STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

J & L BABY FOOD CENTER,

Petitioner,

vs.

DEPARTMENT OF HEALTH,

Respondent.

Case No. 01-0274

RECOMMENDED ORDER

The parties having agreed mutually to submit this case for a determination based on stipulated facts and evidence according to an agreed-upon procedure in lieu of a formal evidentiary proceeding, and Administrative Law Judge John G. Van Laningham of the Division of Administrative Hearings having convened a telephone conference on July 11, 2001, to hear the parties' arguments on the so-called "Phase 1" issues, which will be described below, this matter is now ripe for adjudication.

APPEARANCES

For Petitioner: Steven J. Tornberg, Esquire
Dean R. Halper, P.A.
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Delray Beach, Florida 33446

For Respondent: Michael E. Cover, Esquire
Department of Health
1350 Northwest 14th Street
Miami, Florida 33125

STATEMENT OF THE ISSUES

In their joint stipulation, the parties framed the issues for determination in Phase 1 of this proceeding as follows:

> a. Whether a reasonable trier of fact can infer from the "Phase 1 Evidence" that Petitioner committed the infraction of a pattern of overcharging.
>
> b. Whether the "Phase 1 Evidence," which is assumed to be admissible, true, and accurate, for purposes of Phase 1, is sufficient for the trier of fact to find that the Department has met its burden of proving by clear and convincing evidence that Petitioner engaged in a pattern of overcharging.

PRELIMINARY STATEMENT

In a certified letter dated November 20, 2000, the Department of Health ("Department") notified J & L Baby Food Center ("J&L") that it intended to disqualify J&L from participating as an authorized vendor in the Special Supplemental Nutrition Program for Women, Infants and Children for a three-year period because, the Department contended, J&L consistently had been overcharging program participants.

On January 8, 2001, J&L filed with the Department its Amended Petition for Formal Administrative Hearing. Ten days later, the Department referred the matter to the Division of Administrative Hearings, whereupon it was assigned to the undersigned Administrative Law Judge.

After the case was set for final hearing, the parties contacted the undersigned and, over the course of two telephone conferences on June 4 and 5, 2001, developed a mutual proposal to postpone the planned evidentiary hearing in favor of a "Phase 1" proceeding, limited to the Department's case-in-chief, which would be presented on stipulated facts and evidence. The idea was that if the Department's unimpeached evidence were either legally insufficient to establish a prima facie case or, alternatively, insufficiently persuasive to meet the Department's burden of proof, then an order could be entered recommending dismissal of the charge against J&L, obviating the need for an evidentiary hearing. If, however, in the judgement of the Administrative Law Judge, as the ultimate trier of fact, the Department's unchallenged evidence would warrant a decision in the Department's favor, then the matter would proceed to final hearing (i.e. Phase 2) as if Phase 1 had not taken place.

On June 8, 2001, an order was entered that provided, in relevant part:

> 2. No later than June 15, 2001, [the Department] shall file its evidence relating to the alleged pattern of overcharging (e.g. the matrices, list of checks, and affidavits, if any). In addition, no later than June 15, 2001, the parties shall file their joint statement of undisputed facts, together with a stipulation setting forth their agreement as to the scope of review and issues to be decided based on [the

Department's] evidence and the undisputed facts.

The parties complied, timely filing a Stipulation of the Parties that set forth the undisputed facts and framed the issues for Phase 1 (as quoted above). In addition to the stipulated facts requiring no proof at Phase 1, 11 joint exhibits were offered into the evidentiary record without objection and accordingly received. These exhibits were identified alphabetically, from "a" to "k."

A hearing was held on July 11, 2001, via telephone conference call, to allow the parties to argue the Phase 1 issues. At the conclusion of this hearing the case was submitted for determination.

FINDINGS OF FACT

The evidence presented in Phase 1, which, as stipulated by the parties, has been deemed to be competent and admissible for purposes of Phase 1, together with the parties' joint statement of undisputed facts, established the facts that follow.

The Dispute

1. As a food vendor under contract with the Department, J&L is authorized to accept food checks from participants in the Special Supplemental Nutrition Program for Women, Infants and Children ("WIC")[1] and to receive payment on these checks from the Department, which administers the program in Florida.

2. In this case, the Department seeks to disqualify J&L from participating in the WIC program for a period of three years as a mandatory sanction for allegedly having committed a serious violation of the federal regulations, namely, engaging in a "pattern of overcharging." J&L denies the charge.

Background

3. On May 24, 2000, Jean H. Cesaire, as the owner and authorized representative of J&L, executed a written agreement with the Department (the "WIC Vendor Agreement") which, by its terms, took effect on May 18, 2000.

4. Under the WIC Vendor Agreement, J&L agreed broadly to comply with all state and federal WIC program rules, regulations, policies, and applicable law, and generally, among other things, to accept WIC food checks from program participants, to "[c]harge WIC customers the same price or less than the price charged to other customers in the quantities specified on the food checks and to not charge the WIC program for food not received by the customer."

5. For its part, the Department agreed, among other things, to pay J&L "the amounts on properly redeemed food checks upon compliance by the vendor with the conditions contained [in the WIC Vendor Agreement]."

6. Participants in the WIC program purchase groceries with food checks (sometimes also called "food vouchers," "food

instruments," or "WIC checks") that they are provided based on individual nutritional needs. Each food check——and there are a number of different types, numerically identified——describes the kind and quantity of items that my be bought with that particular check.

7. All of the check types at issue in this case afford the participant a menu of selections from which to choose, some offering a wider variety of options than others. For example, check type 029 permits the participant to purchase as many as five separate foodstuffs (some being available in alternative forms, e.g. frozen or liquid) in amounts up to a stated maximum, as follows:

(1) milk (1.5 gallons or six cans evaporated or 6 quarts dry);

(2) cheese (up to one pound);

(3) juice (12 ounces frozen or one 46-ounce can/bottle);

(4) cereal (up to 36 ounces); and

(5) eggs (one dozen).

