

Commonwealth of Kentucky
Court of Appeals

NO. 2009-CA-002043-MR

KIMMY'S KORNER

APPELLANT

v. APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE PHILLIP J. SHEPHERD, JUDGE
ACTION NO. 08-CI-01733

COMMONWEALTH OF KENTUCKY,
CABINET FOR HEALTH AND
FAMILY SERVICES; JANIE MILLER,
SECRETARY

APPELLEES

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: ACREE AND NICKELL, JUDGES; HARRIS,¹ SENIOR JUDGE.

ACREE, JUDGE: The appellant, Kimmy's Korner, was disqualified from participation as a vendor in Kentucky's Special Supplemental Nutrition Program

¹ Senior Judge William R. Harris sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statute (KRS) 21.580.

for Women, Infants and Children (WIC). The Franklin Circuit Court affirmed the Cabinet's decision finding that Kimmy's due process rights were not violated and the decision to disqualify Kimmy's was supported by substantial evidence. We affirm.

Kimmy's Corner is a small grocery store in Covington, Kentucky. Kimmy's was an approved vendor participant in the WIC program, which is a federally funded program administered by the Cabinet, and is designed to provide nutritious food to pregnant, breast-feeding and post-partum women, and to infants and children. Kimmy's entered into a vendor agreement after applying, going through a screening process, and completing a training course.

Once vendors like Kimmy's are approved, they are reimbursed for food items purchased by a WIC "participant" who uses WIC "food instruments" specifying the kind and quantity of food that can be obtained. *See* 902 Kentucky Administrative Regulations (KAR) 4:040 §1 (15), (20). In order to be reimbursed, a vendor must submit redeemed WIC food instruments through a centralized WIC bank account. The WIC program regulations specify that a vendor may not charge a participant more than the "current shelf price." 902 KAR 4:040 §12. In order to enforce the program requirements, the Cabinet conducts "compliance buys." 902 KAR 4:040 §1 (20). Compliance buys are carried out by a member of the Cabinet

who poses as a WIC participant and purchases food from the WIC vendor using WIC instruments.

Kimberly Hatton, an investigator employed by the Cabinet's Office of Inspector General, made three compliance buys at Kimmy's. The compliance buys occurred on March 22, 2007, April 10, 2007, and May 2, 2007. In accordance with her usual routine, Hatton conducted the compliance buy, left the store, and while still in the parking lot, created a report. Hatton's investigation reports documented the date and time of visit, the items she purchased, the price identified on each item, the shelf or the case in which the item was located, a description of the circumstances of each purchase, information identifying the posted price tags on the items, and a description of the clerk who processed the purchase. Later, Hatton took pictures of the items she purchased. She later donated the items to a local charity, keeping a receipt for the donation. While Hatton did not request a receipt during the compliance buy, in her report she noted the current shelf price of the items.

In accordance with procedure, one of Kimmy's store clerks wrote on the WIC food instrument in the "Pay Exactly" box the amount Kimmy's actually intended to charge the Cabinet. Kimmy's then submitted the WIC instrument to the Cabinet for redemption. Nancy Sullivan, the supervisor of the Vendor Management Section of the WIC program, indicated that it is part of WIC's normal procedure to make copies of the WIC instruments that are redeemed. Those copies are then compared with the prices recorded in the investigative report. When

Hatton's report was compared with the WIC instruments redeemed by Kimmy's, the comparison revealed that Kimmy's charged more than the sum of the item's "shelf prices" on three consecutive compliance buys.

On August 15, 2007, Kimmy's received notification that it was being disqualified from participation in the WIC program for three years. The "vendor violation" stated that the grounds for disqualification were "charging more for supplemental food than the current shelf price" during three consecutive compliance buys, which requires suspension. *See* 902 KAR 4:040 §12. The letter was accompanied by a copy of the three investigative reports, a compliance buy summary, and copies of the food instruments submitted by Kimmy's. The notification letter also included a copy of the participation agreement executed by Kimmy's.

