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# Commonwealth of Kentucky

# Court of Appeals

NO. 2006-CA-000262-MR

DR. JAMES W. HOLSINGER, JR.,
SECRETARY, COMMONWEALTH OF KENTUCKY,
CABINET FOR HEALTH & FAMILY SERVICES;
HON. ROBERT G. LAYTON, ADMINISTRATIVE
LAW JUDGE, CABINET FOR HEALTH & FAMILY
SERVICES; RUTHANNE C. BOYLES, SUPERVISOR,
DEPARTMENT FOR PUBLIC HEALTH; NANCY SULLIVAN,
SUPERVISOR, CABINET FOR HEALTH & FAMILY
SERVICES, WIC VENDOR MANAGEMENT; AND
COMMISSIONER WILLIAM D. HACKER, MD, FAAP,
CPE, DEPARTMENT FOR PUBLIC HEALTH — APPELLANTS

v.

APPEAL FROM MCCRACKEN CIRCUIT COURT
HONORABLE, ROBERT J. HINES, JUDGE
ACTION NO. 05-CI-00846

KROGER V-338 — APPELLEE

OPINION
REVERSING

** ** ** ** **

BEFORE: ABRAMSON AND KELLER, JUDGES; HOWARD,[1] SPECIAL JUDGE.

ABRAMSON, JUDGE: Appellants Dr. James W. Holsinger, Jr., Secretary, Commonwealth of Kentucky, Cabinet for Health & Family Services, Hon. Robert G. Layton, Administrative Law Judge, Cabinet for Health & Family Services, Ruthanne C.

[1]Special Judge James I. Howard completed this opinion prior to the expiration of his Special Judge assignment effective February 9, 2007. Release of the opinion was delayed by administrative handling .

Boyles, Supervisor, Department for Public Health, and Nancy Sullivan, Supervisor, Cabinet for Health & Family Services (collectively, the "Cabinet") appeal from a judgment of the McCracken Circuit Court reversing a final decision by the Cabinet barring Kroger V-338 from participating in the "WIC" program for one year. The circuit court held that Kroger V-338 was denied its due process rights when the Cabinet failed to follow its own administrative procedures requiring Kroger to be notified of WIC program violations before entry of a final order. Because the record does not disclose that Cabinet procedures at the time required that notice, we are compelled to reverse.

The Special Supplemental Nutrition Program for Women, Infants and Children (WIC) is a federally funded program that is administered in Kentucky by the Cabinet for Health and Family Services, Department of Public Health. The purpose of the WIC program is to make certain health and nutrition services available to program participants.[2] Among the services offered is a system of food vouchers that participants may use in lieu of cash to purchase various food items from vendors having a WIC program contract with the local health department and the Cabinet. In order for a vendor to become approved to participate in the WIC program, it must first meet certain criteria set forth in 7 CFR, Part 246, as well as 902 KAR 4:040, Section 10.

Kroger V-338 is located at 3275 Irvin Cobb Drive in Paducah, Kentucky. Throughout June and July 2003, Kroger V-338 was an authorized WIC program vendor. Prior to this period of time, the Cabinet suspected that Kroger V-338 employees had, on at least one occasion, sold 12-ounce "Carnation Powdered Good Start" infant formula in

[2] Program participants are eligible pregnant, breast-feeding and postpartum women, infants and children.

place of 13-ounce cans of "Concentrate Good Start" as specified on food vouchers. As a result, during these two months, an investigator, posing as a WIC participant, was dispatched from the Cabinet to perform investigative compliance buys at Kroger V-338 on five separate occasions: June 18, June 24, July 1, July 7, and July 9. The purpose of the compliance buys was to determine if Kroger V-338 was complying with the WIC program requirements applicable to vendors.

During the 2003 compliance visits that occurred on June 18, June 24, July 7, and July 9, the Cabinet's investigator possessed a WIC voucher authorizing her to purchase ten cans of the "13 oz. Concentrate Good Start" infant formula. On each of these occasions, the Kroger V-338 cashier permitted the investigator to substitute ten cans of the "12 oz. Powdered Good Start" infant formula in place of the liquid concentrate formula required by the voucher. During the July 1 visit, the investigator used a voucher authorizing her to purchase eleven cans of the concentrate formula. On this occasion, the Kroger V-338 cashier permitted the investigator to substitute eleven cans of the powdered formula. The cashier further failed to enter the "pay exactly" amount on the voucher prior to requiring the investigator to sign it as is mandated under WIC program regulations.[3]

On September 22, 2003, approximately two and one-half months after the final compliance buy, the Cabinet prepared a letter to Kroger advising it of the possible compliance violations. However, it was never sent. Nonetheless, on November 6, 2003, the Cabinet notified Kroger that as a result of the five compliance buys, it had determined

[3] The Cabinet ultimately chose not to impose a penalty against Kroger for the signature requirement violation.

that the vendor had violated WIC program requirements. The Cabinet further informed Kroger that Kroger V-338 would be suspended from participation in the WIC program for a period of one year.

