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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-002160-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

** ** ** ** **

BEFORE: ACREE, CHIEF JUDGE; MAZE AND TAYLOR, JUDGES.

MAZE, JUDGE: Kroger Limited Partnership I, d/b/a Kroger R–783 ("Kroger") appeals from an October 27, 2011, opinion and order by the Franklin Circuit Court upholding an order of the Secretary for the Cabinet for Health and Family Services ("the Secretary") affirming the recommended order by the Chief Hearing Officer

("CHO") from the Cabinet for Health and Family Services ("the Cabinet"). The Cabinet 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.

In a prior appeal, this Court remanded the matter to the circuit court for a ruling on the merits of Kroger's claims that the Cabinet and the CHO violated its due process rights. Upon further review, the circuit court again affirmed the Cabinet's order. We conclude that, while the individual issues likely would not rise to the level of a due process violation, the overall pattern of irregularities and questionable practices in the Cabinet's administrative processes amounted to a violation of Kroger's due process rights. Therefore, we must reverse the circuit court's order upholding the Secretary's action, and remand this matter to the Cabinet for additional proceedings which comply with the minimum requirements of procedural due process.

The essential facts of this action were set out by another panel of this Court in the previous appeal:

> 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 Officer ("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.
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> 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.
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> 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.

Kroger Ltd. Partnership I v. Cabinet For Health and Family Services, 2009 WL 414032 (Ky. App. 2009) (2007–CA–002590–MR),*1-2.

In the first appeal, Kroger argued that the circuit court erred in finding that it had failed to exhaust its administrative remedies. This Court found that

Kroger had waived its objection to the default judgment because it failed to appear at the hearing before the CHO. However, the Court found that Kroger's due-process claims were preserved and were properly raised on appeal to the circuit court. As a result, this Court remanded the matter for the circuit court to address four particular issues raised by Kroger: (1) Whether Kroger received adequate notice of the Cabinet's motion for entry of a default judgment; (2) Whether the CHO engaged in improper *ex parte* communications with the Cabinet and its Secretary; (3) Whether the CHO should have been disqualified due to improper bias; and (4) Whether the CHO applied proper law and procedure in his discovery orders.

On remand, the parties submitted briefs to the circuit court addressing these issues. After considering the briefs and arguments of counsel and reviewing the administrative record, the circuit court issued an opinion and order on October 27, 2011, affirming the Cabinet's Final Order. Addressing the issues remanded by this Court, the circuit court found as follows: (1) Kroger's failure to receive notice of the Cabinet's motion for a default judgment was caused by its failure to attend the hearing and did not amount to a denial of due process; (2) Kroger failed to substantiate its claims that the CHO and the Cabinet engaged in improper *ex parte* communications; (3) Kroger failed to substantiate its claims that the CHO was disqualified due to an improper bias in favor of the Cabinet; and (4) There was no pattern of arbitrariness to the CHO's prehearing discovery orders, and in any event,

those rulings did not materially prejudice Kroger because it failed to attend the final hearing. Kroger again appeals to this Court.

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. *See Am. Beauty Homes Corp. v. Louisville & Jefferson County Planning & Zoning Comm'n*, 379 S.W.2d 450, 457 (Ky. 1964). KRS 13B.150(2) further provides that a court …

> shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court may affirm the final order or it may reverse the final order, in whole or in part, and remand the case for further proceedings if it finds the agency's final order is:
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> (a) In violation of constitutional or statutory provisions;
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> (b) In excess of the statutory authority of the agency;
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> (c) Without support of substantial evidence on the whole record;
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> (d) Arbitrary, capricious, or characterized by abuse of discretion;
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> (e) Based on an *ex parte* communication which substantially prejudiced the rights of any party and likely affected the outcome of the hearing;
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> (f) Prejudiced by a failure of the person conducting a proceeding to be disqualified pursuant to KRS 13B.040(2); or
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> (g) Deficient as otherwise provided by law.

