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Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-001243-MR

COMMONWEALTH OF KENTUCKY,
CABINET FOR HEALTH AND FAMILY
SERVICES

APPELLANT

v. APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE THOMAS D. WINGATE, JUDGE
ACTION NO. 05-CI-01204

GAMBREL'S FOOD MART, INC.

APPELLEE

OPINION AFFIRMING

** ** * ** * ** *

BEFORE: COMBS, CHIEF JUDGE; STUMBO, JUDGE; BUCKINGHAM,¹
SENIOR JUDGE.

STUMBO, JUDGE: The Commonwealth of Kentucky, Cabinet for Health and
Family Services, appeals from a Judgment of the Franklin Circuit Court holding
that Gambrel's Food Mart should not be disqualified from participating as a vendor

¹ Senior Judge David C. Buckingham 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.

in Kentucky's "Women, Infants and Children" (WIC) program. The lower court determined that Gambrel's was subject to a waiver from disqualification because disqualification would hinder consumer access to WIC-approved food. The Cabinet argues that Gambrel's was not entitled to a hearing or judicial review of the hearing regarding its disqualification. Gambrel's argues that it was entitled to a hearing and judicial review on the grounds that to hold otherwise would be an arbitrary denial of due process. We affirm the circuit court and find that Gambrel's was entitled to a hearing and judicial review of its WIC disqualification.

Gambrel's is a small grocery store in Arjay, Kentucky. It is a vendor which participates in the WIC program. In April of 2001, the U.S. Department of Agriculture (USDA) issued a civil money penalty against Gambrel's for accepting food stamp electronic benefit transfers as payment on credit accounts in violation of federal regulations. The USDA issued the money penalty in lieu of disqualifying Gambrel's from the food stamp program for one year after the USDA acknowledged that a one-year disqualification would pose a hardship for food stamp customers who shop in Gambrel's area.

On November 27, 2002, the WIC program, acting through the Cabinet, disqualified Gambrel's from participating in the WIC program for one year based on the USDA's issuance of the penalty.² Vendors, such as Gambrel's, can avoid disqualification if the WIC program determines disqualification would

² When a vendor is given a civil money penalty by the USDA for violating a regulation regarding food stamps, the state WIC agency is required to either disqualify the vendor from participation for a period of time or issue its own money penalty.

result in inadequate participant access, meaning those receiving WIC benefits would be unable to adequately use or take part in the WIC program.

The criteria the Cabinet uses to determine adequate participant access can be found in 902 Kentucky Administrative Regulations (KAR) 4:040 Section

13. It states in relevant part:

(1) Except for a violation specified in Section 12(1)(g) of this administrative regulation, prior to disqualifying a vendor for a violation specified in Section 12 of this administrative regulation, the WIC Program vendor manager shall determine if disqualification of the vendor will result in inadequate participant access.

(2) The determination and documentation of adequate participant access shall be made using the criteria provided in subsections (4) and (5) of this section.

(3) Mileage shall be measured by automobile odometer.

(4) There is adequate participant access, if:

(a) There is another vendor within seven (7) miles of the vendor;

(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.

(5) If five (5) or more total food packages are redeemed by the subject vendor in the calendar month period

immediately preceding the issuance of a sanction letter, the WIC coordinator shall be consulted to determine if a special circumstance exists that will result in inadequate participant access.

(6) If inadequate participant access is determined, a civil money penalty shall be assessed for a violation listed in Section 12 of this administrative regulation. The civil money penalty shall be calculated in accordance with the procedures outlined in the Vendor Manual.

The Cabinet offered Gambrel's a hearing on the matter. The Hearing Officer found that there would be inadequate participant access if Gambrel's were disqualified for one year because there was not another authorized WIC vendor within seven miles of Gambrel's and that frequent flooding of the roads blocks access to the next participating vendor. However, the Hearing Officer upheld the disqualification because according to 7 Code of Federal Regulations (C.F.R.) § 246.18(a)(1)(iii) (2009) and 902 KAR 4:040 Section 11(2)(b), the WIC program's determination of participant access is not subject to appeal. Participant access was the only contested issue in this case.