Because, as the WIC Vendor Agreement directs, "[t]he vendor shall not require WIC customers to purchase all of the items prescribed on the WIC check," a participant is free to tender a check type 029 in payment for, say, three cans of evaporated milk and a half pound of cheese. Doing so, of course, would unwisely "leave money on the table," needlessly relinquishing

available benefits, but this sort of "under-consuming" is theoretically possible. Consequently, check type 029 permits a large number of potential purchase combinations.

8. Other check types offer fewer choices. Check type 301, for instance, authorizes the purchase of up to seven, one-ounce cans of concentrated liquid infant formula, the WIC customer's only choice (in addition to quantity) being that between the brands Good Start and Alsoy. The limited menu on this check will produce (at least in most instances, presumably) one of two purchase combinations: either seven cans of Good Start or seven cans of Alsoy. The possibility that a participant might buy, e.g., three cans of Good Start and four of Alsoy, however, together with the potential for under-consuming (i.e. buying fewer than seven cans), increase the number of purchase combinations.

9. Under the WIC Vendor Agreement, J&L is required to "submit an accurately completed WIC Food Price List to the department or local WIC office upon request." On July 20, 2000, J&L provided such a list to the Department. The Florida WIC Program Food Price List that J&L furnished the Department (the "Price List") constituted a representation by J&L that it would charge WIC customers (and hence the WIC program) the prices stated therein.

10. Although a maximum price is not printed on the food checks used in Florida, it is possible, using J&L's Price List, to determine the costliest purchase combination available under a particular check type when presented in J&L's store. Simply put, the most expensive possible purchase for a given check type comprises the largest allowable amount of the priciest form of each foodstuff prescribed on the check. The sum total of the respective prices of these items (as set forth in the Price List) equals the check's dollar-limit in J&L's store.

The Charge and the Department's Theory

11. By a letter addressed to Mr. Cesaire and dated November 20, 2000, the Department notified J&L of its intent to disqualify the vendor from participating in the WIC Program for a period of three years, based on J&L's allegedly having engaged in a pattern of overcharging.[2] In pertinent part, the Department alleged:

> During a visit to your store on July 20, 2000, [an inspection of WIC checks] showed: (1) You were systematically charging a fixed price——i.e. the highest amount allowed for reimbursement by the Department——regardless of what customers actually purchased, and (2) You were systematically charging amounts that were higher than your shelf prices for WIC food items, as set forth in the [Price List]. . . . .
>
> Since that visit, an audit of WIC checks submitted for payment by your store revealed that you continued to overcharge the WIC Program by routinely charging a

> fixed price and by claiming reimbursement for WIC checks in amounts that exceed your stated food item prices.

12. Although these allegations imply that the Department has direct proof that J&L both (a) systematically charged a "fixed price" and (b) routinely charged WIC participants amounts that exceeded the current contract prices, in fact it is undisputed that statement (b) is the ultimate factual determination that the Department draws from basic premise (a). That is, the Department has no direct evidence that J&L routinely charged WIC participants prices in excess of those stated in the Price List; rather, it possesses proof that J&L systematically charged the dollar-limit on purchases paid for with the various food check types at issue, and the Department considers this to be circumstantial evidence of the violation charged.

13. Underscoring the foregoing point is this from the parties' statement of facts not requiring proof at trial:

> 26. The parties stipulate that there is no particular WIC check that can be identified as having been utilized in the commission of an "overcharge" in that there is no way to tell what a customer actually purchased during a particular WIC transaction.[[3]] (However, this should not be construed as an admission by [the Department] that [J&L] did not commit a pattern of overcharging by maximum pricing, which is a theory that views the checks [in question] as a whole and not individually.)

14. At the core of the Department's case is a chart containing data derived from hundreds of individual WIC checks that the Department contends collectively demonstrate a pattern of overcharging. The parties call this chart the "Matrix," and it is reproduced in full below.

J & L	**#4626**				
Check Type	**Date Cleared**	**Number of Checks**	**Amount**	**Highest Price**	**Lowest Price**
29	7/11/00	1	$ 25.99	$ 25.98	$ 18.32
	7/18/00	1	$ 25.99		
	7/25/00	1	$ 22.82		
	8/29/00	1	$ 22.82		
	10/10/00	2	$ 22.82		
31	6/28/00	52	$ 16.93	$ 16.23	$ 15.03
	7/11/00	16	$ 16.93		
	7/18/00	30	$ 16.93		
	7/25/00	37	$ 13.53		
	8/1/00	34	$ 16.23		
	8/8/00	47	$ 16.23		
	8/15/00	40	$ 16.23		
	8/22/00	42	$ 16.23		
	8/29/00	57	$ 16.23		
	9/12/00	1	$ 16.23		
	9/19/00	12	$ 16.23		
	9/26/00	1	$ 16.03		
	9/26/00	22	$ 16.23		
	10/2/00	59	$ 16.23		
	10/10/00	45	$ 16.23		
	10/17/00	1	$ 11.10		
	10/17/00	8	$ 16.23		
	10/23/00	64	$ 16.23		
	10/30/00	1	$ 12.72		
	10/30/00	47	$ 16.23		
	11/7/00	1	$ 12.23		
	11/7/00	76	$ 16.23		
	11/10/00	1	$ 14.23		
	11/10/00	3	$ 16.23		