In the prior appeal, this Court specified that further review of the Cabinet's final order should be limited to four designated issues generally concerning whether the conduct of the proceedings before the CHO violated Kroger's right to due process. To determine the sufficiency of due process

provided in an administrative setting, the Kentucky Supreme Court in *Div. of Driver Licensing v. Bergmann*, 740 S.W.2d 948, 951 (Ky. 1987), adopted the three-prong analysis from *Mathews v. Eldridge*, 424 U.S. 319, 333–35, 96 S. Ct. 893, 902–03, 47 L. Ed. 2d 18 (1976). That test requires consideration of the private interest that will be affected by the official action; the risk of an erroneous deprivation of such interest through the procedures used; the probable value, if any, of additional or substitute procedural safeguards; and the government's interest that any additional procedural requirement would entail. *Mathews*, 424 U.S. at 335, 96 S.Ct. at 903.

In addition to the facts set out above by the prior panel of this Court, we have reviewed the administrative record to set out additional facts which are relevant to this appeal. As outlined above, there were ongoing disputes about discovery in July and August 2006. Kroger's counsel became increasingly frustrated with the CHO's adverse discovery rulings. The CHO ultimately granted most of Kroger's requests in an order entered on August 15, 2006. However, Kroger's counsel complained fervently about the documents which the CHO did not order produced, and about the Cabinet's resistance to providing the documents which the CHO did order produced. On August 22, 2006, the CHO entered an order partially granting Kroger's motion to compel the disputed documents.

Although Kroger was partially successful on this issue, Kroger's frustrations with the CHO came to a head almost immediately thereafter. Late in the day on August 22, 2006, the Cabinet filed a motion to compel Kroger to

produce the names and addresses of five employees identified in the compliance buys at issue. The CHO granted the motion at the opening of business on August 24, 2006, and directed Kroger to provide the names by August 25, 2006. Kroger complained that it had not been given an adequate opportunity to respond to the motion, and also objected that the subpoena infringed on the privacy rights of its employees. In addition, Kroger suggested that the Cabinet's knowledge of the reasons for the CHO's early entry of the order suggested some type of *ex parte* contact had occurred.

In an order entered on August 28, 2006, the CHO denied any improper conduct, stating that the timing of its August 24, 2006, order "was made in consideration of this tribunal's schedule, both parties' responsibilities under the circumstances, and out of consideration of those individuals whose attendance is sought for a hearing that begins on August 30, 2006." The CHO added that the Cabinet's subpoenas were proper and involved a "simple discovery matter" which was well within the scope of KRS 13B.080(3). Finally, the CHO stated that "[a]ny motions to quash a subpoena may be addressed at hearing."

The next day, Kroger filed its motion to disqualify the CHO based on alleged bias and *ex parte* conduct. Kroger's counsel also advised the Secretary that it would not attend the August 30, 2006, hearing, contending that Kroger could no longer receive a fair hearing from the CHO. Kroger's motion to disqualify was not accompanied by a motion for a continuance or to hold the matter in abeyance.

The scheduled hearing convened at 9:30 a.m. on August 30, 2006. Kroger did not have a representative at the hearing. The Cabinet moved to enter a default judgment in light of Kroger's failure to appear and its failure to comply with the August 24, 2006, discovery order. The CHO took note of Kroger's motion to disqualify. The Cabinet's counsel noted that the Secretary had been out of the state and would be delayed in returning until sometime later that morning. In light of this, the hearing officer recessed the hearing until 1:00 p.m. to allow the Secretary an opportunity to rule on the motion.

The Secretary denied Kroger's motion to disqualify the CHO sometime before noon, although the exact time the order was entered is not clear from the record. The certification on the order states that it was served on Kroger's counsel via fax. The hearing resumed at 1:15 p.m., at which time the Cabinet renewed its motion for default judgment. Since Kroger's counsel was still not present, the CHO granted the motion, although the order was not entered until the following day. Kroger's counsel states that he did not receive notice of either the rescheduled hearing or the denial of the request for disqualification until after the default judgment was entered.

In his recommended order, the hearing officer granted default judgment for the Cabinet on two grounds: (1) Kroger's failure to comply with the CHO's discovery orders entered on August 24 and 28, 2006; and (2) Kroger's failure to attend the scheduled hearing on August 30. In the final order confirming entry of default judgment, the Secretary primarily discussed the latter issue, but

also agreed with the hearing officer on the former issue. On appeal, the circuit court did not address that issue, finding only that default judgment was entered because Kroger failed to attend the August 30 hearing, and that Kroger's own actions were the cause of its failure to receive notice of the rescheduled hearing or the denial of the disqualification motion. Because the default judgment was properly entered on this ground alone, the circuit court concluded that Kroger was not prejudiced by the hearing officer's adverse discovery rulings.

