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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-000376-MR

NEIGHBORHOOD FOOD MART — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE GEOFFREY P. MORRIS, JUDGE
ACTION NO. 03-CI-000797

COMMONWEALTH OF KENTUCKY,
CABINET FOR HEALTH SERVICES — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: GUIDUGLI AND MINTON, JUDGES; EMBERTON, SENIOR JUDGE.[1]

GUIDUGLI, JUDGE: Neighborhood Food Mart appeals from an opinion and order of the Jefferson Circuit Court affirming the findings of fact, conclusions of law, and final order of the Secretary of the Cabinet for Health Services. The Secretary rejected a hearing officer's recommended decision, and ruled that Neighborhood should be suspended for three years from participation in the WIC program. The suspension was based on

[1] Senior Judge Thomas D. Emberton, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 100(5)(b) of the Kentucky Constitution and KRS 21.580.

the allegation that Neighborhood charged a WIC participant more for food than the current shelf price in violation of 902 KAR 4:040 § 12(1)(i)1.b. For the reasons stated below, we affirm.

Neighborhood is a small grocery store located in Jefferson County, Kentucky. Neighborhood participates in the federally funded WIC program, which is a supplemental nutritional program for women, infants and children. Under the terms of the program, Neighborhood may accept WIC "food instruments", i.e., vouchers, from WIC participants, parents or caretakers in exchange for specified food items. Neighborhood is reimbursed by the WIC program from a centralized WIC bank account for the cost of the food items. As a food vendor in the WIC program, Neighborhood agreed to abide by the relevant state and federal regulations governing the operation of the program.

In January 2002, a Cabinet for Health Services investigator posing as a WIC customer made food purchases at Neighborhood using WIC vouchers. Over the course of three visits, the investigator purchased WIC-authorized food items including milk, breakfast cereal and eggs. The investigator determined that on two of the three visits, Neighborhood charged more for certain food items than the listed shelf price in violation of WIC regulations, and that it made the sale of an unauthorized food item.

On April 23, 2002, the Cabinet notified Neighborhood by letter of its findings and imposed a three-year disqualification from the WIC program. The disqualification was based in part on the Cabinet's December 21, 2001, finding of a pattern of "low variance" in three of the last four federal fiscal year quarters.[2] In the December 21, 2001, letter to Neighborhood, the Cabinet warned that the low variance coupled with any future violations could result in disqualification from the WIC program.

Neighborhood requested and received a hearing before an administrative hearing officer. It stipulated to the violations, but argued that they were inadvertent. It claimed that the co-owner and cashier, Salwa Ali, was not present because of a family medical emergency, and that the store's butcher, Yousef Ali (also a co-owner), was operating the cash register when the investigator made the purchases. Neighborhood claimed that Mr. Ali could not read English and had not received any WIC training. In sum, Neighborhood contended that the overcharges were not intentional and that it did not knowingly violate the applicable WIC regulations.

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[2] Low variance is defined as "the redemption of the same type of food instruments at the same price or within a narrow price range." 902 KAR 4:040 § 1(13). It is a measure of the degree to which a store's redemption amount of similar food program vouchers varies. According to the Cabinet, low variance vendors are more likely to have fraudulent submissions.

After considering the arguments, the hearing officer rendered his findings of fact, conclusions of law, and recommended decision in favor of Neighborhood. It noted that while the Cabinet had a policy that a variance below 0.30 was "low", this policy did not have the force of a regulation and could not be relied upon as a basis for suspending Neighborhood from the WIC program. Based on the Cabinet's failure to establish that Neighborhood's variance levels violated a provision of the WIC regulation, the hearing officer recommended that Neighborhood's three-year disqualification be reversed.

The matter went before the Secretary of the Cabinet, who rejected the hearing officer's recommended decision. By way of findings of fact, conclusions of law, and final order rendered on December 26, 2002, the Secretary concluded that the Cabinet met its burden of proving violations on two of the three compliance buys, that low variance was shown, and that the sanction imposed was in accordance with 902 KAR 4:040 § 12.

