

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

In the Matter of:

Master Case No. M2016-896

Appellant.

**CORRECTED FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND INITIAL ORDER**

APPEARANCES:

the Appellant, Self-represented

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

PRESIDING OFFICER: Matthew R. Herington, Health Law Judge

On September 13, 2016, the Presiding Officer (on authority delegated by the Secretary of Health) conducted a fair hearing in this matter. The Appellant requested a fair hearing to contest the WIC Program's¹ Notice of Claim for Reimbursement Letter, dated August 30, 2016. Claim for Reimbursement **AFFIRMED**.

CORRECTION

This Findings of Fact, Conclusions of Law, and Initial Order was originally served on October 11, 2016. On October 17, 2016, the Presiding Officer discovered that the Order contained an incorrect effective date in the section titled "Notice to Parties." Under the rationale of Civil Rule (CR) 60(a) and the

¹ Special Supplemental Nutrition Program for Women, Infants and Children.

**CORRECTED FINDINGS OF
FACT, CONCLUSIONS OF LAW,
AND INITIAL ORDER**

Page 1 of 10

Master Case No. M2016-896

significant decision *In re Jantz*, OPS No. 90-07-31-065 MA (June 28, 1993), the correction is entered below.

ISSUES

Did the Appellant improperly dispose of WIC benefits as the result of a participant violation as defined in 7 C.F.R. § 246.2?

Did the Program properly establish a claim in the amount of \$50.99 against the Appellant pursuant to 7 C.F.R. § 246.23(c)(1)(i)?

SUMMARY OF PROCEEDINGS

At the hearing, the Program presented the testimony of _____, WIC Compliance Team Supervisor; and _____, WIC Investigator. The Appellant testified on her own behalf and presented the testimony of _____, Appellant's mother.

The Presiding Officer admitted the following exhibits:

- Exhibit P-1: Copy of the WIC Nutrition Program Confidential Client information Detail Report, dated July 5, 2016, WIC0002-WIC0012;
- Exhibit P-2: Copy of WIC Rights and Responsibilities signed by Appellant, dated August 24, 2015, WIC0013-WIC0014;
- Exhibit P-3: Copy of Transacted WIC Check No. 13559175 and Check History, dated October 22, 2015, WIC 0017;
- Exhibit P-4: Copy of Craigslist Advertisement of Nutramigen, WIC0002-WIC0012
- Exhibit P-5: Copy of text messages between Appellant and WIC Investigator _____, WIC0022-WIC0031;
- Exhibit P-6: Copy of Department of Health (DOH) Investigation Summary and photographs of buy, dated July 6, 2016, WIC0037-WIC0045; WIC0034-0035;

**CORRECTED FINDINGS OF
FACT, CONCLUSIONS OF LAW,
AND INITIAL ORDER**

Page 2 of 10

Master Case No. M2016-896

Exhibit P-7: Copy of Appellant's Washington State Department of Licensing Photo and Vehicle Report, WIC0032-WIC0033; WIC0036;

Exhibit P-8: Copy of DOH Certified Letter Notice of Claim for Reimbursement with enclosures, dated August 4, 2016, WIC0047-0059;

Exhibit P-9: Copy of Corrected DOH Investigation Summary of buy, dated July 6, 2016, WIC0072-WIC0074; WIC0060; and

Exhibit P-10: Copy of DOH Certified Letter Notice of Claim for Reimbursement with enclosures, dated August 30, 2016, WIC0061-0071.

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'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 KMH-1 was born in June 2015. The Program certified the Appellant to be a WIC caregiver on behalf of KMH-1 on August 18, 2015. See Exhibit P-1.

1.3 On August 24, 2015, the Appellant signed a "Rights and Responsibilities form." By doing so, the Appellant agreed that she would comply with multiple WIC rules, including the following:

- Not sell or give away my WIC check, 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-2.

1.4 In September and October 2015, KMH-1 was experiencing difficulties with feeding. As of September 14, 2015, KMH-1 began eating Nutramigen formula. See Exhibit P-1.

1.5 On October 22, 2015, the Appellant reported to her local WIC clinic that Nutramigen was causing KMH-1 to have watery diarrhea, sometimes with blood. Nonetheless, the Program issued the Appellant a WIC check that could be used to purchase six 12.6 ounce cans of Nutramigen powdered formula. Later on October 22, 2015, the Appellant subsequently used that WIC check to purchase six cans of formula from a grocery store. See Exhibit P-1 and Exhibit P-3.

1.6 On October 28, 2015, the Appellant used another WIC check to purchase Alimentum, a different type of formula. KMH-1 tolerated Alimentum well and continued to receive Alimentum from WIC from that date forward.

1.7 On May 3, 2016, WIC Investigator saw an advertisement that had been posted on Craigslist by the Appellant. The advertisement read, in part, as follows:

I have two different Brands [sic] of infant formula! 4 can [sic] Gerber Gentlease I payed [sic] \$18 a can and 5 cans Nutramigen I payed [sic] \$25 a can I also have 5 big containers of rice cereal. My son has a milk allergy and we could no longer use them! They

have never been open and our [sic] just taking up space. Make Offer!

1.8 Later on May 3, 2016, Investigator [redacted] responded to the advertisement, indicating that she would purchase five cans of Nutramigen and five containers of cereal. The Appellant responded that she had one can of Nutramigen available, in addition to some cereal.

1.9 Investigator [redacted] subsequently searched the Appellant's name in the Program's Client Information Management System (CIMS). As a result of her query, Investigator [redacted] learned that the Appellant was listed as an active WIC caregiver for KMH-1. The CIMS also indicated that the Appellant had used a WIC check to purchase six cans of Nutramigen on October 22, 2015.