Kroger first argues that it did not receive timely notice of the Secretary's action, the rescheduled hearing and the Cabinet's motion for a default judgment. Consequently, Kroger maintains that the CHO improperly entered the default judgment against it. In an administrative proceeding, procedural due process only requires that the notice afford the parties a reasonable opportunity to be heard under the circumstances. *Triple M. Min. Co., Inc. v. Natural Resources and Environmental Protection Cabinet*, 906 S.W.2d 364, 367 (Ky. App. 1995), citing 2 Am.Jur.2d *Administrative Law*, §§ 360, 361. Although we agree with the circuit court that sufficiency of notice is the primary issue in this case, the circumstances surrounding the other issues are relevant to determine whether the proceedings afforded Kroger with the minimum requirements of procedural due process.

The Cabinet points out that Kroger had timely notice of the hearing scheduled at 9:30 a.m. and it elected not to appear at that hearing. As the circuit court further pointed out, Kroger could have had notice of the rescheduled hearing

at 1:00 p.m. if its counsel had attended the hearing commencing at 9:30 a.m. Kroger's counsel could also have learned that the Secretary's decision on the motion to disqualify was "expected" sometime before 1:00 p.m., and would have known that his appearance at the later hearing was necessary. Furthermore, the Cabinet maintains that its efforts to provide Kroger with notice on August 30, although perfunctory, were not made in bad faith and were reasonably calculated to notify Kroger's counsel of the Secretary's ruling and the rescheduled hearing.

If we were viewing this issue by itself, we would be inclined to agree with the circuit court that Kroger's failure to receive notice was caused largely by its own actions and did not constitute a violation of its due process rights. Indeed, we do not condone a party's unilateral decision to withdraw from participation in a scheduled administrative hearing. At the very least, the decision by Kroger's counsel not to appear at the August 30 hearing was unwise and risky to Kroger's interests. By not appearing at the 9:30 a.m. hearing on August 30, counsel missed the opportunity to receive timely notice of the 1:00 p.m. hearing and the expected decision by the Secretary.

Nevertheless, the decisions by Kroger's counsel are mitigated by the peculiar circumstances of this case. In particular, Kroger filed a motion prior to the hearing seeking to disqualify the CHO for bias. KRS 13B.040(2) gives the agency head up to 60 days to rule on a request. The statute does not expressly require a hearing officer to defer further substantive proceedings until the agency head answers the request for disqualification. But considering that the

participation of a disqualified hearing officer is grounds for reversal under KRS 13B.150(2)(f), we may reasonably assume that the filing of a motion for disqualification operates to suspend further proceedings.

The CHO properly recognized this rule by recessing the hearing until 1:00 p.m. to await action by the Secretary. The Cabinet contends that, while Kroger's counsel may have expected the Secretary to take more time on the disqualification motion, he could not assume that the motion would compel the CHO to reschedule the hearing to another date. To a certain extent, we agree. A motion to disqualify is different from a motion for a continuance. Furthermore, the filing of a motion to disqualify should not be used as a delaying tactic and it cannot justify a failure to appear at a scheduled hearing.

However, the Cabinet announced its intent to seek a default judgment as soon as possible after the Secretary denied his motion. Thus, the risk of unfair prejudice to Kroger from inadequate notice is very great. Given this risk, we also question the sufficiency of the notice of the Secretary's action by fax approximately one to one-and-a-half hours before the hearing reconvened. Kroger was entitled to reasonable notice of the Secretary's action. Such notice could have been easily ensured by at least an attempt to directly contact Kroger's counsel of the Secretary's order and the recommencement of the hearing.

Furthermore, while the CHO and counsel for the Cabinet may have expected the Secretary to act on the disqualification motion before 1:00 p.m., the Secretary was not obligated to take action within that expected time frame. Indeed,

the hearing had been scheduled over a two-day period. Under the circumstances, it was simply unnecessary to reconvene the hearing on such short notice after the Secretary had ruled on the request to disqualify.

