

**IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
12 DHR 02165**

FINAL DECISION

This contested case was heard before the Honorable Donald W. Overby, Administrative Law Judge, on April 30, 2012, and May 14, 2012, in the Office of Administrative Hearings in Raleigh, Wake County, North Carolina.

For Respondent: Janelle E. Varley,
Assistant Attorney General
N.C. Department of Justice
9001 Mail Service Center
Raleigh, North Carolina 27699-9001

ISSUE

Whether Respondent properly denied Petitioner's claims for reimbursement for meals served pursuant to the Child and Adult Care Food Program for the months of October, November and December 1-22, 2011?

STATUTES AND RULES

42 U.S.C. § 1766
7 C.F.R. § 226
7 C.F.R. § 226.2
7 C.F.R. § 226.6
7 C.F.R. § 226.11
N.C.G.S. § 130A-361
10A N.C.A.C. 43J.0101

EXHIBITS

Petitioner admitted no Exhibits into evidence.

Respondent's Exhibits 1 through 8 were admitted into evidence.

BASED UPON careful consideration of the sworn testimony of the witnesses presented at the hearing, along with documents and exhibits received and admitted into evidence and the entire record in this proceeding, the undersigned administrative law judge has weighed all the evidence and has assessed the credibility of the witnesses by taking into account the appropriate factors for judging credibility, including, but not limited to, the demeanor of the witness, any interests, bias or prejudice the witness may have, the opportunity of the witness to see, hear, know or remember the facts or occurrences about which the witness testified, whether the testimony is reasonable, and whether the testimony is consistent with all other believable evidence in the case.

FINDINGS OF FACT

1. Petitioner, Cornerstone Church of Salisbury Inc., is a child care center with its principal place of business located in Salisbury, Rowan County, North Carolina.

2. Respondent, the North Carolina Department of Health and Human Services ("NCDHHS"), Division of Public Health ("DPH"), is the State agency authorized to administer the CACFP in North Carolina.

3. The Child and Adult Care Food Program ("CACFP") is a federally funded program administered by the United States Department of Agriculture ("USDA").

4. The purpose of the CACFP is to provide nutritious meals to children and adults

enrolled in nonresidential care institutions, such as child care centers, day care homes, and adult day care centers, through the operation of a nonprofit food service program. Participating Institutions are provided monetary reimbursement for qualifying meals served to enrolled children and adult participants by submitting monthly claims for reimbursement to the State agency.

5. CACFP is governed by Title 7, Code of Federal Regulations, Part 226 which is promulgated by the USDA.

6. Respondent incorporated by reference 7 C.F.R. Part 226 in the North Carolina Administrative Code at 10A NCAC 43J .0101. No other rules have been adopted in Subchapter 43J.

7. Under 7 C.F.R. § 226.2, “Institution” means a sponsoring organization, child care center, at-risk afterschool center, outside-school hours care center, emergency shelter or adult day care center which enters into an agreement with the State agency to assume final administrative and financial responsibility for Program operations.

8. Petitioner began participating in the CACFP as an Institution on March 3, 2011.

9. Petitioner testified that more than 213 children are provided meals by Petitioner each school day through Petitioner’s participation in the CACFP.

10. Institutions within North Carolina, such as Petitioner, submit applications to Respondent for review in order to receive approval from the state agency to participate in the CACFP.

11. After Respondent approves an application, the Institution and Respondent enter into a written agreement as required by 7 C.F.R. §§ 226.6(b) and 226.11(a).

12. The CACFP Agreement (“Agreement”) is the contract between the Institution and the Respondent that sets forth the terms and conditions with which the Institution and the Respondent agree to comply.

13. Respondent administers the CACFP. 7 C.F.R. § 226.6(a) requires that Respondent: “[p]rovide sufficient consultative, technical, and managerial personnel to: (a) Administer the Program; (2) Provide sufficient training and technical assistance to institutions; (3) Monitor Program performance; (4) Facilitate expansion of the Program in low-income and rural areas; and (5) Ensure effective operation of the Program by participating institutions.”