	11/14/00	56	$ 16.23		
	11/15/00	1	$ 16.23		
	11/20/00	40	$ 16.23		
	11/28/00	31	$ 16.23		
33	6/25/00	12	$ 10.49	$ 10.34	$ 9.45
	7/11/00	5	$ 10.49		
	7/18/00	12	$ 10.49		
	7/25/00	15	$ 9.64		
	8/1/00	9	$ 10.34		
	8/8/00	13	$ 10.34		
	8/15/00	10	$ 10.34		
	8/22/00	16	$ 10.34		
	8/29/00	7	$ 10.34		
	9/12/00	5	$ 10.34		
	9/19/00	4	$ 10.34		
	9/26/00	1	$ 9.16		
	9/26/00	6	$ 10.34		
	10/2/00	15	$ 10.34		
	10/10/00	13	$ 10.34		
	10/17/00	13	$ 9.64		
	10/30/00	1	$ 6.64		
	10/30/00	1	$ 7.25		
	10/30/00	20	$ 9.64		
	11/7/00	12	$ 10.34		
	11/10/00	11	$ 10.34		
	11/14/00	17	$ 10.34		
	11/17/00	1	$ 7.47		
	11/20/00	21	$ 10.34		
	11/24/00	1	$ 7.16		
	11/28/00	1	$ 10.34		
86	8/29/00	1	$ 13.95	$ 13.87	$ 13.27
	9/19/00	1	$ 13.17		
159	6/28/00	50	$ 7.96	$ 7.51	$ 6.75
	7/11/00	18	$ 7.96		
	7/18/00	32	$ 7.96		
	7/25/00	39	$ 6.74		
	8/1/00	35	$ 7.51		
	8/8/00	50	$ 7.51		
	8/15/00	40	$ 7.51		
	8/22/00	44	$ 7.51		
	8/29/00	66	$ 7.51		

	9/12/00	9	$ 7.51		
	9/19/00	15	$ 7.51		
	9/26/00	26	$ 7.51		
	10/2/00	62	$ 7.51		
	10/10/00	49	$ 7.51		
	10/17/00	59	$ 7.51		
	10/18/00	1	$ 7.51		
	10/23/00	64	$ 7.51		
	10/30/00	1	$ 4.46		
	10/30/00	50	$ 7.51		
	11/7/00	48	$ 7.51		
	11/10/00	1	$ 7.47		
	11/14/00	59	$ 7.51		
	11/15/00	1	$ 7.51		
	11/20/00	45	$ 7.51		
	11/28/00	41	$ 7.51		
160	7/18/00	1	$ 27.49	$ 30.16	$ 21.67
	7/25/00	1	$ 24.20		
	8/1/00	3	$ 24.20		
	8/8/00	3	$ 24.20		
	8/15/00	1	$ 24.20		
	8/22/00	4	$ 24.20		
	8/29/00	4	$ 24.20		
	9/12/00	1	$ 24.20		
	9/19/00	1	$ 24.20		
	9/26/00	5	$ 24.20		
	10/2/00	5	$ 24.20		
	10/10/00	5	$ 24.20		
	10/17/00	2	$ 24.20		
	10/30/00	8	$ 24.20		
	11/7/00	4	$ 24.20		
	11/10/00	3	$ 24.20		
	11/14/00	6	$ 24.20		
	11/20/00	8	$ 24.20		
	11/28/00	1	$ 24.20		
162	6/28/00	26	$ 30.49	$ 33.05	$ 27.77
	7/11/00	11	$ 30.49		
	7/18/00	26	$ 30.49		
	7/25/00	26	$ 30.40		
	8/1/00	20	$ 30.40		
	8/8/00	28	$ 30.40		
	8/15/00	31	$ 30.40		

	8/22/00	19	$ 30.40		
	8/29/00	24	$ 30.40		
	9/12/00	6	$ 30.40		
	9/19/00	7	$ 30.40		
	9/26/00	14	$ 30.40		
	10/2/00	36	$ 30.40		
	10/10/00	23	$ 30.40		
	10/17/00	27	$ 30.40		
	10/23/00	38	$ 30.40		
	10/30/00	20	$ 30.40		
	11/7/00	18	$ 30.40		
	11/10/00	1	$ 30.40		
	11/14/00	38	$ 30.40		
	11/20/00	27	$ 30.40		
	11/28/00	16	$ 30.40		
201	7/11/00	1	$ 23.90	$ 21.00	$ 20.30
	7/18/00	2	$ 23.90		
	7/25/00	2	$ 21.00		
	8/1/00	8	$ 21.00		
	8/8/00	5	$ 21.00		
	8/15/00	3	$ 21.00		
	8/22/00	11	$ 21.00		
	8/29/00	1	$ 21.00		
	9/19/00	1	$ 21.00		
	9/26/00	3	$ 21.00		
	10/2/00	6	$ 21.00		
	10/10/00	4	$ 21.00		
	10/17/00	7	$ 21.00		
	10/23/00	5	$ 21.00		
	11/7/00	9	$ 21.00		
	11/10/00	5	$ 21.00		
	11/14/00	3	$ 21.00		
	11/15/00	1	$ 21.00		
	11/20/00	10	$ 21.00		
	11/28/00	5	$ 21.00		
202	7/18/00	2	$ 50.80	$ 45.00	$ 43.50
	8/1/00	3	$ 45.00		
	8/8/00	5	$ 45.00		
	8/15/00	7	$ 45.00		
	8/22/00	6	$ 45.00		
	8/29/00	5	$ 45.00		
	9/12/00	1	$ 45.00		