In addition, the CHO's knowledge that the Secretary would act within this time frame raises troubling questions about *ex parte* contact and the independence of the process for evaluating requests for disqualification. Kroger does not present any direct evidence that the CHO engaged in *ex parte* communications with the Cabinet's counsel. Rather, Kroger argues that such contact may be implied by statements from the hearing officer following his ruling on August 24 on the Cabinet's discovery motion, and on August 30 while the motion to disqualify was pending.

As noted above, the CHO granted the Cabinet's request to compel Kroger to produce the full names and addresses of its employees involved in the compliance buys. Kroger points out that the Cabinet's counsel was aware of the CHO's reasons for entering the order early in the day before it was even aware that that the order had been signed. Similarly, on August 30, the CHO stated that he was aware that the Secretary would return to Frankfort and would rule on the disqualification motion sometime before 1:00 p.m. Kroger contends that these statements imply that the hearing officer and the Cabinet's counsel exchanged information outside of the record.

With limited exceptions, KRS 13B.100 expressly prohibits a hearing officer from communicating "off the record with any party to the hearing or any

other person who has a direct or indirect interest in the outcome of the hearing, concerning any substantive issue, while the proceeding is pending." If any *ex parte* communication occurs, the hearing officer must note the occurrence and the substance of the communication in the record. KRS 13B.100(3). The purpose of the statute is to prevent *ex parte* communications between interested parties and the hearing officer. *Fankhauser v. Cobb*, 163 S.W.3d 389, 404 (Ky. 2005).

In response to Kroger's allegation of *ex parte* contact with respect to the CHO's entry of the August 24 order, the Cabinet's counsel stated that she had acquired the information about the CHO's schedule from the legal secretary for the Division of Administrative Hearings. The Cabinet's counsel also provided a copy of the e-mail thread from the legal secretary providing this information. With regard to the August 30 hearing, the Cabinet provided a copy of e-mails between the Cabinet's counsel, the Cabinet's General Counsel and the Secretary's staff discussing the motion to disqualify and the Secretary's schedule.

Ex parte contact is condemnable when it is relevant to the merits of the proceeding between an interested person and an agency decision maker. *Louisville Gas and Elec. Co. v. Commonwealth, ex rel. Cowan*, 862 S.W.2d 897, 900 (Ky. App. 1993). But, since the contact must relate to the merits of the proceeding, legitimate procedural and status inquiries are not subject to sanction. *Id.* It appears that most of these contacts involve legitimate procedural and status inquiries and not the merits of the proceeding. Such exchanges generally do not

constitute impermissible *ex parte* contact. *Louisville Gas and Elec. Co. v. Commonwealth, ex rel. Cowan*, 862 S.W.2d 897, 900 (Ky. App. 1993).

However, we caution that even such seemingly innocuous inquiries can be subtle or indirect attempts to influence the substantive outcome. *Id.* Most of the exchanges relating to the August 24 order merely discuss the scheduling of the CHO's order granting the motion to compel. However, the exchanges, and the CHO's subsequent orders justifying them, suggest that the Cabinet's counsel had an inappropriate level of access to the CHO's decision-making process. This access clearly influenced the timing of the CHO's order granting the motion to compel, since the CHO entered the order before Kroger had an opportunity to respond to the Cabinet's motion.

Similarly, the e-mail exchanges around August 30 mostly discuss the Secretary's schedule and expected return to Frankfort. But they also include comments from the Cabinet's counsel to the Secretary's staff describing the request for disqualification as "nonsense" and "horsefeathers," and responses from the Secretary's staff which assure a speedy disposition of the matter. Again, we are troubled by the Cabinet's degree of access to the decision-making process.

Such incidental *ex parte* contact might be tolerable in the absence of other issues. But in this case, it merely adds to a disturbing pattern of conduct. Furthermore, such conduct also suggests that the CHO showed improper bias against Kroger or favoritism toward the Cabinet's counsel. This, of course, brings us to the question of whether the hearing officer should have been disqualified due

to bias. Kroger contends that the CHO's disparate treatment of the parties during the prehearing discovery process raises valid inferences of arbitrariness and bias.

From our review of the record, it is clear that there was significant animosity between counsel for Kroger and counsel for the Cabinet during the proceedings before the CHO. The pleadings are replete with personal attacks, snide comments, and sniping by counsel for both parties. Such unprofessional conduct is inappropriate in any proceeding, whether judicial or administrative.

