

STATE OF WASHINGTON
DEPARTMENT OF HEALTH
ADJUDICATIVE SERVICE UNIT

In the Matter of:

Master Case No. M2017-755

and

FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND INITIAL ORDER

Appellants.

APPEARANCES:

and , the Appellants, Self-represented

Department of Health WIC Program (Program), by
Office of the Attorney General, per
Assistant Attorney General

PRESIDING OFFICER: Matthew R. Herington, Health Law Judge

The Appellant requested a fair hearing to contest the WIC Program's¹ Notice of Claim for Reimbursement Letter, dated July 3, 2017. On August 22, 2017, the Presiding Officer (on authority delegated by the Secretary of Health) conducted a fair hearing in this matter. Claim for Reimbursement AFFIRMED.

ISSUES

- A. Did the Appellants commit a WIC participant violation as defined in 7 C.F.R. § 246.2?
- B. Did the Program properly pursue a claim in the amount of \$348.46 against the Appellants pursuant to 7 C.F.R. § 246.23(c)(1)(i)?

¹ Special Supplemental Nutrition Program for Women, Infants and Children

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SUMMARY OF PROCEEDINGS

At the hearing, the WIC Program presented the testimony of Anthony Valenzuela; [redacted], WIC Investigator; and [redacted], WIC Investigator. [redacted] testified on behalf of the Appellants.

The Presiding Officer admitted the following Program exhibits:

- Exhibit P-1: Copy of WIC Investigation Summary, dated June 22, 2017;
- Exhibit P-2: Copy of Formula from Facebook advertisement;
- Exhibit P-3: Copy of WIC Client Group/Family Information Summary, dated June 21, 2017;
- Exhibit P-4: Copy of Placement Letters from EV's biological parents, received by WIC on June 1, 2017, dated August 21, 2016, and September 2, 2016;
- Exhibit P-5: Copy of Redeemed WIC Checks for EV, Issued November and December, 2016;
- Exhibit P-6: Copy of [redacted] and [redacted] Facebook profiles;
- Exhibit P-7: Copy of Washington State Department of Licensing Driver's License Photos and Vehicle Information for [redacted] dated March 13, 2017;
- Exhibit P-8: Copy of Facebook correspondence between [redacted] and DOH WIC Investigator [redacted], dated March 13, 2017, through March 16, 2017;
- Exhibit P-9: Copy of DOH WIC Compliance Buy Report (Online Sales), dated March 16, 2017;
- Exhibit P-10: Copy of Photo of [redacted] and Investigator [redacted] exchanging WIC Formula for Cash;

Exhibit P-11: Copy of WIC Compliance Team Undercover Petty Cash Funds Disbursement Request by DOH Investigator, dated March 12, 2017;

Exhibit P-12: Copy of DOH WIC Program Evidence/Property Form, dated March 16, 2017;

Exhibit P-13: Copy of WIC Participant Rights and Responsibilities signed by, dated September 20, 2016;

Exhibit P-14: Copy of Email from DOH Investigator to DOH Investigator regarding phone contact with, dated July 14, 2017;

Exhibit P-15: Copy of DOH Notice of Claim for Reimbursement to, dated July 3, 2017; and

Exhibit A-1: Copy of text messages from phone.

The Notice of Claim for Reimbursement in this matter named only, whereas the caption in the August 1, 2017, Scheduling Order, named only. At the beginning of the hearing, the Program moved to amend the caption in this case to include both names. Given that, have participated in all stages of these proceedings, and both were listed as WIC caregivers for EV, the motion was GRANTED. See WAC 246-10-202.

I. FINDINGS OF FACT

1.1 The federal Special Supplemental Nutrition Program for Women, Infants, and Children (WIC) provides supplemental foods and nutrition education to pregnant, postpartum and breastfeeding women, infants, and young children from families with inadequate income through payment of cash grants to states that operate WIC food delivery systems. The Department of Health (DOH) administers the WIC Program in

Washington state, and the DOH's WIC operations are to comply with the most current version of 7 C.F.R. § 246. WAC 246-790-001; RCW 43.70.120.