14. 7 C.F.R. § 226.6(b) requires Respondent to: “[E]stablish application review procedures, in accordance with paragraphs (b)(1) through (b)(3) of this section, to determine the eligibility of new institutions, renewing institutions, and facilities for which applications are submitted by sponsoring organizations.”

15. 7 C.F.R. § 226.6(b)(2) controls application procedures for renewing institutions under the CACFP.

16. The stated purpose of the CACFP as set forth in 7 C.F.R. § 226.1 is: "...[T]o enable such institutions to integrate a nutritious food service with organized care services for enrolled participants."

17. Petitioner's Fiscal Year (FY) 2010-2011 CACFP application and Agreement to participate in CACFP was approved by Respondent on March 3, 2011.

18. Petitioner, pursuant to 7 C.F.R. § 226.2, was a renewing institution as it was participating in the CACFP at the time it submitted its FY 2011-2012 renewal application to Respondent on November 4, 2011.

20. Petitioner participated in the CACFP for over (6) months prior to submitting its FY 2011-2012 renewal application.

21. The CACFP fiscal year runs from October 1st through September 30th of the following calendar year, and is clearly so stated within the terms of the participation agreement.

22. Petitioner's agreement with Respondent for participation in the CACFP for the FY 2010-2011 expired on September 30, 2011.

23. Institutions must submit a renewal application and obtain approval from Respondent in order to continue participating in the CACFP.

24. Under 7 C.F.R. Part 226, Petitioner, as a renewing institution, was to receive uninterrupted reimbursements for food costs allowed by the CACFP and expended by Petitioner during the (60) day period following September 30, 2011, so long as Petitioner applied for renewal of its participation in the CACFP and such application was accepted by Respondent within the (60) day period.

25. As 2011 was the first year the Petitioner began participation in the CACFP, the 2011-2012 application represented the Petitioner's first time completing the CACFP renewal process.

26. In reliance upon its multiple communications with Respondent by and through Respondent's designated representative, with the expectation of receiving reimbursement, Petitioner continuously provided meals to its eligible children in need at its child care centers on each business day beginning October 1, 2011, and continuing thereafter through each month until December 22, 2011.

27. On November 4, 2011, Respondent received Petitioner's renewal application for participation in the CACFP for the 2011-2012 fiscal year.

28. Petitioner's renewal application was submitted to and received by Beverly Ferrell ("Ms. Ferrell"), Respondent's employee. Ms. Ferrell was assigned as Petitioner's consultant under the CACFP and authorized by Respondent to accept and review Petitioner's renewal application.

29. By letter dated November 16, 2011, Ms. Ferrell determined that Petitioner's renewal application was incomplete. Petitioner maintained that the "incomplete application" letter was actually received by their office on November 23, 2011. Ms. Ferrell's letter listed the items that were necessary for Petitioner's renewal application to be complete and be considered for approval by Respondent, but did not mention a pending "lapse in participation" if Petitioner's application was not approved by November 30, 2011.

30. After multiple communications with Ms. Ferrell for clarification purposes, before and after November 30, 2011, Petitioner submitted its revised renewal application on December 8, 2011. This application was received by Ms. Ferrell on December 9, 2011.

31. Petitioner's revised renewal application cured Petitioner's previous omissions, complied with Respondent's asserted omissions and contained all information required and necessary for acceptance of the application as required in 7 C.F.R. § 226.6(b)(2) for a complete application for a Renewing Institution, rather than 7 C.F.R. § 226.6(b)(1) for a New Institution.

32. Petitioner's revised renewal application was received by Respondent on December 9, 2011. The Petitioner's revised renewal application was approved by Respondent by a letter dated December 23, 2011. Respondent's approval letter listed the same CACFP Agreement Number of "9069" for the Petitioner that was used during the previous 2010-2011 fiscal year.

33. Respondent failed to inform or give notice that Petitioner's application received on December 9, 2011, and subsequently approved on December 23, 2011, was considered by Respondent as an application by a New Institution.

