

8.06 Fair Hearing Policy for Vendors

POLICY:

The State Agency will provide a hearing procedure whereby a food Vendor adversely affected by a State Agency action may appeal the action.

PROCEDURE:

A. Notification of Right to Request a Fair Hearing

1. The right to request a fair hearing will be granted when a food Vendor's application to participate is denied or, during the course of the vendor agreement, when a Vendor is disqualified or other adverse action which affects participation is taken.
2. Expiration of a vendor agreement with a food Vendor and/or sanctions which do not pertain to disqualification will **not** be subject to appeal.
3. The Vendor must be informed in writing of their right to request a fair hearing and the method to request a fair hearing when they are found to be ineligible, or they are disqualified from participation in the WIC Program.

B. Notification of WIC Program Policies and Federal Regulations

1. The Vendor may request a pre-hearing conference to discuss the topic(s) prior to the actual fair hearing.
 - a. The pre-hearing conference is an informal meeting between the State Agency and the Vendor representative.
 - b. The State Agency will explain the reason(s) for the action taken and the Vendor representative will be allowed to share any pertinent information which the Vendor believes that the State Agency should be informed about.
 - c. The pre-hearing conference is an option offered to the Vendor to resolve misunderstandings or it may simply act to define or consolidate the issues to be addressed during the fair hearing.
2. If, as a result of the pre-hearing conference, the State Agency representative finds that the information upon which the State Agency based its action is incorrect, or if for any other reason the State Agency representative determines that the action taken is inappropriate, the State Agency may reverse or modify the action.
3. If the State Agency finds that the action was appropriate, the proposed action will remain in effect unless it is reversed at the fair hearing.
4. When the Vendor continues to want a fair hearing after the pre-hearing conference, the State Agency will distribute to the Vendor:
 - a. Information on fair hearing procedures;

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- b. A discussion of their rights and responsibilities;
- c. The role of the Hearing Officer; and
- d. Other pertinent information.

C. Time Limit for Requesting a Fair Hearing

1. The Vendor must request a fair hearing within fifteen (15) days of the date the State Agency mails or gives the written notice of adverse action to assess sanction points, to deny participation, to disqualify or, to terminate the Vendor Agreement.
2. The Vendor must use the **Appeals Request form** (see **Policy 8.06 Attachment #1**) to request a fair hearing. No other form or method of requesting a fair hearing will be accepted in lieu of this form.

D. Denial or Dismissal of Request

1. The State Agency will not deny or dismiss a Vendor's right to request a fair hearing involving a sanction assessment, denial of participation, or, disqualification unless:
 - a. The request is not received within the fifteen (15) day time limit;
 - b. The request involves a previous action taken by the agency in which a fair hearing has already been held and a decision rendered;
 - c. The request involves a previous action taken by the agency in which a request was made but not held as it was either abandoned or withdrawn by the Vendor or their representative;
 - d. The request involves a disqualification from the WIC Program which is a result of Vendor being disqualified from SNAP;
 - e. The request involves the State Agency's determination on what constitutes inadequate participant access;
 - f. The request is withdrawn in writing by the Vendor or their representative; or
 - g. The Vendor or their representative fails, without good cause, to appear at the scheduled hearing.

E. Continuation of Vendor Authorization

The Vendor found to be ineligible for WIC Program participation at any time during the vendor agreement period will be notified in writing fifteen (15) days before termination of the vendor agreement of the reason(s) for termination of the agreement.

1. When the Vendor appeals the termination of their vendor agreement within the fifteen (15) days advance adverse notice period, they may continue to accept food drafts from the WIC Program participants until the Hearing Officer reaches a

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decision.

- a. The Vendor will **immediately** cease accepting food benefits and will be liable for all over charges and erroneous payments incurred both before and after the fifteen (15) days following the receipt of the notification of the adverse action if the hearing decision is against the Vendor.
 - b. Once a hearing decision to uphold the State Agency's action to terminate the vendor agreement has been made, the Vendor will be notified of the date that the disqualification will go into effect.
 - c. The Vendor will no longer be authorized to accept food benefits once the hearing decision to uphold the State Agency's action is rendered unless the vendor elects to proceed to the Judicial Review level.
 - d. No payments will be made for food benefits accepted after the termination date unless the vendor has elected to proceed to the Judicial Review level.
2. The Vendor has the option not to redeem food benefits during the hearing process.