1.10 After exchanging additional text messages with each other later in May 2016, Investigator [redacted] and the Respondent agreed to a purchase price and a location to complete the transaction.

1.11 On May 18, 2016, at the agreed time, Investigator [redacted] met with the Appellant outside a grocery store in Nine Mile Falls, Washington. The Appellant gave Investigator [redacted] one can of Nutramigen formula and two bags of infant cereal in exchange for \$25 dollars.²

1.12 Investigator [redacted] subsequently conducted a search of the Department of Licensing (DOL) database using the license plate number of the car driven by the Appellant to the grocery store. The DOL database indicated that the car was registered

² The WIC Program does not allege that the Appellant purchased the infant cereal using WIC funds.

to the individual listed as KMH-1's alternate WIC caregiver. Investigator also obtained a copy of the Appellant's DOL photograph and confirmed that the Appellant was the individual who had sold her the Nutramigen. See Exhibit P-7.

1.13 On July 6, 2016, Investigator contacted the Appellant for an interview. The Appellant at first denied knowledge of Nutramigen formula, but then admitted that she had talked to someone about disposing of excess Nutramigen formula.

1.14 On August 4, 2016, the Program sent the Appellant a Notice of Disqualification and Claim for Reimbursement. The August 4, 2016, Notice assessed a claim in the amount of \$104.95, as well as indicated that the Appellant could be disqualified for one year if she failed to pay the claim.

1.15 The Appellant appealed the August 4, 2016, Notice on August 25, 2016.

1.16 After a review of the record, the Program determined that the August 4, 2016, Notice contained an incorrect claim amount. On August 30, 2016, the Program sent the Appellant a new Notice of Claim for Reimbursement indicating that it sought a claim of \$50.99, and that it did not seek a disqualification.

1.17 The claim of \$50.99 is based on the retail value of a can of Nutramigen formula (\$25.99) plus the money given to the Appellant in exchange for the formula (\$25.00).

Credibility Finding

1.18 The Appellant does not contest the fact that she sold a can of Nutramigen formula to Investigator. Rather, the Appellant argues that the formula she sold to

Investigator [redacted] was not purchased with WIC benefits. For several reasons, the Appellant's argument is deemed not credible.

First, although the Appellant expressed difficulties with the use of Nutramigen on October 22, 2015, the Appellant used a WIC check to purchase Nutramigen on that same date. The Appellant then redeemed another WIC check for cans of Alimentum formula just six days later. Given that the Appellant had just reported to the WIC clinic that Nutramigen was causing KMH-1 to have watery diarrhea, it is unlikely that the Appellant continued to feed Nutramigen to KMH-1 after another formula was available. Furthermore, it is highly improbable that KMH-1 went through six 12.6 ounce cans of infant formula in just a six-day time period.

Secondly, Investigator [redacted] credibly testified that the Appellant told her she was "not familiar" with Nutramigen when Investigator [redacted] contacted her for an interview; in fact, Investigator [redacted] recorded that statement in print the same day as the interview. However, it is exceedingly unlikely that the Appellant was "not familiar" with Nutramigen given that: (1) she previously reported that Nutramigen was causing KMH-1 to have watery diarrhea in October 2015; and (2) she had just sold Nutramigen to Investigator [redacted] in May 2016. Moreover, the Appellant admitted to Investigator [redacted] that she had talked with someone about how to dispose of leftover Nutramigen.

Finally, the Appellant claims seven cans of Nutramigen were purchased with personal or family funds in September 2015, in addition to the six cans purchased with the WIC check on October 22, 2015. The Appellant was unable to provide a receipt to support proof of such a purchase. In addition, [redacted], did not have a good

memory of Nutramigen formula purchases that may have been made in September 2015.

Based on the totality of the evidence, the Presiding Officer finds that it is more likely than not that the Appellant used WIC benefits to purchase Nutramigen formula, and then deliberately sold such formula in exchange for cash.

II. CONCLUSIONS OF LAW

2.1 The Secretary of Health (and by delegated authority, the Presiding Officer) has jurisdiction over the Appellant's 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.

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.

2.4 7 C.F.R. § 246.23(c)(1)(i), requires the Program to establish a claim against a participant for the full value of program benefits if it determines that a participant improperly disposed of program benefits as the result of a participant violation.

2.5 The WIC Program has proved by a preponderance of the evidence that the Appellant committed a participant violation by selling WIC benefits in violation of 7 C.F.R. § 246.2, and that WIC benefits have been disposed of improperly as the result of that participant violation. Consequently, the Program is entitled to a repayment of \$50.99.

III. ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is **ORDERED:**

3.1 The WIC Program's Notice of Claim for Reimbursement, dated August 30, 2016, is **AFFIRMED**.

3.2 The Appellant **SHALL** reimburse the sum of **\$50.99** to the WIC Program of the Department of Health. Pursuant to 7 C.F.R. § 246.9(k)(3), the WIC Program shall resume its efforts to collect the claim.

Dated this 18 day of October, 2016.

/s/
MATTHEW R. HERINGTON, Health Law Judge
Presiding Officer

NOTICE TO PARTIES

When signed by the presiding officer, this order shall be considered an initial order. 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 twenty-one (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/PublicHealthandHealthcareProviders/HealthcareProfessionsandFacilities/Hearings.aspx>

**CORRECTED FINDINGS OF
FACT, CONCLUSIONS OF LAW,
AND INITIAL ORDER**

Page 10 of 10

Master Case No. M2016-896