1.2 EV was born in January 2016.

1.3 _____ and _____ are a married couple who live together along with five children. EV, the _____ nephew, was placed in the care of _____, in September 2016.

1.4 The Program subsequently certified _____ as WIC participant caregivers for EV on September 20, 2016.

1.5 On September 20, 2016, _____ signed a "Rights and Responsibilities" form. By doing so, _____ agreed that she would comply with multiple WIC rules, including the following:

- Make sure any person I name to use my checks knows the WIC rules. I will teach him or her how to use my checks correctly.
- Not sell or give away my WIC checks, foods, or formula. If I have WIC items I can't use, I will return them to the clinic.
- Not trade my WIC checks, foods, or formula for money, credit, rain checks, or other items.
- Not post WIC items on the internet.

See Exhibit P-13.

1.6 Between November 2016 and January 2017, _____ used WIC checks to purchase 28 cans of Similac Advance infant formula, as well as multiple Gerber baby food containers.

1.7 On March 13, 2017, WIC Investigator [redacted] saw an advertisement that had been posted on Facebook by [redacted]. The advertisement showed a photograph of nine cans of Similac Advance infant formula and read, in part, as follows:

“15 cans that expires at the end of 2019 Make me a deal”

1.8 Investigator Coss conducted a search of the Department of Licensing (DOL) database for [redacted]. The DOL database indicated that two vehicles were registered to [redacted] and one vehicle was registered to [redacted]. Investigator [redacted] also received copies of photographs of both [redacted] from the DOL.

1.9 Later on March 13, 2017, Investigator [redacted] contacted [redacted] via Facebook Messenger, indicating that she wanted to purchase all 15 cans of formula. [redacted] responded that he would sell all 15 cans of formula to Investigator Coss for \$100.

1.10 After additional contacts via Facebook Messenger over the next couple of days, Investigator [redacted] and [redacted] agreed to a location to complete the transaction.

1.11 On March 16, 2017, at an agreed upon time, Investigator [redacted] met with [redacted] outside a store in Moses Lake, Washington. Investigator Coss confirmed that it was [redacted] comparing his face with the photographs she had obtained from the DOL. In addition, [redacted] was observed to be driving a vehicle registered to [redacted]. In exchange for \$100,

gave Investigator 15 cans of Similac Advance infant formula, as well as 21 containers of Gerber baby food.

1.12 On June 22, 2017, Investigator unsuccessfully attempted to contact to discuss the matter.

1.13 On July 3, 2017, the Program sent a Notice of Claim for Reimbursement. The July 3, 2017, Notice assessed a claim in the amount of \$348.46.

1.14 contacted WIC Investigator on July 14, 2017. During the phone call, admitted giving Investigator Coss Gerber baby food that had been purchased with WIC benefits. However, contended that the WIC formula that he sold was formula that he had purchased on Facebook.

1.15 appealed the July 3, 2017, Notice on August 1, 2017, via a Fair Hearing Request. In the Fair Hearing Request, represented that the formula cans he had sold were not purchased with WIC funds but were purchased from someone on Facebook.

1.16 The claim of \$348.46 is based on the retail value of 15 cans of Similac Advance formula (\$236.70) and the retail value of 21 containers of Gerber baby food (\$11.76), plus the money given to by Investigator in exchange for the formula and baby food (\$100.00).

Credibility Findings

1.17 The Appellants do not dispute that provided the Similac Advance formula to Investigator in exchange for \$100.

also does not dispute giving the Gerber baby food to Investigator

although he contends it was not given in exchange for the money. The Appellants argue that the formula they sold was not purchased with WIC funds, but rather was purchased on Facebook from a man named [REDACTED]. The [REDACTED] contend they purchased 23 cans of formula from [REDACTED]. After considering all of the testimony and documentary evidence presented, the [REDACTED] version of events is deemed not credible.