Moreover, this behavior created a bitter tone to all the proceedings and the CHO, whether rightly or wrongly, became associated with the Cabinet's position in the increasingly hostile proceeding. We find very little indication that the CHO took steps to control the tenor of the proceedings. In fact, his discretionary rulings may well have fed into Kroger's frustrations and conclusion that it could not obtain a fair hearing.

We note that the CHO ultimately granted most of Kroger's discovery requests, and articulated specific reasons for denying the rest. However, Kroger was required to file repeated motions to compel and open records requests to obtain documents from the Cabinet. Yet within hours after the CHO finally granted most of Kroger's requests for documents on August 22, the Cabinet filed its motion to compel Kroger to produce the names and addresses of the five employees. The CHO granted this motion less than 48 hours later and without affording Kroger an opportunity to reply to the motion. The CHO's order required Kroger to produce the names and addresses only one business day later.

In defense of this action, the CHO noted that the Cabinet was entitled to this information and granted the motion on such short notice due to the imminent hearing. The CHO also noted that Kroger had not articulated a valid objection to the subpoena. Although the CHO's conclusions on these points could be reasonable when viewed alone, the CHO's handling of the motion raises serious questions of fairness. The timing of the Cabinet's final motion to compel on August 22 smacks of gamesmanship and the CHO's hasty granting of that motion contributed to Kroger's impression that the process was rigged in the Cabinet's favor.

Moreover, the Cabinet had identified the first names of these employees during its compliance buys in January-March of 2006, but did not bring the motion until less than a week before the scheduled hearing. Considering the prior handling of Kroger's discovery requests, it appears that the CHO held Kroger to a much higher standard of compliance than he had held the Cabinet. And in fact, he granted the motion without adequate notice and was very dismissive of Kroger's objections.

Kroger filed its August 29 motion to disqualify the CHO against this backdrop. Kroger notified the Cabinet and the CHO that it would not appear at the scheduled hearing until the Secretary ruled on its motion. The CHO accepted the Cabinet's counsel's vociferous objection to the late filing of this motion. However, the CHO had previously accepted without complaint Kroger's equally late filing of its motion to compel on August 22. When the Cabinet's counsel appeared at the

hearing on the morning of August 30, the CHO was clearly inclined to grant the Cabinet's motion for a default judgment immediately after the Secretary ruled on the motion to disqualify.

The CHO and the Cabinet extensively argue that the Civil Rules do not apply to discovery or pleadings in administrative proceedings. We agree. The Civil Rules apply to proceedings before an administrative agency only to the extent provided by statute or regulation. *Burroughs v. Martco*, 339 S.W.3d 461, 465 (Ky. 2011). In the absence of any statute or regulation expressly adopting the provisions of the Civil Rules to administrative proceedings before the Cabinet, the CHO was not obligated to apply those standards to his discovery rulings.

But while the Civil Rules do not apply in this case, the CHO was not free to make arbitrary decisions in his discovery rulings. *See Kentucky Milk Marketing & Antimonopoly Comm'n v. Kroger Co.,* 691 S.W.2d 893, 899 (Ky. 1985). When considered individually, the issues relating to the CHO's rulings during the discovery process, the pattern of *ex parte* contact and suggestions of bias, or the short notice on which default judgment was granted would not require reversal of the entry of the default judgment. But after considering the totality of the circumstances, we must conclude that the proceedings before the CHO did not afford Kroger the minimum due process required for administrative proceedings.

Therefore, the default judgment against Kroger was improperly entered and must be set aside. While we do not condone Kroger's decision to be absent from the August 30 hearing, we must conclude that the default judgment

was entered with inadequate notice. In addition, we find that Kroger's alleged failure to comply with the discovery orders was not a sufficient basis for entry of the default judgment. Finally, we further conclude that the CHO should have been disqualified for bias. Upon remand, this matter must be assigned to a different hearing officer. We express no opinion whether the subpoenas issued to Kroger on August 24 were validly entered. That issue and any other discovery issues should be addressed to the new hearing officer on remand.

Accordingly, the October 27, 2011, opinion and order of the Franklin Circuit Court is reversed, and the default judgment entered by the Secretary in the administrative matter is vacated and set aside. This matter is remanded to the Cabinet for Health and Family Services for further proceedings as set forth in this opinion.

ALL CONCUR.

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