	9/26/00	3	$ 45.00		
	10/2/00	4	$ 45.00		
	10/10/00	5	$ 45.00		
	10/17/00	5	$ 45.00		
	10/23/00	6	$ 45.00		
	11/7/00	6	$ 45.00		
	11/10/00	7	$ 45.00		
	11/14/00	5	$ 45.00		
	11/20/11	4	$ 45.00		
	11/28/00	8	$ 45.00		
203	7/11/00	3	$ 54.80	$ 48.89	$ 47.19
	7/18/00	5	$ 54.80		
	7/25/00	1	$ 48.89		
	8/1/00	5	$ 48.89		
	8/8/00	8	$ 48.89		
	8/15/00	10	$ 48.89		
	8/22/00	10	$ 48.89		
	8/29/00	7	$ 48.89		
	9/12/00	3	$ 48.89		
	9/19/00	2	$ 48.89		
	9/26/00	7	$ 48.89		
	10/2/00	7	$ 48.89		
	10/10/00	7	$ 48.89		
	10/17/00	9	$ 48.89		
	10/23/00	7	$ 48.98		
	10/30/00	8	$ 48.89		
	11/7/00	8	$ 48.89		
	11/10/00	3	$ 48.89		
	11/14/00	6	$ 48.89		
	11/20/00	6	$ 48.89		
	11/28/00	14	$ 48.89		
204	7/11/00	1	$ 53.80	$ 48.00	$ 46.40
	7/18/00	5	$ 53.80		
	7/25/00	3	$ 48.00		
	8/1/00	9	$ 48.00		
	8/8/00	11	$ 48.00		
	8/15/00	9	$ 48.00		
	8/22/00	17	$ 48.00		
	8/29/00	6	$ 48.00		
	9/12/00	1	$ 48.00		
	9/19/00	1	$ 48.00		
	9/26/00	5	$ 48.00		

	10/10/00	18	$ 48.00		
	10/17/00	15	$ 48.00		
	10/23/00	10	$ 48.00		
	10/30/00	3	$ 48.00		
	11/7/00	15	$ 48.00		
	11/10/00	11	$ 48.00		
	11/14/00	9	$ 48.00		
	11/20/00	13	$ 48.00		
	11/28/00	15	$ 48.00		
205	7/11/00	3	$ 59.71	$ 53.58	$ 51.78
	7/18/00	4	$ 59.71		
	7/25/00	2	$ 53.58		
	8/1/00	4	$ 53.58		
	8/8/00	8	$ 53.58		
	8/15/00	11	$ 53.58		
	8/22/00	6	$ 53.58		
	8/29/00	7	$ 53.58		
	9/12/00	2	$ 53.58		
	9/19/00	2	$ 53.58		
	9/26/00	7	$ 53.58		
	10/2/00	10	$ 53.58		
	10/10/00	3	$ 53.58		
	10/17/00	8	$ 53.58		
	10/23/00	8	$ 53.58		
	10/30/00	8	$ 53.58		
	11/7/00	7	$ 53.58		
	11/10/00	2	$ 53.58		
	11/14/00	6	$ 53.58		
	11/15/00	1	$ 53.58		
	11/20/00	7	$ 53.58		
	11/28/00	15	$ 53.58		

15. The Matrix shows that for about a four month period, from August through November 2000, a high percentage of the WIC check types 029, 031, 033, 086, 159, 160, 162, 201, 202, 203, 204, and 205 that J&L submitted for payment were written at the particular check's dollar-limit. Two explanations for this phenomenon come readily to mind: Either, in these hundreds of

transactions, the individual WIC consumers, presumably making their respective purchases largely unknown to (and independent of) one another, just happened consistently to select the most expensive combination of items available on these many checks, or the checks do not accurately and truthfully reflect the actual purchases made. The Department argues that the former, innocent explanation is incredible, leaving the latter, inculpatory explanation as the lone reasonable inference.

Weighing the Department's Proof

16. The strength of the Department's theory depends, in part, on the number of purchase combinations arising under each of the food checks in question: the more combinations the less likely the observed pattern of uniformity in check prices can credibly be explained as innocent coincidence. In this regard, the Department implicitly has conceded that under-consuming (i.e. foregoing the purchase of some authorized foodstuff(s) or buying less than the maximum allowed quantities thereof) is so infrequent as to have a negligible effect on the analysis.[4] This is so because the Department has calculated a "lowest price" for each check type, that being (presumably) the least costliest combination of available items, assuming that the participant purchases the maximum amount of all the listed foodstuffs.[5] Accepting the Department's assumptions in arriving at the "lowest price" figures reduces the number of potential purchase

combinations, somewhat to the detriment of the Department's position.

17. As mentioned above, some check types offer more food items than others. Check type 029, which already has been examined, allows the participant to buy five separate foods (milk, cheese, juice, cereal, and eggs), as does check type 160 (milk, cheese, juice, cereal, and eggs). Check type 162 lists six products (milk, cheese, juice, cereal, eggs, and peanut butter). Check type 086 authorizes the purchase of four items (milk, cheese, eggs, and peanut butter). Several checks permit the purchase of three food items: 031 (milk, cheese, juice); 159 (milk, juice, eggs); 203 (formula, juice, cereal); and 205 (formula, juice, cereal). One check type, 033, lists two items: milk and cheese. A few (check types 201, 202, and 204) allow the purchase of only one food item: infant formula. Obviously, the greater the number of food items (and attendant alternative forms or brands), the greater the number of purchase combinations, making the Department's argument facially more persuasive in connection with check types 029, 160, and 162, for example, than with respect to check types 201, 202, and 204.

18. There are other factors to consider in evaluating the probative value of the Department's Matrix. One is the number of transactions associated with each check type, and the statistical significance of these numbers. For some check

types, especially 029, 086, and, to a lesser extent, 160, the number of transactions during the pertinent period is seemingly too small to demonstrate a pattern, which casts doubt on the validity of the Department's desired inference of wrongdoing concerning these particular checks. Further, no expert testimony providing a comprehensive statistical analysis of the Matrix was (or would be) offered,[6] and that also adversely affects the overall weight of this evidence.

19. A related consideration involves the number of customers that the subject transactions comprehend. Assume, as a thought experiment, that every transaction identified in the Matrix involved a separate WIC participant. If true, that fact would bolster the Department's theory, because the probability that the observed uniformity in purchase prices occurred randomly presumably diminishes as the number of customers increases. On the other hand, it seems likely that, over the course of the months in question, some WIC participants used more than one food check to make multiple purchases in J&L's store; hence, the total number of such participants should be less than the total number of transactions reflected in the Matrix. The fewer the participants, the less persuasive the Department's theory, since price-uniformity presumably becomes more likely (and thus less suspicious) as the number of buyers decreases. The evidence in the record does not reveal the

actual number of customers involved, which negatively affects the evidential weight of the Matrix.