Kroger requested a hearing to appeal Kroger V-338's disqualification from the program. A hearing was held on January 22, 2004, following which the administrative law judge ("ALJ") recommended upholding the Cabinet's initial determination to disqualify Kroger V-338 from the WIC program for one year. The Cabinet subsequently entered a final order affirming the ALJ's decision. Kroger then sought review of the administrative decision in the McCracken Circuit Court. Pending its review, the trial court stayed imposition of the penalty against the store. Following a comprehensive hearing, the court overturned the final decision of the Cabinet. In its Findings of Fact, Conclusions of Law, and Order, the circuit court stated:

> 12. During the hearing and in its Brief, the Cabinet freely admitted it had reason to suspect that Kroger V-338 may have been allowing WIC participants to purchase unauthorized infant formula. The Cabinet also freely admitted that it suspected any authorized purchases were due to some confusion among cashiers about when powdered infant formula and concentrate liquid infant formula may be purchased under the program.
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> 13. Carlene Egbert testified at the administrative hearing in this matter that the Cabinet's procedure was to provide a warning letter to the vendor that the Cabinet suspected the vendor failed to comply with the WIC contract and to offer additional training. She also testified that even though a letter had in fact been prepared to warn Kroger concerning the possible confusion over the sale of powdered infant formula with concentrate infant formula, the letter was never signed, and the letter was never mailed to Kroger.

Evidence at the hearing also showed no additional training was offered to Kroger V-338.

14. The Cabinet's procedures clearly required the Cabinet to warn Kroger of possible violations and offer additional training before completing all five compliance buys, which could lead to a one-year disqualification of a vendor in the WIC program.

15. By the testimony of the Cabinet's own witnesses, it was shown at the hearing that the Cabinet had violated its own procedure.

16. The Cabinet responded to the allegation that it failed to follow its procedure by stating that the law did not require it to warn a vendor of possible violations.

17. Where agency procedures clearly required the Cabinet to warn a vendor of possible noncompliance, it was the duty of the Cabinet to follow its own procedure. Failure of the Cabinet to follow its procedures resulted in denial of due process to Kroger V-338.

. . .

19. The public would have been better served if Kroger had been warned of possible noncompliance in accordance with the Cabinet's procedure. Furthermore, the public would be better served if Kroger is allowed to participate in the WIC program.

20. The Cabinet did not [consider] the geographic barriers posed by a multi-lane highway in the area of Kroger V-338 store and the inconvenience caused by this multi-lane highway to low-income women and children. However, the Cabinet's failure to consider geographic barriers is not dispositive.

This appeal followed.

With respect to a judicial appeal of an administrative decision, the standard of review is whether that decision was erroneous as a matter of law. *See, e.g., American*

*Beauty Homes Corp. v. Louisville & Jefferson County Planning Comm' n,* 379 S.W.2d 450 (Ky. 1964). Where the administrative law judge (ALJ) has determined that a party has satisfied its burden of proof with regard to a question of fact, the issue on appeal is whether there is substantial evidence in the record to support that determination. *Special Fund v. Francis,* 708 S.W.2d 641 (Ky. 1986). Substantial evidence has been defined as some evidence of substance and relevant consequence, having the fitness to induce conviction in the minds of reasonable people. *Smyzer v. B.F. Goodrich Chemical Co.,* 474 S.W.2d 367 (Ky. 1971). Although there may be evidence in the record that would have supported a different conclusion than that reached by the ALJ, such evidence is not an adequate basis for reversal on appeal. *McCloud v. Beth-Elkhorn Corp.,* 514 S.W.2d 46 (Ky. 1974). The focus of the inquiry on appeal is whether the finding which was made is so unreasonable under the evidence that it must be viewed as erroneous as a matter of law. *Special Fund v. Francis, supra.*

In the present matter, the trial court found that the Cabinet failed to account for a geographic barrier comprised of a multi-lane highway when it found that the loss of Kroger V-338 as a WIC vendor would not create a hardship to the public. Although the trial court readily acknowledged that it did not consider this particular determination dispositive, we must address it before turning to the trial court's holding that the Cabinet denied Kroger V-338 the due process to which it was entitled.

Before the Cabinet can disqualify a vendor from participation in the WIC program, it must first ensure that the disqualification will not result in "inadequate

participant access." According to 902 KAR 4:040, Section 13(4), there is adequate participant access if:

> (a) There is another vendor within seven (7) miles of the vendor; or
>
> (b) There is another vendor between the subject vendor and a health department service site, and the other vendor is within seven (7) miles of the health department service site;
>
> (c) There is no geographic barrier, such as an impassable mountain or river, between the subject vendor and the next accessible vendor; or
>
> (d) The subject vendor is redeeming food instruments for formulas classified as special formulas and there is another vendor within seven (7) miles that can obtain the formula.

In his testimony before the ALJ, the Cabinet's vendor monitor, Joe Settles, testified that the disqualification of Kroger V-338 would not result in inadequate participant access. He supported this testimony with evidence of other vendors located within a seven mile radius of Kroger V-338, as well as demonstrating a lack of geographic barriers as defined in the above quoted regulation. Under these circumstances, the Cabinet's decision regarding participant access is supported by substantial evidence and we find no reason to hold otherwise.