34. 7 C.F.R. § 226.6(b)(4)(ii)(B) requires that, "If a state agency denies the application of a renewing institution, it must temporarily extend its agreement with that institution in accordance with paragraph (c)(2)(iii)(D)." Paragraph (c)(2)(iii)(D) provides that, upon denial of a renewing institution's application, the state agency must temporarily extend its current agreement with the renewing institution and continue to pay any valid unpaid claims for reimbursement during the time allotted for corrective action and/or the conclusion of any administrative review.

35. Respondent did not inform Petitioner or give notice to Petitioner of Petitioner's rights under 7 C.F.R. § 226.6(b)(4)(ii)(B). Petitioner subsequently submitted the required documentation for reimbursements for October 1, 2011 through December 22, 2011, and was denied.

36. 7 C.F.R. § 226.11(a) allows the state agency implementing CACFP to "[D]evelop a policy under which centers are reimbursed for meals served in accordance with provisions of

the Program in the calendar month preceding the calendar month in which the agreement is executed, or the state agency may develop a policy under which centers receive reimbursement only for meals served in approved centers on and after the effective date of the Program agreement.”

37. Ms. Arlene Cowan (“Ms. Cowan”) is the supervisor of the nutrition program for Respondent. Among Ms. Cowan’s duties is administering the CACFP program.

38. Respondent agency created and implemented unpromulgated policies and procedures for the Respondent in regard to applications for CACFP participation and compliance by participating institutions by reading applicable portions of 7 C.F.R. Part 226 and announcements by the USDA, interpreting these announcements and establishing binding policies, interpretive statements, regulations, and standards based solely upon her interpretation. (Emphasis added)

39. Respondent’s Exhibit 2 is a Memorandum from Ms. Cowan, dated June 15, 2009, which purportedly “clarifies policies on agreements application updates and reimbursement.” In actuality, there are no other policies of any kind, and this memorandum served as the “policy” for Respondent. This is not a properly promulgated policy, but merely a recitation of Ms. Cowan’s interpretations.

40. Respondent implemented unpromulgated policy whereby renewing institutions would receive reimbursement only for meals served in approved centers on and after the effective date of the Program agreement. (Emphasis added)

41. Petitioner received the renewal application in July 2011. Representatives of Petitioner had attended the “webinar” offered by Respondent in August 2011 and had been told in the webinar that there were going to be changes in the process, so they took more time to make sure they were getting everything correct in the renewal application. The format of the webinar was not conducive to asking questions, but the participants were encouraged to seek the advice from their individual consultants. Petitioner first submitted the renewal application on November 4, 2011, and again on December 8, 2011 with the additional information requested by Ms. Ferrell.

42. Ms. Ferrell was assigned as the consultant to review Petitioner’s renewal application at the time she reviewed Petitioner’s application.

43. During the time Petitioner was completing the renewal application, Petitioner’s representative was in continuous contact with Ms. Ferrell, their consultant, as suggested in the webinar. There was never any mention of a November deadline. Ms. Ferrell stated that she did not think the November 30 deadline applied to the Petitioner. She consistently testified that it was not her job to communicate to the Petitioner about any deadlines.

44. Petitioner made multiple contacts with Ms. Ferrell during the renewal process to request assistance and obtain clarification regarding the applicable time limits and other issues related to the renewal application. Ms. Ferrell never communicated to Petitioner prior to or after

November 30, 2011, that, the Petitioner's agreement was deemed to have lapsed effective November 30, 2011, and Petitioner would therefore be treated as a New Institution.

45. Although Respondent contends that there had been a lapse and therefore the application was to be treated as a "New Institution" application, the Respondent did not treat the applications as such. The "new" application requires considerable more information than the renewal application, and Petitioner was not required to provide that additional information. In addition, Respondent's approval letter listed the same CACFP Agreement Number of "9069" for the Petitioner that was used during the previous 2010-2011 fiscal year, indicative of a renewal.

46. Respondent approved Petitioner's application on December 23, 2011. Petitioner was subsequently denied reimbursement for October 1, 2011 through December 22, 2011.