F. Policy and Procedure

The State Agency will process each request for a fair hearing according to policy and will make the fair hearing policies and procedures available for public inspection and copying.

1. A copy of **Policy 8.06 Fair Hearing Policy for Vendors**, and the **Appeals Request Form** (see **Attachment #1**) will be issued to the Vendor upon receipt of a request for a fair hearing.
2. The **Appeals Request Form** (see **Attachment #1**) will be completed by the Vendor representative and sent to the State Agency to request a fair hearing.
3. The State Agency will immediately notify the State Board of Review of receipt of a request for a fair hearing.

G. State Agency

The State Agency will send the personnel who make the decisions regarding the appellant to the fair hearing in order to explain why the appellant was denied participation, assessed sanction points, disqualified, or terminated from the WV WIC Program. State Agency personnel will:

1. Appear at the fair hearing to testify regarding the sanction action, denial, disqualification, or termination.
2. State exactly how they came about making the decision regarding the appellant.

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3. Explain each step within the decision-making process as it pertains to the appellant.
4. Inform the Hearing Officer of the policy and procedure upon which they relied to make the decision regarding the appellant.

H. Hearing Officer

Fair hearings will be conducted by an officer of the WV Department Of Health And Human Resources, Office Of Inspector General, State Board of Review who does not have any personal stake or involvement in the decision and who was not directly involved in the initial determination of the action being contested. The Hearing Officer is responsible for the following:

1. To notify the appellant and the State Agency Director of the hearing location, date and time with a **minimum** of ten (10) days advance written notice.
 - a. The fair hearing will be held in Charleston, West Virginia, unless otherwise agreed to by the State Agency and the Hearing Officer.
 - b. The initial hearing will be scheduled within thirty (30) days from the date the State Agency received the request for a fair hearing.
 - c. The Vendor may reschedule a hearing date a maximum of one (1) time. A third hearing date will be granted only if the State Agency determines that the Vendor has shown good cause for failure to attend the first two (2) hearings.
2. To maintain an updated copy of the **West Virginia WIC Policy and Procedure Manual**. A copy of the fair hearing policy will be included with the written notice to the appellant.
3. To administer oaths of affirmation.
4. To ensure all relevant issues are considered.
5. To request, receive and make part of the hearing record all evidence determined necessary to decide the issues being raised.
6. To regulate the conduct of the fair hearing to be consistent and orderly.

I. Conduct of the Hearing

1. The Vendor or their representative will have an opportunity to:
 - a. Examine the evidence to support the decision under appeal prior to and during the hearing;
 - b. Be assisted or represented by an attorney (at the Vendor's own expense)

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- or other person;
- c. Bring witnesses;
- d. Advance arguments without undue interferences;
- e. Question or refute any testimony or evidence, including an opportunity to confront and cross examine adverse witnesses; and
- f. Submit evidence to establish all pertinent facts and circumstances in the case.

J. Hearing Decisions

1. Decisions of the Hearing Officer will comply with Federal Law, 7 CFR §246.18, **State WIC Policy, WV WIC Vendor Handbook**, and will be factually based on the hearing record.
2. The decision will be binding on the State Agency and will summarize the facts of the case, specify the reasons for the decision, identify supporting evidence and relevant regulations or policy. The decision will become a part of the record.
3. The decision of the Hearing Officer will not be based upon the appropriateness of a State Agency policy, but instead will be made on the fair, correct and equitable application of established policies and procedures.
4. Within **ninety (90)** days of receiving the hearing request by the **Vendor**, the Vendor or the Vendor's representative and the State Agency Director will be notified in writing of the decision. The Vendor may continue to operate as an authorized West Virginia WIC Vendor when the decision is in their favor. **In accordance with 7 CFR §246.18(b)(9) this ninety (90) day timeframe is only an administrative requirement for the State Agency and does not provide a basis for overturning the State Agency's adverse action if a decision is not made within the specified timeframe.**
5. All State Agency hearing records will be available to the appellant or representative at any reasonable time period.
 - a. All records will be kept on file until all issues are resolved, or until the end of a three (3) year and one-hundred fifty (150) day period, whichever is later.
6. The fair hearing records can include but are not limited to: the verbatim transcript or recording of testimony; an official report containing the substance of what transpired at the hearing; and all papers and requests filed in the proceeding.
7. **If the decision results in disqualification of the Vendor, the State Agency will also terminate the Vendor Agreement.**

K. Appeal of Unfavorable Fair Hearing Decision

1. The fair hearing will be conducted in conformance with USDA Regulations.
2. If the decision of the Hearing Office is unfavorable to the Vendor, the decision will include explanation of appellant's right to pursue Judicial Review.