20. Moreover, there is (and would be) no evidence, such as expert opinion testimony on buying habits in the relevant market, bearing on whether, for any given check type, a particular purchase combination was more or less likely than any other.[7] This deficiency undermines the probative value of the Matrix, because it is unreasonable to assume that all purchase combinations are equally likely or, more to the point, that the most expensive combinations are not likely to be seen with greater frequency than others. Indeed, it might reasonably be supposed that the most costly purchase combinations would be the most popular (and thus most often occurring) ones, not only because high-demand items tend to command higher prices than less desired products, but also because WIC participants, as rational economic actors, presumably would want to maximize their benefits. If this supposition were true, then the uniformity in purchase prices shown in the Matrix might not be as anomalous as the Department would have it.

21. It could be, of course, that the high degree of price-uniformity (nearly 100% with some check types) seen here is telling; one can imagine an expert testifying, to make up an example, that while 75% of purchases are expected to be at the dollar-limit, 95% price-uniformity is suspiciously outside the

normal distribution. These hypothetical numbers underscore the point, however, that absent such evidence the factfinder is left without a benchmark against which to measure the probative value of the Matrix. The buying patterns it reflects may be highly suspicious, somewhat suspicious——or completely innocent.

22. In addition, to enlarge the foregoing point, because it is reasonable to assume that some percentage——perhaps a significant number——of "regular" purchases (i.e. those untainted by any misconduct) will be at the dollar-limit, it follows that not all of the transactions identified on the Matrix can reasonably be considered suspect. The lack of evidence concerning the percentage of dollar-limit purchases made in similarly-situated, law-abiding stores makes it impossible to calculate, for any given check type, how many of the transactions identified on the Matrix might reasonably be regarded as suspicious——and hence impossible to determine whether, assuming the Matrix is circumstantial evidence of wrongdoing, the violations occurred in a "pattern."

23. The Department has attempted to shore up its proof with the testimony of John Harrison, a longtime employee of the Department who has extensive experience in conducting compliance investigations of WIC vendors. In an affidavit, Mr. Harrison avers, in pertinent part, as follows:

3. I was instrumental in the development of a retailer profiling system that is used to identify suspect WIC check redemption activities. I continue to provide training and guidance to the Florida WIC Program's investigators in the use of this system. During the past year, data from the system was used to identify [J&L] in Miami for investigation, along with several similar stores in Dade and Broward County that cater to clients of the WIC Program.

4. The investigation of [J&L] confirmed for the Department what had been suggested by the computerized profile of the store and led to the allegations set forth in the November 20, 2000, disqualification letter: that the store was charging a fixed price that was unrelated to the shelf price of foods actually purchased by WIC customers. That is to say, [J&L] has systematically and methodically overcharged the WIC Program for approved WIC foods.

5. The allegations of fixed pricing by [J&L] were substantiated to the Department's satisfaction through comparison with other independently owned stores in Miami-Dade County that appear to be charging fair and honest prices. The computer profile in these stores shows that a wide variety of prices are charged on WIC checks, which reflects the fact that WIC customers make different selections among the types and brands of foods that are approved for purchase.

6. In my years of experience in investigating fraud by retailers in the WIC Program, I have not seen fixed pricing of the kind committed by [J&L], excepting several recent examples in Miami-Dade County.

24. Even if Mr. Harrison's affidavit testimony were believed, this proof has little probative value because all the witness has said, at bottom, is that a computer-generated profile, which is not in evidence, together with other data not in the record, were sufficiently persuasive to convince <u>the Department</u> that J&L is guilty of the instant charge. The Department's burden, however, is to prove J&L's guilt to <u>the factfinder's</u> satisfaction——not merely to tell him that it truly believes the accused store is guilty. On its face, therefore, Mr. Harrison's testimony is not persuasive evidence of the facts that the Department must prove to prevail.

25. Further, without the profile and other information underlying Mr. Harrison's conclusory assertions of guilt, the factfinder cannot independently assess the credibility of his assertions, which consequently are entitled to no more weight than allegations.

26. The Department's proof suffers from another serious shortcoming. Assume, for argument's sake, that the high percentage of dollar-limit checks shown in the Matrix persuasively establishes, inferentially, that the checks which J&L submitted for payment do not accurately and truthfully reflect the actual purchases its WIC customers made. This would mean that J&L has done something wrong. But, the question then would arise, must that "something" be patterned overcharging?

27. Upon reflection, it becomes apparent that the practice of "fixed pricing" or "maximum pricing" (as the Department has called it) could be used to cover up a number of different transgressions. One of them, certainly, is patterned overcharging. If, for example, J&L charged a purchaser of frozen orange juice the (higher) contract price for canned orange juice, that would be a form of overcharging. If this unsavory practice were consistently followed for all food items on all check types, a pattern of "maximum pricing" such as that seen in the Matrix would be produced.[8]

28. Imagine another scenario in which a vendor charges every user of check type 029 for a dozen eggs——even those purchasers who choose not to buy eggs. Charging WIC customers for food not received is a separate violation, distinct from overcharging. Yet, if this particular form of fraud were repeated consistently with regard to all check types, a pattern of "maximum pricing" also might emerge——even if no customers (or too few to constitute a "pattern") were "overcharged."[9]

29. Providing unauthorized food items is another serious violation. Imagine that a vendor were selling WIC customers ice cream and cookies and other unauthorized foods, and charging them for cheese and eggs and cereal. That, too, might result in a pattern of "maximum pricing," but the violation would not be overcharging. The same can be said about the provision of non-

food items, and about the sale of alcoholic beverages and tobacco products as well. These also are separate violations that do not involve overcharging (as that offense is defined in the regulations) but could as readily as overcharging produce a pattern of "maximum pricing."

