

## **Section 10**

# **APPEAL RIGHTS AND HEARING PROCEDURES**

## Appeal Rights and Hearings

Vendors shall have the right to appeal (request for a fair hearing) certain adverse actions of the Department as set forth in the Federal Regulations, Arizona WIC Program Policies and Procedures and the Vendor Manual.

Adverse actions subject to administrative review include:

1. Denial of authorization, unless authorization is subject to the procurement procedures applicable to the Department, termination of the Vendor Contract, imposition of an administrative fine or civil money penalty.
2. Disqualification, unless the disqualification is the result of disqualification from the Food Stamp Program.
3. Determination of a Vendor's peer group status or status as an Above-50-Percent Vendor.

Adverse actions not subject to administrative reviews (a fair hearing) include:

1. The validity or appropriateness of the Department's Vendor limiting or selection criteria.
2. The validity or appropriateness of the Department's participant access criteria and the Department's participant access determination.
3. The validity or appropriateness of the Department's Vendor peer group criteria and the criteria used to identify Vendors that are Above-50-Percent Vendor or comparable to Above-50-Percent Vendors.
4. The validity or appropriateness of the Department's prohibition of incentive items and the Department's denial of an Above-50-Percent Vendor's request to provide an incentive item to customers.
5. The Department's determination whether a Vendor had an effective policy and program in effect to prevent trafficking and that the ownership of the Vendor was not aware of, did not approve of, and was not involved in the conduct of the violation.
6. The Department's determination whether to notify a Vendor in writing when an investigation reveals an initial violation for which a pattern of violations must be established in order to impose a sanction.
7. The Department's determination to include or exclude an infant formula manufacturer, wholesaler, distributor, or retailer from the Arizona WIC Program Infant Formula Suppliers list.
8. Denial of authorization if the Department's Vendor authorization is subject to the procurement procedures applicable to the Department.
9. The expiration of the Vendor's Contract.
10. Disputes regarding food instrument payments and Vendor claims (other than the opportunity to justify or correct a Vendor overcharge or other error) as permitted by 7 CFR § 246.12 (k) (3).
11. Disqualification of a Vendor as a result of disqualification from the Food Stamp Program.

Except for violations that seriously affect public health, safety or welfare, as described below, a Vendor whose Contract is terminated before the expiration of the Contract or who is disqualified from the WIC Program may remain on the Program until the effective date of the final order or the date that the Vendor Contract expires, whichever occurs first. A request for a fair hearing (including the informal settlement conference) does not extend the Vendor's Contract beyond its expiration date nor does it require the Department to contract with the Vendor for the new contract cycle.

Contract denials and Vendor disqualifications due to trafficking conviction or a conviction of selling firearms, ammunition, explosives, or controlled substances (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)) in exchange for food instruments will be effective on the date the Vendor receives notice of the adverse action.

If the Director finds that the Vendor has engaged in violations of the Contract, Federal Regulations or this Vendor Manual, and the activity affects the public health, safety or welfare, the Director may issue an order terminating the Vendor's Contract effective fifteen (15) calendar days from the date the Vendor receives the order. The Department shall provide the Vendor with the opportunity for a hearing. The hearing shall be promptly instituted and determined. The order shall contain the hearing date and time.

The hearing shall be conducted according to the standards established below. If there is a conflict between the Vendor Manual and A.R.S. § 41-1092 through A.R.S. § 41-1092.12, the Arizona Revised Statutes take precedence over the Vendor Manual.

The Department shall render a final administrative decision within ninety (90) calendar days from the date the Department received the Vendor's request for a fair hearing.

If, during the fair hearing process, the appellant requests a time continuance of the fair hearing, the appellant's request for a continuance is an expressed waiver of the ninety (90) calendar day decision deadline imposed upon the Department.

The Arizona WIC Program sends out important information that can assist you (Vendors) in maintaining compliance with your Arizona WIC Program Vendor Contract. Therefore, it is essential that you accept/pick up **all** certified mail sent to you from the Department. Examples of items that may be sent to you via certified mail are replacement food instruments; contract related items (including some WIC Alerts); sanctions; lost/stolen food instruments; and training notices.

