed documents are accepted as legal in terms of contracts when followed up by the original. The WIC Program could have gone by this accepted procedure and if the WIC Program had not received the original, then it could have withdrawn the offer retroactively. The Respondent stated that it does this faxing of contracts regularly as part of its business. The Respondent recognized that the WIC Program was trying very hard to have the Contract Amendment completed in time and to follow its regulations.

4.3 The Respondent pointed out that it was a new retailer in town and wanted to take care of these clients under the WIC Program. The Respondent felt it could not turn the WIC clients down over the weekend by just saying to them that the store did not have authorization to accept WIC checks, because of paper work not being completed with the WIC Program. These clients are mothers who are emotional and are claiming that their children will starve and that they cannot feed their children unless they receive the formula and food supplements. The Respondent was aware that these WIC clients normally do not have other resources.

4.4 Responding to the WIC Program's argument that Super 1 Foods could have limited its liabilities by giving only partial amounts of food, the Respondent asserted that the WIC clients have limited or no transportation and that they can come to town only once a week or so. Living in the outlying areas, the WIC clients just cannot come back the following weekday to have their checks reissued. This made it impractical to provide just a limited amount of the food products. The Respondent further asserted that it was new in the community and was unable to refer the clients to local charities during this weekend. The new store manager, Mr. Broderius, was not

familiar with the local network to get help from the community in case of severe needs of customers.

4.5 The Respondent acknowledged that it had been informed by the WIC Program that the checks would not be processed unless the Respondent had authorization. The Respondent pointed out that it did not process these checks in question which were accepted prior to December 30, 1997. The Respondent did not want to mislead or defraud the WIC Program by trying to do something before having the proper authorization. The Respondent assumed that it had authorization effective the date verbally provided by the WIC Program on December 30, 1997.

V. CONCLUSIONS OF LAW

5.1 The WIC program was established by the Child Nutrition Act of 1966, now codified with subsequent amendments as 42 U.S.C. §1786 et seq. The Food and Nutrition Service within the United States Department of Agriculture administers the program and provides funds to the State of Washington, Department of Health, WIC Program for distribution of benefits in accord with federal rules.

5.2 The purpose of the WIC Program is to serve as an adjunct to health care by providing nutritious food, nutrition education, health screening and referral services to pregnant and breast-feeding women, infants, and children in certain high-risk categories. WAC 246-790-050(1). The WIC Program has incorporated by reference into its administrative rules the federal regulations governing the WIC Program (7 CFR Part 246). WAC 246-790-050(2). The Department of Health has jurisdiction over this matter.

5.3 Clinics across the state issue the WIC checks to clients to purchase food at local retailers participating in the WIC Program. Retailers are required to enter into written contracts with the department. WAC 246-790-080(3)(c). 7 CFR Ch. II, Subpart

E, Sect. 246.12(f). In this case, the Respondent had a contract with the WIC Program and was attempting to amend its contract to add Super 1 Foods, a new store which it had just purchased.

5.4 Only food vendors authorized by the State agency may redeem food instruments or otherwise provide supplemental foods to participate. 7 CFR Ch. II, Subpart E, Sect. 246.12(e). WAC 246-790-100(1)(h). The previous owner of Super 1 Foods had a contract as a retailer to accept WIC checks. Since the store was being sold, the contract between the WIC Program and the former owner of Super 1 Foods was null and void. 7 CFR Ch. II, Subpart E, Sect. 246.12(f)(2)(xix).

5.5 The retailer is required to notify the WIC Program of any change of ownership no later than the tenth of the month prior to the effective date of the change. WAC 246-790-085(28). In this case, the Respondent notified the WIC Program of the change of ownership of Super 1 Foods on December 3, 1997, which was as soon as it learned that the store was being purchased. The Respondent was requesting to be authorized by the time it took over ownership. It usually takes the WIC Program 60 to 90 days to process authorization for a retailer, but on rare occasions the WIC Program has authorized a store in less than 30 days. Thus, the WIC Program was attempting to facilitate the authorization process to accommodate the Respondent's request. Super 1 Foods had been recently inspected and had met the stocking levels required by the

WIC Program. There had been a good working relationship between the WIC Program and the Respondent under its existing contract.

56 When the request for authorization was submitted by the Respondent, the WIC Program notified the Respondent that Super 1 Foods had complied with all the requirements to be authorized, except that there needed to be a documented on-site visit prior to initial authorization of a new vendor. 7 CFR Ch. II, Subpart E, Sect. 246.12(e)(1). See WAC 246-790-070(c). The Respondent had assured the WIC Program that Super 1 Foods was meeting minimum stock levels and had asked the WIC Program to check with the clinic to see if there had been any complaints to date regarding Super 1 Foods. The Respondent informed the WIC Program that, even though the Super 1 Foods would be under new ownership, the store and the employees would be the same. The WIC Program arranged for the on-site visit of Super 1 Foods and both parties were waiting for this to occur.