30. The bottom line is, even if the factfinder were inclined to infer from the pattern of "maximum pricing" shown in the Matrix that J&L committed WIC program violations, for the Department to prevail he would need to infer from that first inference the conclusion that J&L was overcharging its customers and not engaging in some distinguishable wrongdoing (or combination of separate wrongs) with which a pattern of "maximum pricing" would be consistent. He would need further to infer that the overcharging had occurred with such frequency as to constitute a pattern of overcharging (because, remember, a dollar-limit check is not necessarily the product of an overcharge). In other words, to determine that J&L is guilty of the offence charged would require a pyramiding of inference upon inference.

Ultimate Factual Determinations

31. From August through November 2000, a high percentage of the WIC checks that J&L submitted for reimbursement were written at their respective dollar-limits. To be sure, this pattern of "maximum pricing" is fishy when considered in the

abstract; the evidence, however, fails generally to put this seemingly suspicious pattern into a real-world context, and it fails in particular to establish, as a benchmark, the percentage of checks that would be written at the dollar-limit in the absence of wrongdoing. Thus, being unwilling to infer that the Matrix pattern is per se indicative of wrongdoing, the factfinder is not persuaded that J&L more likely than not engaged in misconduct.

32. Additionally, even if the factfinder were willing to infer that the Matrix pattern would not have emerged but for some wrongdoing on J&L's part, it would yet be too much of a stretch to infer further that the violation was overcharging as opposed to something else. Because J&L was accused of overcharging and nothing else, J&L cannot be found guilty of the specific offense charged.

33. Finally, while it would be unreasonable to infer, from the Matrix alone, that J&L likely had engaged in overcharging, it would be irrational to infer that any suspected overcharging occurred so regularly as to constitute a pattern, because no demonstrated basis in fact or logic supports the proposition that every dollar-limit check is evidence of a transaction tainted with the fraud of overcharging, and the record reveals no principled basis for distinguishing between innocent maximum purchases and those resulting from misconduct.

CONCLUSIONS OF LAW

34. The Division of Administrative Hearings has personal and subject matter jurisdiction in this proceeding pursuant to Sections 120.569 and 120.57(1), Florida Statutes.

35. The wrongdoing with which J&L has been charged is proscribed in Title 7, Code of Federal Regulations, Section 246.12(l), which provides in pertinent part:

> (l) Retail food delivery systems: Vendor sanctions--
>
> (1) Mandatory vendor sanctions--
>
> *   *   *
>
> (iii) Three-year disqualification. The State agency must disqualify a vendor for three years for:
>
> (A) One incidence of the sale of alcohol or alcoholic beverages or tobacco products in exchange for food instruments;
>
> (B) A pattern of claiming reimbursement for the sale of an amount of a specific supplemental food item which exceeds the store's documented inventory of that supplemental food item for a specific period of time;
>
> (C) A pattern of vendor overcharges;
>
> (D) A pattern of receiving, transacting and/or redeeming food instruments outside of authorized channels, including the use of an unauthorized vendor and/or an unauthorized person;
>
> (E) A pattern of charging for supplemental food not received by the participant; or

> (F) A pattern of providing credit or non-food items, other than alcohol, alcoholic beverages, tobacco products, cash, firearms, ammunition, explosives, or controlled substances as defined in 21 U.S.C. 802, in exchange for food instruments.

7 C.F.R. Section 246.12(l)(1)(iii)(C)(emphasis added).

36. The unambiguous terms of the WIC Vendor Agreement notified J&L that a pattern of overcharging (among other grounds) would subject the violator to a three-year disqualification from participation in the WIC program.

37. In a commentary published in the Federal Register, the United States Department of Agriculture, Food and Nutrition Service, shed light on the nature of this particular violation:

> On the proposed violation for "charging WIC customers more for food than non-WIC customers or charging more than the current shelf or contract price," commenters were concerned about establishing a pattern for this violation, distinguishing between outright fraud and abuse and inadvertent human error, and having a sanction that is appropriate for the violation. As noted above in this preamble, the Department has modified this violation in the final rule to establish that a pattern of incidences is necessary to warrant a mandatory sanction. In addition, the Department has clarified that the evidence necessary to establish a pattern is influenced by both the severity and number of the incidences of a violation.
>
> The intent to commit a violation versus inadvertent human error is not a distinction that State agencies must establish in order to impose sanctions, including sanctions for overcharging. The vendor sanctions are not criminal; they are imposed in order to

protect the integrity of the WIC Program. If stores consistently overcharge customers for purchases, customers take their business elsewhere regardless of whether the overcharges are intentional or inadvertent. Likewise, when a pattern of overcharging is established, the State agency will be required to impose a mandatory sanction on the vendor regardless of whether the violation is intentional or inadvertent. Current regulations at §246.12(f)(2)(ix), which cover the requirements for vendor agreements, state: "The food vendor shall be accountable for actions of employees in the utilization of food instruments or provision of supplemental foods." The WIC Program has limited resources and cannot tolerate vendors whose employment practices repeatedly result in direct losses to the Program.

Six commenters questioned the severity of the sanction for this violation. Overcharging is one of the most common vendor violations. Funds lost through overcharges could otherwise be used to serve more participants. As such, the sanction for this type of violation must be sufficient to deter this type of fraud and abuse. Consequently, the Department has retained the three-year sanction for this violation in the final rule.

One commenter suggested that vendors should be granted the opportunity to correct overcharging problems as outlined in §246.12(r)(5)(iii) in the current regulations, which states: "When payment for a food instrument is denied or delayed, or a claim for reimbursement is assessed, the affected food vendor shall have the opportunity to correct or justify the overcharge or error.* * *" Another commenter noted that the regulations already require vendors to refund the difference between their reported price for the food package and the actual redemption price.