### **Procedure**

1. The Department shall provide a certified written notice to the Vendor applicant of the denial of the Contract application and to the current Vendor of termination, administrative fine, civil money penalty, or disqualification, which includes the effective date of the action and the steps to request an administrative review. The written notice shall reflect all violations. The Department shall mail notification by certified mail to the Vendor Applicant or current Vendor at least thirty (30) calendar days before the effective date of the termination, administrative fine or disqualification.
2. The Vendor Applicant or current Vendor can request a fair hearing, which must be in writing and postmarked within thirty (30) calendar days of receiving the notice of denial of its WIC Vendor application, assessment of an administrative fine or when termination or disqualification of the Vendor Contract occurs. In addition to the fair hearing, pursuant to A.R.S. § 41-1092.06, you have the right to request an informal settlement conference during the fair hearing process. The request for a fair hearing or informal settlement conference shall include a statement of the facts asserted and the relief sought. If the Vendor Applicant or current Vendor intends to be represented by an attorney, the name, address and phone number of the attorney should be included in the request.
3. The request for a fair hearing shall be submitted to the **Clerk of the Department, Arizona Department of Health Services, 1740 West Adams, Suite 200, Phoenix, Arizona 85007**. The request for informal settlement conference shall be submitted to the **Arizona Department of Health Services, Bureau of USDA Nutrition Programs, WIC Program Integrity Manager, 150 North 18<sup>th</sup> Avenue, Suite 310, Phoenix, Arizona 85007**. If a Vendor Applicant or current Vendor fails to request a fair hearing within the time and in the manner established in this Section, the Vendor Applicant or current Vendor shall waive its right to any administrative review to which it may otherwise be entitled. This waiver is construed as acceptance of the Department action. **The Department will not accept fax copies in lieu of an original document.**

### **Fair Hearings**

#### Acceptance of Request for Fair Hearing

The Clerk of the Department shall obtain a fair hearing date, time and place if it receives a timely written request for a fair hearing and the Vendor applicant or current Vendor is entitled to a fair hearing according to the prerequisites established in this Section.

The Clerk of the Department shall send notice to the Vendor Applicant or current Vendor of the date, time and place of the fair hearing.

If you request an informal settlement conference, the Department will hold the conference within fifteen (15) calendar days after receiving the request. This request must be filed no later than twenty (20) calendar days before the fair hearing date.

The Director of the Department does not conduct the hearing. The Office of Administrative Hearings appoints an Administrative Law Judge to conduct the hearing and to make findings of facts, conclusions of law and recommended decision, which is sent to the Director (A.R.S. § 41-1092.08.) The Director can accept, reject, or modify the Administrative Law Judge's decision within thirty (30) days after the date the Office of Administrative Hearings sent a copy of the recommended decision to the Director.

If the Director declines to take review the decision within the prescribed thirty (30) day period, then the recommended decision becomes the final decision (A.R.S. § 41-1092.08.) The final administrative decision is subject to rehearing or judicial review as provided by A.R.S. § 41-1092.09 and § 12-901, *et seq.*

#### Denial of Request for Fair Hearing

If the Director denies the request for a fair hearing, the Department shall provide the Vendor Applicant or current Vendor with a written copy of the decision stating the reasons for denial.

#### Service of Written Notice

The Vendor Applicant or current Vendor and the Department shall assure that service of any written notice made is filed with the **Clerk of the Department, Arizona Department of Health Services, 1740 West Adams, Suite 200, Phoenix, Arizona 85007**. Service shall be made by personal delivery, or certified mail; return receipt requested to the last known address of the person or authorized representative of the Vendor Applicant or current Vendor as indicated on the Contract on file with the Department.

Service on the Department shall be made in person or by registered, certified or first class mail to the **Arizona Department of Health Services, Bureau of USDA Nutrition Programs, WIC Program Integrity Manager, 150 North 18<sup>th</sup> Avenue, Suite 310, Phoenix, Arizona 85007**. Proof of service shall be filed with the Clerk of the Department at the address indicated above.

#### Appearances

At a fair hearing, the Vendor Applicant or current Vendor may represent himself or herself. A Vendor Applicant or current Vendor who is a partnership may be represented by a partner. A Vendor Applicant or current Vendor shall pay for its own legal representation, if applicable.

#### Pre-hearing Conferences

The Administrative Law Judge may schedule a pre-hearing conference upon his or her own motion or at the request of the Vendor Applicant or current Vendor or Department. The pre-hearing conference can be used to discuss settlement, stipulations, clarification of issues, rulings on the identity and limitations of the number of witnesses, objections to the admission of documents or the expertise of witnesses, the use of telephone testimony as a substitute for proceedings in person, the order of presentation of witnesses, rulings regarding the issuance of subpoenas, discovery orders and protective orders, and any other matter that will promote an orderly, fair and prompt hearing.

The Administrative Law Judge shall issue an order following the pre-hearing conference to memorialize the matters determined at the conference. The Administrative Law Judge may authorize all or part of a pre-hearing conference to be conducted by telephone as long as each participant in the conference has an opportunity to participate in the entire proceeding.

#### Pleadings, Legal Memoranda and Motions

The Administrative Law Judge may give the Vendor Applicant or current Vendor and the Department the opportunity to file legal memoranda, motions, objections, offers of settlement, pleadings, proposed findings of fact and conclusions of law.