Neighborhood appealed to the Jefferson Circuit Court. In affirming the Secretary's ruling, the circuit court determined that the Cabinet's decision was supported by substantial evidence. This appeal followed.

Neighborhood now argues that the circuit court erred in affirming the Cabinet's ruling. It maintains that it failed to receive due process of law before the Secretary; that the use

of a low variance violates the due process and equal protection guarantees of the United States and Kentucky Constitutions; that the WIC regulations improperly fail to distinguish between intentional and unintentional conduct; that the application of a low variance is "statistical profiling"; that the circuit court erred in finding that the Cabinet's decision was supported by substantial evidence; and that the Cabinet's failure to properly file its charges against Neighborhood Food Mart, Inc., should result in a reversal of the circuit court's ruling. In sum, it maintains that the circuit court's ruling was erroneous and it seeks an order reversing the circuit court's ruling and reinstating the hearing officer's decision.

We have closely examined the record and the law, and find no error. 902 KAR 4:040 § 12(1)(i)2.a. states that, "[T]wo (2) positive compliance buys out of three (3) shall result in a three (3) year disqualification if: . . . (ii) The vendor has exhibited a pattern of two (2) out of four (4) quarters of low variance in the prior federal fiscal year." Neighborhood has stipulated to two positive compliance buys. The dispositive question, then, is whether Neighborhood exhibited a pattern of low variance in at least two out of four quarters, and whether the Cabinet properly applied these facts to the law in determining that a three year suspension was warranted.

The record indicates that the Cabinet's policy is to adjudge a variance below 0.30 to be "low" for purposes of 902 KAR 4:040 § 12(1)(i)2.a. While Neighborhood correctly notes that this 0.30 standard is not found in the regulatory language, it is a fixed standard which is applied equally to all WIC participants and does constitute a reasonable basis for determining what constitutes a "low" variance. Under this standard, Neighborhood's variance ratios of 0.0038, 0.0256 and 0.0847 are "low" for purposes of 902 KAR 4:040 § 12(1)(i)2.a., and the Secretary properly so found.

In reviewing an agency decision, a court may overturn that decision only if the agency acted arbitrarily or outside the scope of its authority, if the agency applied an incorrect rule of law, or if the decision itself is not supported by substantial evidence in the record.[3] The court's role is to review the administrative decision, not to reinterpret or reconsider the merits of the claim.[4] In the matter at bar, the circuit court properly determined that the Cabinet acted within the scope of its authority, that it applied the correct rule of law, and that its findings were supported by substantial evidence. Accordingly, we find no error on this issue.

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[3] Lindall v. Commonwealth Retirement Systems, 112 S.W.3d 391 (Ky.App. 2003), citing Kentucky State Racing Comm'n v. Fuller, 481 S.W.2d 298 (Ky. 1972).
[4] Id., citing Kentucky Unemployment Ins. Comm'n v. King, 657 S.W.2d 250 (Ky.App. 1983).

Neighborhood's remaining arguments were not addressed by the Cabinet or the circuit court, which prevents us from addressing them.[5] "CR 52.04 requires a motion for additional findings of fact when the trial court has failed to make findings on essential issues. Failure to bring such an omission to the attention of the trial court by means of a written request will be fatal to an appeal."[6] We are constrained to address only those claims of error which have been adjudicated by a lower court or tribunal. That is to say, we may examine alleged errors of law but may not undertake a *de novo* review of matters not previously addressed.[7] Since Neighborhood's remaining arguments were not addressed by the Cabinet or the circuit court, there is nothing for us to review on these issues.

For the foregoing reasons, we affirm the Opinion and Order Affirming Judgment of the Jefferson Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

Nader G. Shunnarah
Louisville, KY

BRIEF FOR APPELLEE:

Graddy W. Johnson
Commonwealth of Kentucky
Cabinet for Health and Family Services
Frankfort, KY

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[5] Monin v. Monin, 156 S.W.3d 309 (Ky.App. 2004).
[6] Eiland v. Ferrell, 937 S.W.2d 713 (Ky. 1997).
[7] Kentucky Constitution § 115; Smith v. Riherd, 603 S.W.2d 494 (Ky.App. 1980).