> The violation, as written in this final rule, does not prohibit the State agency from pursuing claims for overcharging before it rises to a level where it warrants a mandatory sanction. The mandatory sanction for this violation is only triggered when a pattern of overcharging is established. However, permitting vendors to just pay claims when the State agency detects overcharges provides vendors with no incentive to ensure that overcharging does not occur in the first place.

64 F.R. 13311, 13311-15.

38. As the party seeking relief, the Department owns the burden of proof. See, e.g., Florida Department of Transportation v. J.W.C. Co., Inc., 396 So. 2d 778, 788 (Fla. 1st DCA 1981). The parties have stipulated that the Department must meet its burden with clear and convincing evidence, presumably because disqualification is, arguably, penal in nature, threatening the vendor with loss of livelihood. If the WIC Vendor Agreement were a "license" that conferred a property interest on the vendor, then disqualification would be analogous to revocation, and the parties' stipulation as to the standard of proof would be reasonable and probably legally correct. See Department of Banking and Finance, Division of Securities and Investor Protection v. Osborne Stern and Co., 670 So. 2d 932, 933-34 (Fla. 1996). The parties, however, have cited no law in support of the premise that the contract is a license.

39. As it happens, the federal regulations explicitly refute the contract-as-license theory. Title 7 of the Code of Federal Regulations, Section 246.12(h)(3)(xxi), provides clearly that "[t]he vendor agreement does not constitute a license or a property interest." That being the case, the parties' agreement regarding the applicable standard of proof is legally untenable.[10] The Department need establish its allegations merely by a preponderance of the evidence.

The Department Failed to Present a Prima Facie Case

40. The first of the two issues framed by the parties' stipulation——namely, whether, through the stipulated facts and evidence, the Department has presented a prima facie case of overcharging——is a question of law. Conceptually, the parties have requested a ruling that is indistinguishable from that required when a defendant moves for involuntary dismissal pursuant to Rule 1.420(b), Florida Rules of Civil Procedure, at the close of the plaintiff's case. Accordingly, the applicable analytical framework is that which is attendant upon such motions.

41. "A trial judge's function, when the defendant raises a motion for involuntary dismissal . . . in a non-jury trial, is to determine whether the evidence, when viewed in a light most favorable to the plaintiff, establishes a prima facie case for relief." Barclays American Mortgage Corp. v. Bank of Central

Florida, 629 So. 2d 978, 979 (Fla. 5th DCA 1993). In making this decision, "the trial judge, even though the ultimate trier of fact, is precluded from weighing the evidence or adjudging its credibility," Valdes v. Association I.N.E.D., H.M.O., Inc., 667 So. 2d 856, 857 (Fla. 3d DCA 1996), just as he or she would be in ruling on a motion for directed verdict, Tillman v. Baskin, 260 So. 2d 509, 511 (Fla. 1972); see also Palm Beach Mall, Inc. v. Walker, 585 So. 2d 1149, 1150 (Fla. 4th DCA 1991). If the plaintiff has presented some competent, substantial (even though conflicting) evidence, including reasonable inferences therefrom, in support of each element of his case, then the motion for involuntary dismissal must be denied, because a reasonable factfinder could find in the plaintiff's favor. Valdes, 667 So. 2d at 857; Wygodny v. K-Site 600 Associates, 644 So. 2d 579, 581 (Fla. 3d DCA 1994); Wimbledon Townhouse Condominium I, Association, Inc. v. Wolfson, 510 So. 2d 1106, 1109 (Fla. 4th DCA 1987); see also Houghton v. Bond, 680 So. 2d 514, 522-23 (Fla. 1st DCA), rev. denied, 682 So. 2d 1099 (1996).

42. In this case, following the adage "where there's smoke, there's a fire," it might be reasonable to infer, from the fact that a high percentage of the WIC checks that J&L presented for payment during the relevant period were written at the dollar-limit, that J&L was up to no good. Bear in mind, however, that to reach that result would require an initial

inference that the pattern reflected in the Matrix is suspicion-arousing "smoke" (to continue the metaphor), for there is no competent, direct proof of that fact.

43. Even if it were reasonable to infer some wrongdoing on J&L's part, though, the Department's burden is not merely to prove "some wrongdoing" generally but to establish the particular wrongdoing with which it has charged J&L. That particular wrongdoing——pattern of overcharging——has two basic elements: The vendor must, first, be charging WIC customers more for authorized WIC foods than the vendor had agreed to charge for those foods and, second, be overcharging so frequently as to constitute a pattern.

44. There is no competent, direct proof supporting either of these elements. Both would need to be inferred from J&L's established pattern of presenting dollar-limit WIC checks for payment (assuming, as a foundational inference, that *that* undisputed pattern is evidence of wrongdoing). Neither inference, however, is reasonable——and not only because it is improper to pile inference upon inference.

45. First, as discussed in the Findings of Fact, too many forms of misconduct besides overcharging could produce the pattern shown in the Matrix. As a matter of law, there is no rational basis for inferring that, more likely than not, overcharging occurred here, because the Matrix is equally

consistent with the also-forbidden practices of charging for non-food items, selling unauthorized foods, and charging for food not received, to name a few.[11]

46. Second, even if wrongdoing were inferred from the Matrix pattern, and even if the specific violation of overcharging were then inferred from the inference of wrongdoing, the factfinder would be called upon to make yet another inference: that the overcharging occurred in a pattern. There simply is no rational basis in the evidence for doing that.

47. It is concluded that a reasonable factfinder, properly instructed as to the applicable law, could not find in favor of the Department in this case based solely on the Phase 1 evidence, even when this proof is viewed in the light most favorable to the Department. Reasonable people might disagree about where, exactly, the train of inferences required to sustain the Department's charge runs off the tracks, but all reasonable people should agree that the inference train derails short of its intended destination.

48. Accordingly, without weighing the evidence or considering whether the Department has met its burden of proof, it is concluded that the evidence in this record does not establish a prima facie case of a patterned overcharging, as a matter of law.