5.7 “Authorized” or “authorization” means the applicant retailer has met selection criteria and signed a contract with the department signifying eligibility to participate in the WIC program. WAC 246-790-010(3). The Respondent had a contract with the WIC Program and the Contract Amendment to add Super 1 Foods was entered into by the parties. The Contract Amendment was being exchanged while the parties were expecting the on-site visit to occur. The Contract Amendment was exchanged; the Respondent signed it on December 22, 1997, and the WIC Program signed it on December 23, 1997. The on-site visit did not occur and on December 30, 1997, the WIC Program contacted the Respondent to obtain a written assurance that the store was meeting minimum stock levels to serve WIC clients. The Respondent immediately submitted a letter to this effect and the WIC Program called the Respondent on December 30, 1997, informing the Respondent that it had authorization to accept WIC checks.

5.8 The issue in this case is when the Respondent became authorized to accept WIC checks. The Department maintained that authorization became effective when the WIC Program signed the contract on December 23, 1997. The Respondent maintained that the authorization should have become effective on December 18, 1997.

5.9 “Authorization is valid for no longer than the period stated in the contract. The retailer must reapply to be considered for authorization in the WIC program.” WAC 246-790-080(3)(c). Here, the Contract Amendment added Super 1 Foods as an outlet under its existing contract, but the Contract Amendment failed to state the period for which the authorization of Super 1 Foods was valid. This was a material omission.

5.10 The Court of Appeals has addressed the duty of the court to determine the intention of the parties when a material omission in the contract has occurred.

It is elementary contract law that the primary factor to be considered in determining the meaning of a written contract is the intention of the parties. Where the terms of the contract taken as a whole are plain and unambiguous, the meaning will be deduced from its language alone, without resort to parol evidence or any other aids to construction. But if the language of a contract is ambiguous, or has material omissions, it becomes the duty of the court to determine the intention of the parties by viewing the contract as a whole and considering all of the circumstances leading up to its execution, including the subject matter and the subsequent acts and conduct of the parties. See Boeing Airplane Co. v. Firemen's Fund Indem. Co., 44 Wn.2d 488 , 268 P.2d 654, 45 A.L.R.[2d] 984 (1954).

(emphasis added). Point Adams Packing v. Daubenspeck, 21 Wn. App. 250, 254, 584 P.2d 479(1978) citing Dennis v. Southworth, 2 Wn. App. 115 , 120, 467 P.2d 330 (1970).

5.11 After considering all of the circumstances leading up to the Contract Amendment's execution, including the subject matter and the subsequent acts and conduct of the parties, the Presiding Officer concludes that the period of authorization for Super 1 Foods began on December 18, 1997. The parties recognized that an extended authorization process was not necessary, because client services would continue as before. Super 1 Foods was currently meeting minimum stock levels and the Respondent, who had a good working relationship with the WIC Program, provided assurances that the stock levels were adequate. The Respondent already had a contract with the WIC Program, but it needed amending to include the new outlet, Super 1 Foods. The parties were acting in concert, were of the same mind that matters were in order and attempted to expedite the Contract Amendment. Had the parties included the authorization period in the Contract Amendment, the Presiding Officer concludes that they would have intended to set the beginning authorization date at December 18, 1997, when the Contract Amendment was sent to the Respondent. An order should be entered directing the WIC Program to allow the Respondent to process the WIC checks it accepted from the clients (in the amount of \$526.03) during the period from December 19, 1997, through December 22, 1997.

VI. FINAL ORDER

Based upon the Procedural Findings, Findings of Fact, the Argument of the Parties and the Conclusions of Law above, the Health Law Judge hereby issues the following ORDERS:

6.1 The WIC Program's decision in a letter dated January 7, 1998, denying to accept WIC checks, which totaled \$526.03, accepted by the Respondent at Super 1 Foods from December 19, 1997, through December 22, 1997, is REVERSED;

6.2 Accordingly, the WIC Program shall accept for processing the WIC checks (in the amount of \$526.03) that the Respondent accepted from the clients at Super 1 Foods in Colville, Washington, during the period from December 19, 1997, through December 22, 1997.

THE PARTIES ARE FURTHER ADVISED, pursuant to RCW 34.05.461 and RCW 34.05.470, that within ten (10) days of service of this Order you may file a petition for reconsideration with the Adjudicative Clerk Office, Department of Health, P.O. Box 47879, Olympia, Washington 98504-7879. The petition shall state the specific grounds upon which relief is requested. The petition for reconsideration shall not stay the effectiveness of this Final Order. The petition is deemed to have been denied if, within twenty (20) days of the date of its filing, the Department has not disposed of your petition or has not served you with written notice specifying the date by which action will be taken on your petition.

"Filing" means actual receipt of the document by Adjudicative Clerk Office. RCW 34.05.010(6). This Order was "served" upon you on the day it was deposited in the United States mail. RCW 34.05.010(18).

Proceedings for judicial review may be instituted by filing a petition in the Superior Court in accord with the procedures specified in Title 34 RCW, Part V, Judicial Review and Civil Enforcement. The petition for judicial review must be filed within thirty (30) days after you have been served with this Final Order, as provided by

