



State of West Virginia
DEPARTMENT OF HEALTH AND HUMAN RESOURCES
Office of Inspector General
Board of Review
2699 Park Avenue, Suite 100
Huntington, WV 25704

Earl Ray Tomblin
Governor

Michael J. Lewis, M.D., Ph. D.
Cabinet Secretary

December 12, 2011

Dear -----:

Attached is a copy of the Findings of Fact and Conclusions of Law on your hearing held November 30, 2011. Your hearing request was based on the Department of Health and Human Resources' action to disqualify you from the Women, Infants, and Children's (WIC) Program based on a program abuse with an underlying monetary claim in excess of \$100.00.

In arriving at a decision, the State Hearing Officer is governed by the Public Welfare Laws of West Virginia and the rules and regulations established by the Department of Health and Human Resources. These same laws and regulations are used in all cases to assure that all persons are treated alike.

Eligibility for the WIC program is based on current policy and regulations. Some of these regulations state that the local agency will assign appropriate sanctions for payee or proxy abuses, including attempting to sell or actually selling food instruments, food or formula for cash to other persons or entities, and that the disqualification period for these abuses may also result in disqualification of up to one year for a monetary claim of \$100.00 or more (West Virginia WIC Policy & Procedures, Chapter 1.06.A).

The information submitted at your hearing revealed that you did attempt to sell formula and the Department was correct to establish a one year program disqualification based on the dollar amount of the monetary claim.

It is the decision of the State Hearing Officer to **uphold** the Department's action to disqualify you from the WIC Program.

Sincerely,

Todd Thornton
State Hearing Officer
Member, State Board of Review

cc: Erika H. Young, Chairman, Board of Review
June Rhodes, Department Representative

**WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES
BOARD OF REVIEW**

IN RE: -----,

Claimant,

v.

ACTION NO.: 11-BOR-1871

**WEST VIRGINIA DEPARTMENT OF
HEALTH AND HUMAN RESOURCES,**

Respondent.

DECISION OF STATE HEARING OFFICER

I. INTRODUCTION:

This is a report of the State Hearing Officer resulting from a fair hearing concluded on December 12, 2011, for ----- . This hearing was held in accordance with the provisions found in the Common Chapters Manual, Chapter 700 of the West Virginia Department of Health and Human Resources. This fair hearing was convened on November 30, 2011 on a timely appeal, filed September 7, 2011.

II. PROGRAM PURPOSE:

The mission of the Office of Nutrition Services' Women, Infants, and Children's (WIC) Program is to improve the Health of Women, Infants, and Children in West Virginia through the provision of nutrition and breast feeding counseling, health monitoring and the provision of nutritious supplemental foods.

III. PARTICIPANTS:

-----, Claimant
-----, Claimant's witness
-----, Claimant's witness
June Rhodes, Department representative
Cindy Pillo, Department's witness

Presiding at the Hearing was Todd Thornton, State Hearing Officer and a member of the State Board of Review.

All persons offering testimony were placed under oath.

IV. QUESTION TO BE DECIDED:

The question to be decided is whether or not the Department was correct to disqualify the Claimant from WIC Program participation for one year.

V. APPLICABLE POLICY:

West Virginia WIC Policies & Procedures Manual

VI. LISTING OF DOCUMENTARY EVIDENCE ADMITTED:

Department's Exhibits:

- D-1 Printout of online advertisement
- D-2 Memo from -----to -----, dated September 2, 2011
- D-3 Disqualification Letter for Program Abuse, dated September 2, 2011
- D-4 Certification forms
- D-5 Excerpt from Food Code Book
- D-6 Food Instrument History printout for -----
- D-7 Food Instrument copies
- D-8 Food Instrument stubs
- D-9 WIC Participant Agreement
- D-10 Request for Proxy Form

VII. FINDINGS OF FACT:

- 1) Cindy Pillo, Assistant Director for the Department's Women, Infants, and Children's (WIC) Program, testified that the Department determined the Claimant placed an advertisement (Exhibit D-1) online for a type of formula available through the WIC, and notified the Claimant (Exhibit D-3) on or about September 2, 2011 of WIC program disqualification. The notice states, in pertinent part (emphasis in original):

You and all your family members are being disqualified from the West Virginia WIC Program beginning September 20, 2011. The value of the formula you are attempting to sell is **\$599.60**. In order to not be disqualified for a time period of **12 months**, you must pay back the entire amount to the West Virginia State WIC Program or return all the items for sale to your local WIC office. Should you make full restitution (pay back) to the WIC Program, you will be disqualified for a time period of three months; you may reapply for benefits after December 19, 2011. If you choose not to reimburse the West Virginia State WIC Program or return the food items, you may reapply for benefits after September 20, 2012.

The reason for this disqualification is: **Attempting to sell or actually selling formula for cash to other persons or entities.**

- 2) A printout (Exhibit D-1) of the online advertisement states, in pertinent part:

I have 40 cans of Similac with Isomil for sale will take 6 dollars a can or 240 for them all or best offer.
Can call 3049662590 if interested.