The Department Failed to Carry Its Burden of Proof

49. The parties stipulated that the undersigned would not be constrained, in this Phase 1, to decide only the narrow legal question whether the Department's proof makes out a prima facie case. The parties agreed that if the Department's evidence were legally sufficient to survive a motion for involuntary dismissal, then the Administrative Law Judge ("ALJ"), as the trier of fact, could weigh the Department's unimpeached evidence (as though J&L had declined at final hearing to present any evidence, with the result that the stipulated facts and proof would comprise the entire record) and decide whether the Department carried its burden of proof. If, in the ALJ's judgment, the evidence warranted a decision in the Department's favor as a matter of fact, then the case would proceed to final hearing, where J&L would have an opportunity to rebut the otherwise persuasive evidence against it. On the other hand, if the ALJ found the stipulated proof to be wanting, then he could find in favor of J&L, obviating the need for a formal evidentiary hearing.

50. Having already concluded that the Department's evidence is legally insufficient, the undersigned is aware that it is unnecessary to reach the second, factual issue whether the Department carried its burden of proof. The undersigned is certain, however, that the parties would prefer that findings of

fact nevertheless be made, the better to bring about an efficient disposition of this dispute.

51. Therefore, to render an alternative determination, the undersigned assumed for argument's sake that the Department had presented sufficient evidence to establish a prima facie case and, as the trier of fact, thereupon weighed the evidence and found that the Department had failed to carry its burden. The ALJ's specific findings, including the ultimate factual determinations, are set forth above in the Findings of Fact.

CONCLUSION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Department, having failed to establish that J&L engaged in a pattern of overcharging, enter a final order rescinding its preliminary determination that J&L be disqualified from participating in the WIC program for a period of three years.

DONE AND ENTERED this 30th day of October, 2001, in Tallahassee, Leon County, Florida.

____

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this 30th day of October, 2001.

ENDNOTES

[1]/ The WIC program, which was authorized by the Child Nutrition Act of 1966, is designed to provide food to pregnant, breastfeeding, and postpartum women and their infants and children (between the ages of one and five years). The federal government provides cash grants to state agencies that administer the program at the local level. In Florida, food is distributed through a system of retail grocery stores, such as J&L, that become authorized WIC vendors. To become a WIC program vendor, a grocery store must submit a completed application, pass a preliminary on-site screening, be trained in WIC policies and procedures, and enter into a written vendor contract with the Department.

[2]/ On February 1, 2001, the Department moved for leave to amend the charge against J&L, as set forth in its November 20, 2000, letter to Mr. Cesaire, to make clear that the violation of which J&L had been accused was pattern of overcharging, not the similar but distinct offense, pattern of charging the WIC program for food not received by a participant. The Department's motion was granted on February 6, 2001.

[3]/ At oral argument, the Department's counsel represented that no compliance buys had been conducted at J&L's store. A compliance buy is a purchase made from a WIC vendor by an undercover investigator. Such purchases must conform to certain regulatory requirements. See 7 C.F.R. § 246.12(j)(6)(ii). It is arguable that a compliance investigation is not complete unless and until the responsible state agency has carried out a sufficient number of compliance buys or performed an inventory audit (which also was not done here, evidently). See 7 C.F.R. § 246.12(j)(4). J&L did not argue, however, that the Department's failure to conduct a complete compliance investigation pursuant to 7 C.F.R. § 246.12(j)(4) precluded it from seeking J&L's disqualification; therefore, no opinion on that issue is expressed herein.

[4]/ Under-consuming doubtless occurs, however. See endnote 9 and accompanying text.

[5]/ Consider, for example, that the Department has stipulated the "lowest price" for check type 029 to be $18.32. Nevertheless, in theory at least, a WIC customer could use this type of check, unwisely, to buy one-half gallon of milk——and nothing else. In this apparently unlikely event, the purchase would cost $2.05. Through its Matrix the Department has acknowledged that outcomes such as this are so uncommon as to be safely ignored.

[6]/ The parties stipulated that, if a formal hearing were held, neither side would offer expert testimony involving a statistical analysis of the Matrix.

[7]/ According to their stipulation, the parties agreed that, if a formal hearing were held, neither side would present expert testimony regarding the buying habits and purchasing trends within the population of WIC program participants.

[8]/ It should be noted, however, that a pattern of "maximum pricing" is not the inevitable (or even the intuitive) result of consistent overcharging. Indeed, one supposes that, to avoid raising any predictable red flags, as a pattern of price-uniformity might be regarded, a dishonest vendor would increase prices a little bit here and there, in varying amounts, without bringing the total price of any (or at least not every) fraud-tainted sale to the check's dollar-limit.

[9]/ That charging for food not received is a WIC program violation separate and distinct from patterned overcharging and similar offenses, such as selling non-WIC foods and non-food items, suggests that some under-consuming takes place in routine WIC transactions.

[10]/ If the Department were seeking to impose a civil money penalty in lieu of disqualification, then the clear and convincing standard would apply. Osborne Stern, 670 So. 2d at 935. Interestingly, the federal regulations require that before a state agency may disqualify a vendor from participating in the WIC program, it must determine if disqualification would result in inadequate participant access. See 7 C.F.R. § 246.12(l)(1)(ix). If inadequate participant access would follow from disqualification, then the state agency must impose a fine instead of disqualifying the violator, except in certain situations where the vendor is a repeat offender. Id. Here, the Department has made no showing regarding participant access. J&L, however, did not argue that the Department's proof was

legally insufficient for this reason, and so the question need not be decided.

[11]/ The legal insufficiency of the Department's case could not be cured simply by amending the charge to add additional grounds for punishment, because, without more proof than has been offered, none of the several violations that could have produced the Matrix pattern is more likely than the others, and hence it would be unreasonable to infer that any particular one had occurred. Remember, regardless of the number of charges, the Department still would need to make a prima facie showing for each one individually, and the evidence here does not do that.

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.