

RENDERED: NOVEMBER 14, 2003; 10:00 a.m.  
NOT TO BE PUBLISHED

**Commonwealth Of Kentucky**

**Court of Appeals**

NO. 2002-CA-002603-MR

COMMONWEALTH OF KENTUCKY,  
CABINET FOR HEALTH SERVICES

APPELLANT

v. APPEAL FROM BELL CIRCUIT COURT  
HONORABLE JAMES L. BOWLING, JR., JUDGE  
ACTION NO. 02-CI-00088

MEVELINE CARNES  
D/B/A MEV'S GROCERY

APPELLEE

OPINION

AFFIRMING

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BEFORE: PAISLEY AND TACKETT, JUDGES; AND HUDDLESTON, SENIOR  
JUDGE. <sup>1</sup>

PAISLEY, JUDGE. This is an appeal from a judgment entered by  
the Bell Circuit Court reversing and remanding an administrative

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

decision of the appellant, Commonwealth of Kentucky, Cabinet for Health Services. For the reasons stated hereafter, we affirm.

The Kentucky WIC program was established to provide specified food items to eligible participants who present the proper vouchers to approved vendors, who are then reimbursed through a centralized WIC account. Investigators periodically make undercover purchases to ensure that WIC vendors comply with applicable regulations, including restrictions against charging the WIC program more than the current retail prices charged to customers who are not WIC participants.

Appellee Meveline Carnes, d/b/a Mev's Grocery, owns and operates a grocery store in Bell County which served as a vendor in the Kentucky WIC program. During June and July 2001, an investigator made three compliance visits to appellee's store to purchase multiple items by using WIC vouchers. It is undisputed that on each occasion the WIC program was charged more for milk than the price listed on the dairy shelf. Appellee asserted, however, that the prices charged were the same as those charged to all customers for milk on the dates in question, and that any inconsistencies between the listed shelf prices and the charged prices resulted from her error in failing to change the posted milk prices as they periodically fluctuated according to changes in the prices charged by suppliers.

Appellant advised appellee by certified mail that she would be disqualified from operating as a WIC vendor for three years due to the pricing discrepancies. On October 5, 2001, appellant received appellee's timely request for an appeal hearing. A hearing was conducted and on January 28, 2002, a final order disqualifying appellee from participating in the WIC program was entered and mailed to her. The Bell Circuit Court subsequently reversed and remanded the matter for a new hearing due to appellant's failure to timely notify appellee of its decision. This appeal followed.

The federal government regulates the method by which a WIC vendor may administratively appeal an adverse agency action. 7 C.F.R. §246.18 (2001) provides in pertinent part as follows:

(b) *Full administrative review procedures.* The State agency must develop procedures for a full administrative review . . . . At a minimum, these procedures must provide the vendor or local agency with the following:

. . . .

(9) Written notification of the review decision, including the basis for the decision, within 90 days from the date of receipt of a vendor's request for an administrative review, and within 60 days from the date of receipt of a local agency's request for an administrative review. These timeframes are only administrative requirements for the State agency and do not provide a basis for overturning the State agency's adverse action if a decision is not made within the specified timeframe.  
(Emphasis added.)

The state of Kentucky complied with this federal mandate by enacting various administrative regulations including 902 KAR 4:040(15)(4) (2001), which provides:

The final order of the cabinet shall be forwarded to the appellant no later than sixty (60) days from the date of receipt of the written request for hearing, unless the appellant waives this date in writing. (Emphasis added.)

Here, it is undisputed that 115 days passed between the date of appellee's written request for an administrative appeal, and the date on which appellant's final order was forwarded to appellee. Although 115 days obviously exceeded both the state and the federal timeframe requirements, appellant urges us to find that the 60-day state requirement conflicts with, and therefore is preempted by, the 90-day federal requirement. Moreover, appellant asserts that since 7 CFR §246.18(b)(9) specifies that a violation of the 90-day federal period is not "a basis for overturning the State agency's adverse action," there is no basis for overturning appellant's decision due to its noncompliance with either the 60-day or the 90-day timeframe. We disagree.

Simply put, we are not persuaded that the 60-day state timeframe set out in 902 KAR 4:040(15)(4) is preempted by the 90-day federal timeframe set out in 7 CFR 246.18. The Kentucky Supreme Court addressed the issue of the federal preemption of

state laws in Commonwealth v. Telcom Directories, Inc., Ky., 806 S.W.2d 638, 640 (1991), noting:

As a general statement, preemption occurs when Congress, in enacting a federal statute, expresses a clear intent to preempt state law, . . .; when there is outright or actual conflict between federal and state law, . . .; where compliance with both federal and state law is in effect physically impossible, . . .; where there is implicit in federal law a barrier to state regulation, . . .; where Congress has legislated comprehensively, thus occupying an entire field of regulation and leaving no room for the states to supplement federal law, . . .; or where the state law stands as an obstacle to the accomplishment and execution of the full objectives of Congress. (Citations omitted.)

Here, as 7 CFR §246.18(b) specifically indicates that it is intended to serve only as a minimum guideline for the development of the administrative review procedures which each state must develop in order to participate in the WIC program, the federal regulation does not show a "clear intent to preempt state law." Telcom, 806 S.W.2d at 640. Moreover, as 7 C.F.R. §246.18(b) specifies only the minimum rights which states must provide, Kentucky's more restrictive timeframe and its omission of the federal language regarding timeframe violations simply do not conflict with the federal regulation or create a situation in which a party would find it impossible to comply with both state and federal regulations. Telcom, 806 S.W.2d at 640. Finally, since 7 C.F.R. §246.18(b) requires appellant to develop full administrative review procedures, there is no merit to the

argument that the state timeframe violates any federal barrier to state regulation, that it violates comprehensive federal legislation, or that it prevents the accomplishment and execution of federal objectives. Telcom, 806 S.W.2d at 640. We conclude, therefore, that the trial court did not err by reversing and remanding the administrative order.

The court's judgment is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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