

RENDERED: FEBRUARY 20, 2009; 10:00 A.M.  
NOT TO BE PUBLISHED

# Commonwealth of Kentucky

## Court of Appeals

NO. 2007-CA-002590-MR

KROGER LIMITED PARTNERSHIP I,  
D/B/A KROGER R-783

APPELLANT

v. APPEAL FROM FRANKLIN CIRCUIT COURT  
HONORABLE THOMAS D. WINGATE, JUDGE  
ACTION NO. 06-CI-01541

CABINET FOR HEALTH AND FAMILY  
SERVICES, COMMONWEALTH OF KENTUCKY

APPELLEE

### OPINION REVERSING AND REMANDING

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BEFORE: KELLER AND WINE, JUDGES; LAMBERT,<sup>1</sup> SENIOR JUDGE.

WINE, JUDGE: Kroger Limited Partnership I, d/b/a Kroger R-783 (“Kroger”),  
appeals from the October 18, 2007, opinion and order and the November 29, 2007,  
order of the Franklin Circuit Court upholding an order of the Secretary for the

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<sup>1</sup> Senior Judge Joseph E. Lambert sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

Cabinet for Health and Family Services (“the Secretary”) affirming the Chief Hearing Officer (“CHO”) from the Cabinet for Health and Family Services (“the Cabinet”) which disqualified Kroger from participating as a vendor in the Special Supplemental Nutrition Program for Women, Infants and Children (“WIC”) for one year. The disqualification resulted after undercover Cabinet investigators determined Kroger to be out of compliance with federal and state program requirements and its WIC vendor agreement.

WIC is a federally-funded program providing nutrition services to eligible pregnant, breast-feeding and postpartum women, infants and children. A staple of the program is a system of food instruments issued to participants through local health departments. These food instruments are used by participants in lieu of cash to purchase specified foods from vendors who have entered into a one-year contract with the Cabinet. Vendors submit redeemed food instruments to a centralized bank account from which they are reimbursed. The vendor agreement, renewable annually, sets forth the responsibilities of both the vendor and the Cabinet. By signing the contract, the vendor agrees to comply with all state and federal policies, procedures and regulations. Code of Federal Regulations (“C.F.R.”), Part 246; 902 Kentucky Administrative Regulations (“KAR”) 4:040, § 10.

This case arises from the Cabinet’s enforcement and administration of WIC. Vendor contracts and applicable regulations require Kroger to comply with

certain guidelines regarding sales and their documentation. On April 13, 2006, a Kroger store located in Ashland, Kentucky, received notice of a one-year suspension from participation in the program, resulting from five non-compliant sales made to an undercover agent of the Office of Inspector General.

Kroger promptly appealed the decision and requested a hearing pursuant to Kentucky Revised Statutes (“KRS”) Chapter 13B. An initial hearing date was set for June 12, 2006. Andrew T. Smith, the Chief Hearing Office (“CHO”) was designated to preside over the hearing. On May 19, 2006, Kroger requested a continuance. The hearing was rescheduled for August 30 and 31, 2006. On June 7, 2006, Kroger filed a request for production of documents to be produced in the office of Kroger’s counsel by July 10. On June 15, the Cabinet denied the request, taking the position that the Kentucky Rules of Civil Procedure (“CR”) do not apply to administrative hearings. On June 23, 2006, Kroger filed a response to the Cabinet’s refusal to produce and a motion to compel production. Simultaneously, Kroger filed an open records request pursuant to KRS 61.870, *et seq.* Counsel for the Cabinet agreed to comply with that request on June 27, 2006. On July 28, 2006, the CHO, while acknowledging the Kentucky Rules of Civil Procedure as to discovery did not apply to administrative hearings, entered an order compelling production of most of the documents by the Cabinet by August 16, 2006. The Cabinet again insisted the civil rules do not apply, relying on *DHR v. Redmon*, 599 S.W.2d 474, 475 (Ky. App. 1980) and *Kentucky Lottery Corp. v. Stewart*, 41 S.W.3d 860, 863 (Ky. App. 2006). On July 28, 2006, Kroger filed a