- 3) Ms. Pillo testified that she determined, from the Department's computer system, that the phone number in this advertisement belonged to the Claimant, an active WIC recipient. She testified that she called this phone number, and verified the Claimant's name and address as listed in Department records, and confirmed the Claimant still had the cans of formula available for sale. The Claimant had no dispute that she had cans of formula available for sale.
- 4) The Claimant, her mother -----, and her father ----- testified that they purchased additional cans of formula at yard sales and flea markets, and that these cans – not the cans obtained through WIC purchases – were the cans offered for sale online. The Claimant testified that she accumulated too many cans of formula, and the advertisement was to sell the accumulated excess cans.
- 5) -----testified that she did not have receipts documenting her formula purchases at yard sales or flea markets. She testified that she did not know the type of formula the Claimant's daughter was using, and that she purchased "any I could find." She testified that if she purchased the wrong type, she added water to the powder formula mix and used it to feed her animals.
- 6) -----testified that he purchased up to twenty cans of formula at a time from yard sales or flea markets. He testified that he continued to buy formula after the Claimant's daughter was no longer using it because he was not aware of this until there were too many cans of formula. He testified that "a lot of" the cans offered for sale by the Claimant were those obtained through his non-WIC purchases.
- 7) The Department presented certification forms (Exhibit D-4) for the Claimant's daughter, with a food package code of "3011," which corresponds with a formula type of "Isomil Advance" in powder form, as noted in an excerpt from the Department's Food Code Book (Exhibit D-5). A food instrument history (Exhibit D-6) for the Claimant's daughter also lists the same food package code, as well as issuance and pickup dates.

- 8) Copies of the food instruments (Exhibit D-7) were additionally provided by the Department, showing the signature of the Claimant or her proxy, and the endorsement and deposit information on the reverse of the documents. Two of these documents – voucher number 3262296 and voucher number 3262297 – were signed by the Claimant, marked with a “first date to spend” of August 20, 2011, and endorsed by the WIC vendor on the afternoon of August 21, 2011. These vouchers represent purchases of seven cans of powder formula, and the purchase amounts are \$59.96 and \$44.97, respectively. The online advertisement (Exhibit D-1) for formula was placed on the evening of August 21, 2011.
- 9) The West Virginia WIC Policies & Procedures Manual, Chapter 1.06.A, states, in pertinent part (emphasis in original):

A. Abuses and Assigned Sanctions

The Local Agency will assign appropriate sanctions for the following payee/proxy abuses upon instruction by the State Agency. Abuses (1-7) may also result in the repayment to the State WIC Agency the value of food benefits improperly received/disposed of. The disqualification period for these abuses may also result in disqualification of up to one year, for a monetary claim of \$100.00 or more.

The second abuse listed is “[a]ttempting to sell or actually selling or attempting to exchange or actually exchanging food instruments, food or formula for cash or other items of value, to other persons or entities.”

VIII. CONCLUSIONS OF LAW:

- 1) Policy for the WV WIC program requires sanctions for program abuse, including the sale or attempted sale of food instruments, food or formula obtained through the program to another person or entity for cash. There is no dispute from the Claimant that she placed an online advertisement to sell cans of powdered formula; however, the Claimant disputes the origin of the formula for sale, contending that it was obtained through non-WIC purchases in yard sales and at flea markets. The testimony offered by the Claimant and her parents in support of this contention is unconvincing for several reasons. First, there are no receipts to document the purchases. Second, the Claimant’s mother testified that when she purchased the incorrect type of formula, she simply mixed it with water and used it to feed her animals; if this were the case for incorrect purchases, it seems that it would be the case for excessive purchases as well, and there never would have been a need to place an advertisement to sell formula. Third, the Claimant’s father testified that of the formula offered for sale, “a lot” of the cans were obtained through non-WIC purchases, stopping short of saying all the cans were; any such sale constitutes a violation. Finally, the Claimant purchased seven cans of formula

on the same date that she placed an online advertisement to sell formula, and the Claimant testified that her daughter consumed between four and six cans of formula per week, making the likelihood that she consumed seven cans of formula on the afternoon of August 21, 2011 virtually zero. The formula offered for sale by the Claimant must have included cans obtained through WIC purchases, and the Department was correct to disqualify the Claimant from WIC participation based on this program abuse.

- 2) The policy for the WIC program additionally allows a disqualification period of one year when the underlying monetary claim is at least \$100.00. The total of the two August 21, 2011 purchases alone exceed this threshold. The Department was correct to disqualify the Claimant from WIC participation for one year.

IX. DECISION:

It is the decision of the State Hearing Officer to **uphold** the action of the Department to terminate and disqualify the Claimant from WIC participation for one year.

X. RIGHT OF APPEAL:

See Attachment

XI. ATTACHMENTS:

The Claimant's Recourse to Hearing Decision

Form IG-BR-29

ENTERED this _____ Day of December, 2011.

Todd Thornton
State Hearing Officer