Gambrel's then appealed to the Franklin Circuit Court. The circuit court found that the Hearing Officer relied upon substantial evidence when it found there would be inadequate participant access if Gambrel's received the one-year disqualification. The lower court also found that giving WIC vendors a hearing, but not allowing review of participant access determinations, is arbitrary in result. The lower court ultimately held that Gambrel's would not be subjected to a one-year disqualification from the WIC program. This appeal followed.

The Cabinet argues that the administrative hearing should never have happened and, therefore, the Hearing Officer's findings were void. It also argues that the circuit court did not have subject matter jurisdiction over this matter because 902 KAR 4:040, the state regulation governing the WIC program, does not provide for an appeal to any court. We disagree with both arguments. See 902 KAR 4:040 Section 11(1)(b) which gives a vendor the right to a hearing when it is being disqualified from the program. Also, the federal WIC regulation, specifically 7 C.F.R. § 246.18(a)(1)(ii)(G) (2009), allows for a hearing.

As for the circuit court's jurisdiction, although 902 KAR 4:040 does not mention appeal to a court, Gambrel's was not only appealing its disqualification; it was also arguing the Cabinet was acting arbitrarily and in violation of the Kentucky and U.S. Constitutions.

Basically, judicial review of administrative action is concerned with the question of *arbitrariness*. On this ground the courts will assume jurisdiction even in the absence of statutory authorization of an appeal. There is an inherent right of appeal from orders of administrative agencies where constitutional rights are involved, and section (2) of the [Kentucky] Constitution prohibits the exercise of arbitrary power. (Citations omitted).

American Beauty Homes Corp. v. Louisville and Jefferson County Planning and Zoning Commission, 379 S.W.2d 450, 456 (Ky. 1964). Also, Kentucky Revised Statutes (KRS) 13B.140(1) states that “[a]ll final orders of an agency shall be subject to judicial review in accordance with the provisions of this chapter.”

Now on to the crux of this case, the reviewability of the Cabinet's participant access determination. We find, as the lower court did, that not allowing Gambrel's the opportunity to appeal the participant access determination was an arbitrary act. "Absolute and arbitrary power over the lives, liberty and property of freemen exists nowhere in a republic, not even in the largest majority." Kentucky Constitution § 2.

In order to not violate section 2 of the Kentucky Constitution, a statute or regulation must be "rationally related to a legitimate state objective."

Commonwealth v. Louisville Atlantis Community/Adapt, Inc., 971 S.W.2d 810, 816 (Ky. App. 1997). " 'Arbitrariness' arises when an agency: (1) rendered a decision on less than substantial evidence, (2) failed to afford procedural due process to an affected party, or (3) exceeded its statutory authority." *K & P Grocery, Inc. v. Commonwealth*, 103 S.W.3d 701, 703-704 (Ky. App. 2002).

Here, the Cabinet has put forth no evidence as to the rationale of not allowing a vendor to appeal its participant access determination. Further, by allowing Gambrel's the opportunity for a hearing, but then not allowing review of the central issue in question, the Cabinet has irrationally and inappropriately limited Gambrel's due process rights.

In the case of *Kroger Ltd. Partnership I v. Cabinet for Health Services, Commonwealth of Kentucky*, 174 S.W.3d 516, 520 n.3 (Ky. App. 2005), another panel of this Court stated that it, too, thought the inability to review the participant access determination violated section 2 of the Kentucky Constitution.

Although this was stated in dicta and was not determinative of the case, we find it illuminating.

Now that we have determined that Gambrel's was entitled to appeal the participant access determination, we look to see if it should have been disqualified from WIC participation.

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 ALJ 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 law. (Citations omitted).

Id. at 518.

We find that the Hearing Officer relied upon substantial evidence in determining there would be inadequate participant access should Gambrel's be given a one-year disqualification from the WIC program. The rural area where Gambrel's is located, the frequent flooding of the roads, and the testimony regarding the lack of another WIC vendor within seven miles of Gambrel's, all point to inadequate participant access. While there was some evidence to the

contrary, the Hearing Officer found Gambrel's evidence more convincing. The circuit court properly upheld that finding.

For the above reasons, we affirm the circuit court and hold that Gambrel's will not be subject to the one-year disqualification from the WIC program.

ALL CONCUR.

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