First of all, the [REDACTED] used WIC checks to purchase 28 cans of WIC formula in September through December of 2016. Given that this was also the time that EV was beginning to transition to milk in lieu of formula, it is unlikely that EV consumed all of those WIC cans. Given the relatively large number of cans purchased using WIC benefits, it is also not likely that the [REDACTED] purchased an additional 23 cans from [REDACTED].

Secondly, the [REDACTED] argued that the WIC formula purchased via Facebook were kept in a separate location from the WIC formula purchased using WIC benefits. Other than [REDACTED] testimony, no evidence of this was provided. Consequently, it is more likely that any formula purchased over Facebook was mixed with WIC formula purchased with WIC benefits.

Finally, the [REDACTED] were unable to produce a receipt from [REDACTED] indicating exactly how many cans of formula they purchased. Although screenshots of text message communications with [REDACTED] were provided, the text messages purporting to show the sales were not included. [REDACTED] did not testify during the hearing.

Based on the totality of the evidence, the Presiding Officer finds that it is more likely than not that the _____ sold formula and baby food purchased with WIC benefits to the investigator.

II. CONCLUSIONS OF LAW

2.1 The Secretary of Health (and by delegated authority, the Presiding Officer) has jurisdiction over the Appellants' request for a fair hearing in this matter.

2.2 The WIC Program bears the burden of proving the allegations set forth in the Notice of Claim by a preponderance of the evidence. WAC 246-10-606. A preponderance of the evidence means that the proposition at issue is more probably true than not true. *Mohr v. Grant*, 108 P.3d 768, 773 (2005).

2.3 Pursuant to 7 C.F.R. § 246.12(u)(1), the WIC Program must implement procedures to control WIC participant violations. Pursuant to 7 C.F.R. § 246.2, a participant violation is defined as:

any deliberate action of a participant, parent or caretaker of an infant or child participant, or proxy that violates Federal or State statutes, regulations, policies, or procedures governing the Program. Participant violations include, but are not limited to, deliberately making false or misleading statements or deliberately misrepresenting, concealing, or withholding facts, to obtain benefits; selling or offering to sell WIC benefits, including cash-value vouchers, food instruments, EBT cards, or supplemental foods in person, in print, or online; exchanging or attempting to exchange WIC benefits, including cash-value vouchers, food instruments, EBT cards, or supplemental foods for cash, credit, services, non-food items, or unauthorized food items, including supplemental foods in excess of those listed on the participant's food instrument; threatening to harm or physically harming clinic, farmer, or vendor staff; and dual participation.

NOTICE TO PARTIES

When signed by the presiding officer, this order shall be considered an initial order. RCW 18.130.095(4); Chapter 109, law of 2013 (Sec. 3); WAC 246-10-608.

Any party may file a written petition for administrative review of this initial order stating the specific grounds upon which exception is taken and the relief requested. WAC 246-10-701(1).

A petition for administrative review must be served upon the opposing party and filed with the adjudicative clerk office within 21 days of service of the initial order. WAC 246-10-701(3). "Filed" means actual receipt of the document by the Adjudicative Clerk Office. RCW 34.05.010(6). "Served" means the day the document was deposited in the United States mail. RCW 34.05.010(19). The petition for administrative review must be filed within twenty-one (21) calendar days of service of the initial order with:

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

and a copy must be sent to the opposing party. If the opposing party is represented by counsel, the copy should be sent to the attorney. If sending a copy to the Assistant Attorney General in this case, the mailing address is:

Agriculture and Health Division
Office of the Attorney General
P.O. Box 40109
Olympia, WA 98504-0109

Effective date: If administrative review is not timely requested as provided above, this initial order becomes a final order and takes effect, under WAC 246-10-701(5), at 5:00 pm on _____. Failure to petition for administrative review may result in the inability to obtain judicial review due to failure to exhaust administrative remedies. RCW 34.05.534.

Final orders will be reported as required by law. Final orders will be placed on the Department of Health's website, and otherwise disseminated as required by the Public Records Act (Chap. 42.56 RCW). All orders are public documents and may be released.

For more information, visit our website at: <http://www.doh.wa.gov/hearings>

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