47. Respondent issued a letter of denial by and through its employee Kathryn Seawell, Financial Program Manager, for the requested October 1, 2011 through December 22, 2011 reimbursements on March 19, 2012. Petitioner testified that this letter represented the first notice to Petitioner that the basis for denial of the reimbursements was due to its reclassification as a New Institution as a result of a "lapse in participation" on November 30, 2011. Prior to that time there had been no communication concerning a November 30 deadline. The denial letter likewise used the same Agreement Number of 9069 that had been used in the previous fiscal year.

BASED UPON the foregoing Findings of Fact, the undersigned makes the following:

CONCLUSIONS OF LAW

1. The Office of Administrative Hearings has jurisdiction of this contested case pursuant to Chapters 130A and 150B of the North Carolina General Statutes.

2. The Child and Adult Care Food Program is authorized by 42 U.S.C. § 1766 and regulated by the United States Department of Agriculture pursuant to 7 C.F.R. Part 226.

3. The Respondent administers CACFP in North Carolina pursuant to N.C.G.S. § 130A-361 and 10A N.C.A.C. 43J.0100. Pursuant to these provisions, Respondent is vested with the authority to review and approve applications to participate in the CACFP, enter into agreements with Institutions, and process claims for reimbursement.

4. 10A N.C.A.C. 43J.0101 is the only rule adopted for Child and Adult Care Food Program. The rule incorporates by reference 7 C.F.R. §226. The rule was temporarily adopted effective July 8, 1996 and has an effective date of August 1, 1998. It has not been amended or updated and the information contained therein is not up to date or correct, other than the incorporation of 7 C.F.R. §226.

5. Petitioner operates an "institution" within the meaning of 7 C.F.R. § 226.2.

6. In order to be eligible to claim and receive reimbursement, an institution must have a valid agreement with the state agency. 7 C.F.R. § 226.11(a).

7. The definition for “new institution” includes the phrase “lapse in participation.” 7 C.F.R. § 226.2. Respondent interpreted the phrase “lapse in participation” found in a federal regulation to occur when a previously-participating institution operates for more than (60) days without a valid CACFP agreement, but Respondent has not promulgated a rule to implement Respondent’s interpretation nor followed the procedures required for public hearing, determination of fiscal costs or review by the Rules Review Commission.

8. Because Respondent determined that Petitioner lapsed in participation, Respondent treated Petitioner as a “new institution” for purposes of reimbursement, but Respondent has not promulgated a rule to implement Respondent’s interpretation, nor followed the procedures required for public hearing, determination of fiscal costs, or review by the Rules Review Commission before a rule becomes effective and codified.

9. Pursuant to the North Carolina Administrative Procedure Act, Chapter 150B (the “APA”), and specifically G.S. 150B-2(8a), “Rule” means any agency regulation, standard, or statement of general applicability that implements or interprets an enactment of the General Assembly or Congress or *a regulation adopted by a federal agency or that describes the procedure or practice requirements of an agency.*” (Emphasis added.) G.S.150B-(8a)(c) defines nonbinding interpretive statements as “statements within the delegated authority of an agency that merely define, interpret, or explain the meaning of a statute or rule.” Respondent’s interpretations that were not adopted as a rule are “nonbinding.” Respondent’s interpretation of “new institution” and “lapse in participation” are nonbinding interpretative statements.

10. In administering the CACFP, Respondent is not exempted from Article 2A of Chapter 150B.

11. Pursuant to N.C. Gen. Stat. § 150B-18, an interpretative statement made by Respondent is not binding unless it is adopted in substantial compliance with the APA. G.S. 150B-18 specifically and affirmatively prohibits the enforcement of a nonbinding interpretative statement. It is quoted as follows:

An agency shall not seek to implement or enforce against any person a policy, guideline, or other nonbinding interpretive statement that meets the definition of a rule contained in G.S. 150B-2(8a) if the policy, guideline, or other nonbinding interpretive statement has not been adopted as a rule in accordance with this Article.

12. To the extent a particular method for submitting information by a renewing institution to Respondent for participation in the CACFP is not prescribed in 7 C.F.R. Part 266 or North Carolina law, such methods must be adopted as a rule as defined in G.S. 150B-2(8a).