L. Adverse Actions Subject to Administrative Appeal

1. Denial of authorization based on the application of the vendor selection criteria for minimum variety and quantity of authorized supplemental foods (246.12(g)(3)(i)), or on a determination that the vendor is attempting to circumvent a sanction (246.12(g)(6));
2. Termination of an agreement for cause;
3. Disqualification; and
4. Imposition of a fine or a civil money penalty in lieu of disqualification.
5. Denial of authorization based on the vendor selection criteria for business integrity or for a current SNAP disqualification or civil money penalty for hardship (246.12(g)(3)(ii) and (g)(3)(iii));
6. Denial of authorization based on the application of the vendor selection criteria for competitive price (246.12(g)(4));
7. The application of the State Agency's vendor peer group criteria and the criteria used to identify vendors that are above-50-percent vendors or comparable to above-50-percent vendors;
8. Denial of authorization based on a State agency-established vendor selection criterion if the basis of the denial is a WIC vendor sanction or a SNAP withdrawal of authorization or disqualification;
9. Denial of authorization based on the State Agency's vendor limiting criteria (246.12(g)(2));
10. Denial of authorization because a vendor submitted its application outside the timeframes during which applications are being accepted and processed as established by the State agency under 246.12 (g)(8);
11. Termination of an agreement because of a change in ownership or location or cessation of operations (246.12(h)(3)(xvii));
12. Disqualification based on a trafficking conviction (246.12(l)(l)(i));
13. Disqualification based on the imposition of a SNAP civil money penalty for

hardship (246.12(l)(2)(ii); and

14. Disqualification or a civil money penalty imposed in lieu of disqualification based on a mandatory sanction imposed by another WIC State Agency (246.12(1)(2)(iii).
15. A civil money penalty imposed in lieu of disqualification based on a SNAP disqualification under 246.12(l)(l)(vii) and,
16. Denial of an application based on a determination of whether an applicant vendor is currently authorized by SNAP.

M. Adverse Actions Not Subject to Administrative Appeal

1. The validity or appropriateness of the State Agency's vendor limiting criteria (246.12(g)(2) or vendor selection criteria for minimum variety and quantity of supplemental foods, business integrity, and current Supplemental Nutrition Assistance Program disqualification or civil money penalty for hardship (246.12(g)(3);
2. The validity or appropriateness of the State Agency's selection criteria for competitive price (246.12(g)(4), including, but not limited to, vendor peer group criteria and the criteria used to identify vendors that are above-50-percent vendors or comparable to above-50-percent vendors;
3. The validity or appropriateness of the State Agency's participant access criteria and the State Agency's participant access determinations;
4. The State Agency's determination to include or exclude an infant formula manufacturer, wholesaler, distributor, or retailer from the list required pursuant to 246.12(g)(11);
5. The validity or appropriateness of the State Agency's prohibition of incentive items and the State Agency's denial of an above-50-percent vendor's request to provide an incentive item to customers pursuant to 246.12(h)(8);
6. The State Agency'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, pursuant to 246.12(l)(3);
7. The State Agency'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 (246.12(l)(l)(i)(B);
8. Denial of authorization if the State Agency's vendor authorization is subject to the procurement procedures applicable to the State Agency;

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9. The expiration of a vendor's agreement;
10. Disputes regarding food instrument or cash-value voucher payments and vendor claims (other than the opportunity to justify or correct a vendor overcharge or other error, as permitted by 246.12(k)(3); and
11. Disqualification of a vendor as a result of disqualification from SNAP (246.12(l)(l)(vii).

REFERENCES:

1. WIC Regulation: 7 CFR 246.18 Administrative Review of State Agency Actions

ATTACHMENTS:

1. Appeals Request