motion to reschedule the hearing and another motion to compel production. On August 3, 2006, the CHO denied as moot the motion to compel production of documents and further denied the motion to reschedule the hearing. On August 16, the Cabinet filed a response to the discovery order. On August 21, Kroger filed another motion to compel, alleging the documents produced on August 16 were not sufficient. The CHO entered an order on August 22. On August 22, the Cabinet filed a motion to compel Kroger to identify five of its hourly workers in Ashland so that the Cabinet could subpoena them for personal appearance and testimony at the hearing. On August 24, before Kroger responded to the motion, the CHO ordered Kroger to comply with the employee list by noon on August 25. Kroger objected, arguing the CHO's order lacked substance and proper procedure. On August 28, the CHO overruled Kroger's objections to disclosing the names of its hourly workers in Ashland.

On the following day, August 29, Kroger filed a verified motion with supporting documents to disqualify the CHO from further participation in the case. In support of the motion, Kroger asserted the CHO engaged in ongoing blatant disregard for the law in its rulings against Kroger on several motions filed by Kroger and the Cabinet. With its motion to disqualify pending, Kroger also notified the Secretary that it would not participate in the hearing until the motion was ruled on. However, Kroger did not file a motion to reschedule the hearing, rather, noted the hearing "must" be rescheduled to allow for a decision by the Secretary. The hearing was called to order as scheduled the next morning on

August 30. Counsel for Kroger did not attend the hearing. The Cabinet moved for a default judgment. The CHO heard the Cabinet's argument, but then declared a recess until 1:00 p.m. to give the Secretary time to rule on Kroger's disqualification motion. That afternoon, the Secretary denied Kroger's motion to disqualify the CHO. A copy of the order was faxed to Kroger.

On August 31, the CHO granted the Cabinet's motion for default judgment against Kroger, pursuant to KRS 13B.030(6) and as advised in the initial letter scheduling the hearing. As a result, Kroger was disqualified from WIC participation for one year. On September 7, 2006, Kroger filed exceptions to the CHO's order as allowed under KRS 13B.110(4). On October 13, 2006, the Secretary entered a final order of the Cabinet granting the motion for a default judgment and affirming the April 13, 2006, sanction letter from WIC.

Prior to filing this appeal, in an attempt to determine if there had been an *ex parte* communication between the CHO and Cabinet representatives and the travel itinerary of the Secretary, Kroger sent the Cabinet an open records request on October 3, 2006, under KRS 61.870. On October 6, 2006, the Cabinet responded initially to Kroger's open records request by stating it would be completed within approximately ten business days. The Cabinet provided some documents, but responded that Kroger's request was open-ended and it would have to identify more specifically any other documents. Subsequently, on November 2, 2006, when Kroger filed its petition for review by the circuit court pursuant to

KRS 13B.140, it included an appeal pursuant to KRS 61.882, alleging that the Cabinet had not produced the requested documents.

The circuit court entered an order on October 18, 2007, holding that Kroger failed to exhaust its administrative remedies by not appearing at the administrative hearing and thus, the court lacked jurisdiction over the case. The Cabinet filed a timely motion pursuant to CR 59.05 to alter, amend or vacate, requesting that the circuit court also rule on the portion of Kroger's complaint relating to the open records request. Kroger filed a response to the Cabinet's motion stating the court's ruling on jurisdiction made the issue moot. The circuit court agreed with Kroger and denied the motion on November 29, 2007. This appeal followed.

On appeal, Kroger first argues that the circuit court erred in finding that it failed to exhaust its administrative remedies. Specifically, Kroger points to KRS 13B.080(6), which states that when a default order is entered as a result of one party's lack of participation in an administrative hearing, such default order shall be considered a recommended order and shall be processed as provided in KRS 13B.110. As such, Kroger argues that the recommended default order, which becomes a final order, is fully appealable as any other final order. In contrast, the circuit court's order reads:

Final orders of administrative agencies may be appealed to the Franklin Circuit Court pursuant to KRS 13B.140(1). However, it is well established that a party may seek judicial review of an administrative decision only after all administrative remedies have been

exhausted. If the appealing party has failed to adequately exhaust all available remedies then the Court will have no jurisdiction over the case. (Citation omitted).