## Computation of Time

### 1. Vendor Manual

In computing any time period established by this Section of the Vendor Manual, the time shall be computed in **calendar days** and no additional time shall be given for mailing.

### 2. Appeal Time Period with Office of Administrative Hearings

In computing any time period, the Office of Administrative Hearings shall exclude the day from which the designated time period begins to run. The Office of Administrative Hearings shall include the last day of the period unless it falls on a Saturday, Sunday, or legal holiday. When the time period is ten (10) days or less, the Office of Administrative Hearings shall exclude Saturdays, Sundays, and legal holidays.

## Vendor Applicant or current Vendor's Right to Review Case File

The Vendor Applicant or current Vendor shall have the right to review the case file on which the Department bases its action prior to and during the fair hearing. It is at the discretion of the Administrative Law Judge whether to grant or deny a party's request for written interrogatories, requests for admission, depositions, and other forms of discovery. If all parties to a case stipulate to such discovery, it shall be conducted under the guidance of the Administrative Law Judge.

## Continuances

Any request for a continuance must be in writing and addressed to the Administrative Law Judge with a copy sent to each party. A party shall file a written response stating any objection to the motion within five (5) days of service, or as directed by the Administrative Law Judge. It is at the discretion of the Administrative Law Judge to grant or deny the continuance.

## Default

If a Vendor Applicant or current Vendor fails to appear at a hearing, the Administrative Law Judge may proceed with the presentation of the evidence of the appearing party, or vacate the hearing and return the matter to the agency for any further action.

## Subpoenas

The Administrative Law Judge may issue subpoenas at the request of any party.

A request for a subpoena shall be in writing, filed with the Office of Administrative Hearings. The request shall include:

1. The caption and docket number of the matter;
2. A list or description of any documents sought;
3. The full name and home or business address of the custodian of the documents sought or all persons to be subpoenaed;
4. The date, time and place to appear or to produce documents pursuant to the subpoena;
5. The name, address and telephone number of the party, or the party's attorney, requesting the subpoena, and if required by the Administrative Law Judge; and
6. A brief statement of the relevance of testimony or documents.

The person to whom a subpoena is issued shall comply with its provisions unless, prior to the hearing date, the Administrative Law Judge grants a written request to quash or modify the subpoena. Any request to quash or modify a subpoena shall state the reasons why the Administrative Law Judge should grant the request. The Administrative Law Judge shall grant or deny the request in an Order.

The party requesting the subpoena shall be responsible to serve it on the person to whom it is directed.

### Stipulations: Disposition of Cases

The parties to a proceeding may stipulate in writing about any fact involved in the controversy. The parties shall file the stipulation with the Administrative Law Judge. Such a stipulation shall be used as evidence at the fair hearing and shall be binding on all parties. Parties are requested to agree on facts when practicable.

### Ex-Parte Communications

Neither party, legal counsel or any person who may be affected by the outcome of a case may communicate, either directly or indirectly, with the Director, Department personnel who assist the Director in rendering a decision, or the Administrative Law Judge concerning any substantive issue related to the proceeding prior to the issuance of a final decision and order, except in the presence of all parties or their counsel, or if by written motion with copies to the Clerk of the Department, and all parties and their counsel.

Anyone receiving a prohibited communication shall file a copy of the communication or a summary of the oral communication with the Office of Administrative Hearings with a copy to each party and their legal counsel. The Administrative Law Judge shall give all other parties reasonable opportunity to respond to the communication.

### Official Record of the Proceeding

The Office of Administrative Hearings shall maintain an official record of the proceeding that shall include:

1. Notices, pleadings, motions and memoranda filed by the parties and Orders of the Administrative Law Judge;
2. Evidence presented;
3. Matters officially noticed;
4. Any decision, opinion, recommended decision, order or report of the Administrative Law Judge and the Director.

The Office of Administrative Hearings shall tape record the fair hearing. The recording of the hearing shall not be transcribed unless a party files an Administrative Review Action pursuant to Title 12, Chapter 7, Article 6 of Arizona Revised Statutes.

### Evidence

All witnesses at a fair hearing shall testify under oath or affirmation. All parties shall have the opportunity to present testimony and documentary evidence and to conduct cross-examination of witnesses. All relevant evidence is admissible, but the Administrative Law Judge may exclude evidence if its probative value is outweighed by the danger of unfair prejudice, by confusion of the issues or by consideration of undue delay, waste of time, or needless presentation of cumulative evidence. The Administrative Law Judge can apply the rules of evidence to the proceeding and may admit hearsay.