After receiving the letter in August of 2007, Kimmy's requested a hearing. In response to that request, Kimmy's received a letter indicating the Administrative Hearings Branch would contact a Kimmy's representative. Attached to the letter was a copy of the case file which included investigative reports detailing the "compliance buys."

Subsequently, a hearing was conducted and on August 18, 2008, the hearing officer issued a recommended order. Kimmy's filed exceptions to the recommended order, but on September 29, 2008, the Secretary of the Cabinet issued a final order affirming Kimmy's three-year disqualification from the WIC

program. Kimmy's appealed the decision to the Franklin Circuit Court. The circuit court affirmed and this appeal followed.

On appeal, Kimmy's argues that its due process rights were violated because the Cabinet did not provide sufficient notice. Further, Kimmy's asserts that the Cabinet's determination is not supported by substantial evidence and the Cabinet incorrectly applied to law to the facts.

The standard of review with regard to a judicial appeal of an administrative decision is limited to determining whether the decision was erroneous as a matter of law. Where the [administrative law judge] determines that a party has satisfied his burden of proof with regard to a question of fact, the issue on appeal is whether substantial evidence supported the determination. 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. Although a party may note evidence which would have supported a different conclusion than that which the ALJ reached, such evidence is not an adequate basis for reversal on appeal. The crux 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 a law.

Kroger Ltd. P'ship v. Cabinet for Health & Family Servs., 174 S.W.3d 516, 518 (Ky. App. 2005) (internal citations omitted). Questions of law are reviewed *de novo*. *Liquor outlet, LLC v. Alcoholic Beverage Control Bd.*, 141 S.W.3d 378, 381 (Ky. App. 2004).

KRS 13B.050(3)(d) requires that notice shall include "[a] statement of the factual basis for the agency action along with a statement of issues involved, in sufficient detail to give the parties reasonable opportunity to prepare evidence and

argument”. Kimmy’s asserts that it did not receive sufficient notice and as a result, was not able to prepare a defense.

However, prior to the hearing, Kimmy’s received copies of investigative reports documenting the compliance buys. Those reports indicated the date and time of the visit, what items were purchased, the listed shelf price, the shelf or case in which the item was located, a description of the circumstances of each purchase, information identifying the posted price tags on the items, and a description of the clerk who processed the purchase. The investigative report also included photos of the items purchased as well as the total amount for each purchase based on the listed “shelf price.” Kimmy’s also received copies of the instruments it submitted to the Cabinet for reimbursement. This was sufficient to provide Kimmy’s with notice of the allegations that would be addressed at the hearing. Further, Kimmy’s owner, Shelton, testified that he understood the meaning of the August 15, 2007 notice.

Kimmy’s also argues that the decision to suspend its participation in the program for three years was not supported by substantial evidence. However, the cabinet presented sufficient evidence to establish that Kimmy’s charged a participant “more for supplemental food than the current shelf price” in violation of 902 KAR 4:040. While Kimmy’s asserts that the conclusion was based on hearsay, it was not solely based on hearsay and therefore does not violate KRS 13B.090. As mentioned above, the investigative report detailed the compliance buy and Hatton testified at the hearing. Those reports, as indicated above, set forth

what items were purchased and the listed shelf price for each item. When the total price charged by the vendor was compared with the total of the shelf prices, the charged amount was more. These reports, coupled with the testimony of agency officials, constitute substantial evidence to support the conclusion that Kimmy's charged more than the listed shelf price on three consecutive compliance buys.

The credibility of the investigator is not for this court to consider because it was already considered by the finder of fact. The cabinet found the investigative reports and the testimony of agency officials to be credible. Therefore, we agree with the circuit court and find that the cabinet's determination was supported by substantial evidence and was not arbitrary.

For all of the above stated reasons, we affirm.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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