13. To the extent a particular method for submitting information by a renewing institution is not prescribed in 7 C.F.R. Part 266 or North Carolina law, or properly adopted as a rule pursuant to the APA, such method does not carry the force of law, or failure to comply with such methods cannot serve, by itself, as the basis to deny the application of a renewing institution for participation in the CACFP. *See Dillingham v. N.C. Dept. of Human Resources*, 132 N.C. App. 704 (1999).

14. 7 C.F.R. § 226.2 defines a new institution as an institution applying to participate in the Program for the first time, or an institution applying to participate in the Program after a lapse in participation.

15. Respondent interprets “lapse in participation” to apply to institutions that have previously participated in the program and have not had a valid agreement with the State agency for more than 60 days. *See* Respondent’s Exhibit 8. This interpretation was not adopted as a rule and is not enforceable against Petitioner.

16. Because Respondent denied Petitioner’s claims for reimbursements for the months of October, November and December 1-22, 2011, on the basis of Respondent’s interpretation that Petitioner had a ‘lapse in participation’, such denial was erroneous.

17. Respondent’s March 19, 2012 letter to Petitioner constituted an improper denial of Petitioner’s claim for reimbursements for October, November and December 1-22, 2011.

18. Upon Respondent’s decision to reclassify Petitioner as a New Institution effective December 23, 2011, Respondent was required to give Petitioner notice of its right to seek review of the denial and was required to extend Petitioner’s prior agreement and continue to make payments to Petitioner during the period of review pursuant to 7 C.F.R. § 226.6(b)(4)(ii)(B).

19. Respondent failed to implement the requirements of 7 C.F.R. § 226.6(b)(4)(ii)(B) in its December 23, 2011 letter approving the Petitioner’s application and failed to properly inform the Petitioner that it was no longer deemed a Renewing Institution.

20. Respondent’s interpretative statement, per Ms. Cowan’s interpretation of 7 C.F.R. § 226.6.11(a) whereby renewal applicants received reimbursement only for meals served in approved centers on and after the effective date of the Program agreement, rather than beginning the month prior to the Program agreement, required the adoption of rules as that term is defined in G.S. 150B-2(8a).

21. By Respondent’s failure to adopt rules regarding the interpretation of the C.F.R. and by the Respondent’s failure to adopt rules regarding the establishment of standards that described the procedure and practice requirements of the application process for CACFP participation, wherein these imposed standards interpret, establish, or exceed the requirements of 7 C.F.R. Part 226, Respondent, in seeking to bind Petitioner to its interpretation, exceeded Respondent’s authority, failed to use proper procedure, and failed to act as required by law.

22. Petitioner is entitled to receive for the period October 1, 2011 through December 22, 2011, the claimed amount of \$31,382.49, or an amount that may otherwise be mutually accepted as accurate by Petitioner and Respondent.

23. To the extent in this Final Decision that the Findings of Fact contain Conclusions of Law or that the Conclusions of Law are Findings of Fact, they should be so considered without regard to the given labels.

BASED UPON the foregoing Findings of Fact and Conclusions of Law, the Undersigned makes the following:

DECISION

Petitioner's Agreement for participation in the CACFP with Respondent for fiscal year 2011-2012 shall be October 1, 2011. Respondent shall pay to Petitioner the CACFP reimbursement amount of \$31,382.49 as claimed or as may be otherwise mutually accepted as accurately calculated by Petitioner and Respondent for the period October 1, 2011 through December 22, 2011.

IT IS SO ORDERED.

NOTICE

Under G.S. 150B-45, any party wishing to appeal the final decision of the Administrative Law Judge may commence such appeal by filing a Petition for Judicial Review in the Superior Court of Wake County. The party seeking review must file the petition within 30 days after being served with a written copy of the Administrative Law Judge's Final Decision. Under G.S. 150B-47, the Office of Administrative Hearing is required to file the official record in the contested case with the Clerk of Superior Court within 30 days of receipt of the Petition for Judicial Review. Consequently, a copy of the Petition for Judicial review must be sent to the Office of Administrative Hearings at the time the appeal is initiated in order to ensure the timely filing of the record.

This the 1st day of June, 2012.

Donald W. Overby
Administrative Law Judge