The submitting party shall provide a copy of each exhibit to each party. All evidence offered shall be subject to appropriate and timely objection. When ordered by the Administrative Law Judge, the parties shall exchange copies of exhibits prior to or at the fair hearing.

### Recommended Decision

The Administrative Law Judge shall render a recommended decision pursuant to A.R.S. § 41-1092.08.

The Administrative Law Judge bases his/her decision solely on applicable statutes, regulations, policies and procedures, including the policies and procedures established by the Department. The Administrative Law Judge applies these standards to the factual evidence presented at the hearing. The Administrative Law Judge does not determine the validity of Federal or State requirements.

A recommended decision shall include separately stated findings of fact, conclusions of law, and the reasoning for the recommended decision.

The experience, technical competence, or specialized knowledge of the Administrative Law Judge may be utilized in evaluating evidence.

The Administrative Law Judge may allow the parties a designated amount of time after the hearing to submit proposed findings of fact and conclusions of law. The Administrative Law Judge shall issue a recommended decision to the Director within twenty (20) calendar days after conclusion of the hearing or after submission of proposed findings and conclusions.

The Director may transmit a copy of the recommended decision to each party who shall then have the time established by the Director to file a memorandum of objections or exceptions to it. The memorandum shall detail reasons why the recommended decision is in error, with appropriate citations to the record, statutes, rules and other authority. The Director may consider such memorandum in making a decision but shall not consider untimely or unsupported memoranda. A recommended decision shall not be subject to a request for review, rehearing or judicial review.

#### Director's Decision

Within thirty (30) calendar days after receipt of any recommended decision from the Administrative Law Judge, the Director will issue a decision. The final decision shall be issued within ninety (90) calendar days following the initial request of the fair hearing.

#### Rehearing or Review of Decision

Any party to a hearing before the Department who is aggrieved by a final decision rendered in a case may file a motion with the Director, within thirty (30) calendar days from the date of service of the final administrative decision, a written motion for rehearing or review of the decision. The request shall specify the particular grounds for rehearing or review. The requesting party shall serve copies of the request upon all other parties.

The opposing party may file a response to the request for rehearing or review within fifteen (15) calendar days after the date the motion is filed with the Director. The Director may require the filing of supplemental memoranda on the issues raised in the motion and may provide for oral argument.

A rehearing or review of the decision may be granted for any of the following causes, which materially affect the requesting party's rights:

1. Irregularity in the proceeding of the hearing or an abuse of discretion that deprived the party of a fair hearing;
2. Misconduct by the Administrative Law Judge or the prevailing party;
3. Accident or surprise which could not have been prevented by ordinary prudence;
4. Newly discovered material evidence which could not with reasonable diligence have been discovered and produced at the original hearing;
5. Excessive or insufficient penalties;
6. Error in the admission or rejection of evidence or other errors of law occurring at the hearing; or
7. The decision is not supported by the evidence or is contrary to law.

The Director may affirm or modify the decision or grant a rehearing to the requesting party on all or part of the issues for any of the reasons set forth above. An order granting a rehearing shall specify the grounds on which the rehearing is granted, and the rehearing shall cover only those matters specified. All parties to the hearing may participate as parties at a rehearing.

#### Effectiveness of Orders

Unless otherwise stated in the Director's decision, a decision becomes a final administrative decision when the decision is rendered. The final administrative decision may be appealed pursuant to Title 12, Chapter 7, Article 6.

#### Appeal to Superior Court

The Director's final administrative decision after a fair hearing is subject to judicial review under Title 12, Chapter 7, Article 6. Appeal to Superior Court must be made on or before the thirty-fifth (35<sup>th</sup>) calendar day after notification was received of the Director's final decision.

### Attorney's Fees and Costs

In the event the Vendor initiates an action, appeal, or suit against the Department, relating to the terms of this Contract, in any administrative or judicial tribunal of competent jurisdiction, and the Department prevails, the Vendor shall pay the Department's reasonable attorney's fees and costs.

The administrative or judicial tribunal of competent jurisdiction where the action, appeal, or suit was adjudicated may determine the Department's attorneys' fees and costs. The department is considered to prevail when:

1. The Vendor's position was not substantially justified; and
2. The Department prevailed as to the most significant issue or set of issues.

The Department shall submit its petition for reasonable attorneys' fees and costs to any administrative or judicial tribunal of competent jurisdiction within **twenty (20) calendar days** after the final decision. The Department's petition shall provide the following information to the administrative or judicial tribunal:

- A. Evidence of the Department's eligibility for attorneys' fees and costs;
- B. The amount sought; and
- C. An itemized statement from the attorney(s) and expert(s) stating:
  1. The actual time spent representing the Department; and
  2. The rate at which the fees were computed.