Turning to the due process issue, this appeal is unusual in that there is no dispute that Kroger V-338 cashiers committed the WIC program violations with which Kroger was charged. Similarly, it is undisputed that the Cabinet's regulations provide for a sanction of a one-year disqualification from the WIC program for commission of these

violations. *See* 902 KAR 4:040, Section 12(o).[4] The issue before us, however, is whether the trial court correctly found that before Kroger V-338 was disqualified from the WIC program the Cabinet was required to notify it that compliance problems had arisen at the June 18 compliance buy so as to allow the vendor the opportunity to correct those problems prior to any follow-up investigatory visits. Because we find nothing in the Cabinet's regulations in effect in 2003 that required it to provide notice to Kroger V-338 of possible compliance violations prior to imposing a sanction, we must reverse.

The Cabinet maintains that the lack of a warning letter should not invalidate Kroger V-338's suspension from the WIC program because there is no requirement that the Cabinet provide any such letter to a vendor. In support of this argument, the Cabinet cites to applicable federal and state regulations. In fact, *under the regulations in effect during 2003,* there was no requirement that the Cabinet provide any warning to Kroger V-338 of potential WIC regulation violations either before or after commencement of the compliance buys.

In support of his decision, the trial judge relied on the testimony of Cabinet employee Carlene Egbert for the proposition that the Cabinet had an internal policy of warning vendors of potential program violations prior to commencing a series of compliance buys. Specifically, Egbert testified:

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[4] In 2003, the regulatory prohibition against providing an "unauthorized food item" other than what is specified on a food voucher was found at 902 KAR 4:040, Section 12(1)(n). Following the February 1, 2006, effective date of certain amendments to the regulation, the subsection at issue was re-designated Section 12(1)(o). The text of the subsection, especially that portion providing for a one-year suspension from the WIC program, remained unchanged. However, a new provision, Section 12(2), was added to the regulation in 2006 and imposed a requirement that the Cabinet, in cases involving suspected violations of what is now Section 12(1)(o), must notify the vendor of the possible violations prior to the completion of the required series of compliance buys. This notice provision allows an opportunity for the vendor to correct any problems before it is disqualified from the WIC program.

> Q. My question, and you might not know the answer, if you're sending a compliance buy person out because you suspect that there could be a problem with providing powdered concentrate versus liquid concentrate, do you know if there's any effort to educate that vendor in advance to say, here's a potential problem, we need to be sure you're in compliance, as opposed to going out and buying five and disqualifying them?
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> A. Joe Settles would be better to ask on that. But it's my understanding that prior to compliance buys, if they notice on any food instruments that's cleared the bank that if they suspect, for example, because we're talking about this issue of powdered formula versus concentrate, they send them a letter. But they also, my understanding is, check with the store if they need additional training or suggest – speak with them on ways to better watch it so that that doesn't occur. But, again, Joe Settles, can better answer that.

Administrative Hearing Transcript, pp. 54-55. Thus, while Egbert stated her belief that the Cabinet usually warned potential violators, her testimony is admittedly only an assumption on her part and is not supported by any evidence or definite knowledge of such an internal policy. Rather, she twice indicated that the proper person to answer such an inquiry was Joe Settles, the Cabinet's vendor monitor. However, when Settles testified during the administrative hearing, the question of whether the Cabinet had an internal policy of warning vendors prior to disqualification was never asked of him. Based on this record, and given the fact that there were no statutory or regulatory warning requirements in effect in 2003, there was not sufficient evidence to support reversal of the Cabinet's final decision.

In reaching this decision, we are mindful of the serious effect the Cabinet's prior regulation had on vendors such as Kroger V-338 who could be disqualified from the WIC program without first being granted the opportunity to correct problems which may well have been simple human errors. The detrimental effect that vendor disqualification surely has on program participants is of particular concern. Though the Cabinet may have correctly determined that participant access would not be unduly burdened, common sense dictates that, at best, the disqualification of a vendor will result in significant inconvenience to program participants who regularly do business with the disqualified vendor. For this reason, it is unfortunate that the Cabinet chose not to offer any warning or additional training to Kroger V-338 once it determined that possible program violations were occurring. A warning early in the process could well have resulted in Kroger V-338 rectifying the problem and the program participants not suffering the resulting inconvenience. Fortunately, the Cabinet's recently amended 2006 regulations include a warning process for situations such as the present one, avoiding future cases where vendors are terminated without prior notice.

In sum, there was no statutory or regulatory requirement in 2003 that the Cabinet warn a vendor of potential "unauthorized food item" violations before completing a sequence of compliance buys and then terminating a non-complying vendor. Moreover, we do not believe that the uncorroborated opinion of a Cabinet employee concerning an unwritten policy which she understood to be in effect but about which she professed limited knowledge is a sufficient basis for setting aside the agency's otherwise valid final decision. We are constrained to find that the Cabinet did not reach an

erroneous decision in this matter, and, therefore, we reverse the January 23, 2006, judgment of the McCracken Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

Michael Deep
Assistant Counsel
Commonwealth of Kentucky, Cabinet for Health and Family Services
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Richard L. Walter
Boehl Stopher & Graves, LLP
Paducah, Kentucky