By failing to participate in an administrative hearing before the Cabinet's hearing officer, the petitioner has failed to exhaust all viable remedies before the agency vested with primary jurisdiction over the matter. (Citation omitted).

We disagree with the circuit court's conclusion that Kroger failed to exhaust its administrative remedies. As noted above, KRS 13B.080(6), requires a final order by the Secretary before it is appealed to the trial court. Kroger timely appealed the CHO's recommended order to the Secretary. But, pursuant to KRS 13B.080(6), the only issue before the Secretary was whether the CHO properly granted a default judgment for the Cabinet. The Secretary issued a final order on October 13, 2006, affirming the entry of a default judgment against Kroger. Kroger filed a timely appeal from the Secretary's order pursuant to KRS 13B.140. Thus, under the statutory scheme, Kroger exhausted its administrative remedies and the trial court had jurisdiction over Kroger's appeal.

On the other hand, Kroger failed to object to the motion for a default judgment at the hearing. Properly objecting to the motion before the trial court provides the means for preserving and identifying issues for further judicial review. *See Rapier v. Philpot*, 130 S.W.3d 560, 562 (Ky. 2004). While Kroger may have anticipated a continuance would be granted, the Secretary acted quickly and denied the motion to disqualify. Therefore, by not attending the hearing, Kroger waived preservation of the substantive issue of whether Kroger was out of

compliance with the guidelines of WIC. Nevertheless, the circuit court had jurisdiction to preside over the remainder of the issues before it, including whether Kroger's due process rights were violated. Kroger specifically asserts that it was not afforded adequate time to prepare a defense to the charge of being in violation of the WIC program guidelines. In addition, Kroger asserts that the CHO was biased, failed to apply proper law and procedures in its orders, and engaged in improper *ex parte* communication with the Cabinet and the Secretary. Kroger further argues the administrative subpoenas were invalidly issued and enforced upon four Kroger representatives.

Because the circuit court erroneously found that Kroger failed to exhaust its administrative remedies, it also erroneously concluded that it lacked jurisdiction to preside over these remaining issues in the case. But as noted above, the remaining issues in this case involve preservation, not jurisdiction. We are satisfied from the record that Kroger preserved these issues for judicial review. After the CHO issued a recommended order granting a default judgment in favor of the Cabinet, Kroger filed exceptions to the CHO's order, including the failure to disqualify the CHO. On October 13, 2006, the Secretary affirmed the CHO's order granting default judgment to the Cabinet. Thus, Kroger's assertions of a due process violation were properly before the trial court and the trial court had jurisdiction to hear these aspects of Kroger's appeal.

Finally, the Cabinet concedes that the issues related to Kroger's second Open Records Request were properly before the circuit court. The trial



court failed to address this issue in its order of October 18, 2007. However, it would appear that Kroger waived any objection to the dismissal of this claim by opposing the Cabinet's CR 59.05 motion for a ruling on the matter. Kroger objected to amending the October 18, 2007, judgment, arguing the open records issue had become moot in light of the circuit court's ruling on the jurisdictional question. A request for review by the Attorney General or the circuit court pursuant to KRS 61.880 or 61.882, respectively, is a separate and distinct cause of action not dependent on the jurisdiction question involved with the appeal. The Cabinet did not file a cross-appeal challenging the trial court's failure to address the Open Records Request. Because Kroger objected to the trial court ruling on the Open Records Request, and because the trial court denied the Cabinet's motion, Kroger is not an aggrieved party and the Open Records Request issues have not been properly preserved for appellate review. Of course, Kroger may file additional Open Records Requests subject to the limitations prescribed in KRS 61.872.

Accordingly, the order of the Franklin Circuit Court dismissing Kroger's appeal is reversed, and this matter is remanded on the limited issues concerning the entry of a default judgment and Kroger's claims of due process violations arising out of the disqualification of the CHO.

KELLER, JUDGE, CONCURS.

LAMBERT, SENIOR JUDGE, DISSENTS.

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