No.26731 - Clay Foodland v. State ex rel. West Virginia Department of Health and Human Resources

Scott, J., dissenting:

FILED
June 22, 2000
DEBORAH L. McHENRY, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

RELEASED
June 23, 2000
DEBORAH L. McHENRY, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

In its fervor to achieve a "fair" result, the majority has intervened inappropriately in an administrative matter and created a rule of law[1] which is not only contrary to the controlling regulatory and contractual provisions, but detrimental to the very women, infants, and children for whose benefit the WIC Program exists. For these reasons, I dissent.

The federal regulations which govern the operation of the West Virginia WIC Program, as they existed at the time of Clay Foodland's overcharge violation, provide: "The State agency shall establish policies which determine the type and level of sanctions to be applied against food vendors, based upon the severity and nature of the Program violations observed, and such other factors as the State agency determines appropriate . . . ." 7 C.F.R. § 246.12(k)(1)(1996). The regulations mandate that "[v]endor offenses which are subject to sanctions shall include . . . charging the State or local agency more for supplemental foods than other customers are charged for the same food item." *Id.* With respect to the length of a vendor's disqualification, the regulations state: "The period of disqualification from Program participation shall be a reasonable period of time, not to exceed three

[1] I am referring to syllabus point two of the majority opinion, which states that DHHR "may not sanction a vendor who participates in the . . . [WIC] Program . . . for an overcharge violation when the overcharge occurs as a result of employee theft if the vendor was not cognizant of the employee's actions and did not participate in or profit from the theft."

years. The maximum period of disqualification shall be imposed only for serious or repeated Program abuse." 7 C.F.R. § 246.12(k)(1)(ii).

As required by the federal regulations, DHHR has promulgated a sanction policy, which is incorporated into the West Virginia Code of State Rules and the vendor contracts of the West Virginia WIC Program and which identifies various vendor offenses with corresponding sanction point values. *See* 64 C.S.R. 55. Under DHHR's policy, a vendor who commits an "overcharge" violation, by charging the WIC Program more for supplemental foods than other customers are charged for the same food item, is penalized with an assessment of thirty sanctions points and automatic disqualificatic from the WIC Program for two years.

Additionally, in compliance with federal law, the West Virginia WIC Program's food vendor contracts contain specifications to the effect that "[t]he food vendor shall provide supplemental foods at the current price or at less than the current price charged to other customers," "[t]he food vendor shall be accountable for actions of employees in the utilization of food instruments," and "[t]he State agency may disqualify a food vendor for reasons of Program abuse." 7 C.F.R. § 246.12 (f)(2)(ii), (ix), (xviii).

In this case, it is undisputed that Clay Foodland's cashier fraudulently altered a food voucher which the store then redeemed by presenting it to a banking agent for processing. Clay Foodland's redemption of a food voucher with an inflated sale price constitutes a textbook case of an

overcharge violation subject to mandatory sanction under federal law. *See* 7 C.F.R. § 246.12(k)(1). In accordance with the federal regulations, DHHR's policy, and the vendor contract, Clay Foodland was charged with an overcharge violation, assessed thirty sanction points, and disqualified from the West Virginia WIC Program for two years, less than the three-year maximum period of disqualification allowed under federal law. *See* 7 C.F.R. § 246.12(k)(1)(ii). Clearly, Clay Foodland's disqualification comported with the applicable regulatory and contractual provisions and was properly upheld by the circuit court.

While acknowledging the relevant law and contractual provisions, the majority nonetheless elects to frame the issue in exceedingly broad, equitable terms: whether "it is fair to sanction the vendor when he or she did nothing wrong." Only by loosely stating the issue, without regard to the controlling law or any deference to DHHR, is the majority able to conclude that it is not "just and proper to take away Clay Foodland's right to participate in the WIC program for two years." I disapprove of the majority's approach. As stated in *Russell's Old Trading Post, Inc. v. United States ex rel. United States Department of Agriculture*, 783 F. Supp. 395 (N.D. Ind. 1992), where the federal district court denied a retail grocery store's motion for a preliminary injunction preventing its withdrawal from the Food Stamp Program:

> [I]t is not for this court to pass judgment on the wisdom of the actions taken against this grocery store and its owners. . . .
>
> Under our system of administrative law and judicial review of administrative decisions, the initial policy decision to act must be left with the state and

> federal bureaucracies. As the statutes and regulations in question are constitutional, it is only in a very narrow and precise way that those who disagree with the administrative agency's decision can be successful in challenging such decisions in either state or federal courts. For this court to change or modify the actions taken against Russell's would constitute the kind of judicial activism that this court and others of like mind have long abhorred.

Id. at 397. Like the court in *Russell's*, the majority should have declined to interfere with DHHR's administration of the WIC Program since DHHR's decision to disqualify Cla Foodland was well within the parameters of the federal regulations and consistent with DHHR's sanction policy and the vendor contract terms.

My dissatisfaction with the majority opinion is heightened by my realization that in holding that a WIC vendor may not be sanctioned for an overcharge violation resulting from employee theft, the majority has articulated a rule with negative implications for the underprivileged beneficiaries the West Virginia WIC Program. "Every dollar which a vendor improperly claims in WIC reimbursement is a dollar less available for the . . . WIC Program to pay for actual food products for the women, infants, and children who need them." *Barakat v. Wisconsin Dep't of Health and Soc. Servs.*, 530 N.W.2d 392, 398 (Wis. Ct. App. 1995). In its quest for "fairness," the majority has focused exclusively on a perceived injustice to Clay Foodland, losing sight of what should have been it main concern--the effect of Clay Foodland's violations on the WIC Program and its participants. Contrary to the tenor of the majority opinion, Clay Foodland was not totally innocent. If its employee had been properly supervised, this incident would not have occurred. Even if this were a court of

equity sitting in review, we could not properly reach the result found by the majority because Clay Foodland would have to be held to have violated that ancient principle which forbids relief to one who comes into court with unclean hands.

Accordingly, I respectfully dissent.