

STATE OF NORTH CAROLINA

COUNTY OF WAKE

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
19 DHR 05469

<p>Trinity Child Care II & I Dennis Vandervender Linda Vandervender and Mary Mathis Petitioner,</p> <p>v.</p> <p>NC Department of Health and Human Services, Nutrition Services, Child and Adult Care Food Program Respondent.</p>	<p>FINAL DECISION</p>
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THIS MATTER came on for hearing before Administrative Law Judge J. Randolph Ward in Raleigh on November 6-8, 2019. Following the parties' submission of proposed decisions, this Final Decision was prepared.

APPEARANCES

For Petitioner: J. Scott Flowers
Hutchens Law Firm
Fayetteville, N.C.

For Respondent: Ryan C. Zellar
Assistant Attorney General
NC Department of Justice
Raleigh N.C.

ISSUES

Whether Respondent exceeded its authority or jurisdiction, acted erroneously, failed to use proper procedure, acted arbitrarily or capriciously, or failed to act as required by rule or law to the Petitioners' substantial prejudice by failing to reimburse Petitioner for meals served under the Child and Adult Care Food Program ("CACFP"), by failing to approve Petitioners' application update for fiscal year 2018-19, by proposing the termination of Trinity Child Care II's participation in CACFP, and by proposing the disqualification of Dennis Vandevender, Linda Vandevender, and Mary Mathis from future CACFP participation, pursuant to 7 C.F.R. § 226.6(c)(3).

STATUTES AND RULES REFERENCED

42 U.S.C. § 1766; N.C. Gen. Stat. §§ 130A-24(a)&(b) and § 130A-361; N.C. Gen. Stat. § 150B-23(f), § 150B-25.1 and § 150B-34(a); 10A N.C.A.C. 43J .0101; 7 C.F.R. § 226, incorporated by 10A NCAC 43J .0101; 7 C.F.R. § 226(a)(2) & (5); 7 C.F.R. § 226.6(b)(2); 7 C.F.R. § 226.6(b)(2)(iii); 7 C.F.R. § 226.6(b)(2)(vii); 7 C.F.R. §§ 226(c)(3)(iii)(D); 7 C.F.R. 226(c)(5)(i)(D); 7 C.F.R. § 226.6(k)(2)(i); 7 C.F.R. § 226.6(k)(2)(ix); 7 C.F.R. § 226.6(k)(5)(i); 7 C.F.R. § 226.6(k)(5)(ii); 7 C.F.R. § 226.6(k)(5)(viii); 7 C.F.R. § 226.25(b).

WITNESSES

Petitioner: Dennis Vandevender
Mary Mathis
Diette Harris
Tonya Locklear

Respondent: Mary Anne Burghardt
Courtney Jones

EXHIBITS

Petitioner: Exhibits 1 - 21 and A - F.

Respondent: Exhibits 1 - 25 and 27 - 29.

UPON DUE CONSIDERATION of the arguments and stipulations of the parties; the exhibits admitted; and, the sworn testimony of each of the witnesses, viewed in light of their opportunity to see, hear, and know of relevant facts and occurrences, any interests they might have, and whether their testimony is reasonable and consistent with other credible evidence; and, the applicable rules and laws, the undersigned makes the following:

FINDINGS OF FACT

1. Pastor Dennis Vandervender founded Trinity Christian Church in Fayetteville in March 1991, and he testified that the institution always sought to meet the needs of low-income parents. In September 1990, a daycare center was opened that now serves 274 children. It currently shares a facility with a school enrolling approximately 350 children. The gospel ministry, the school and the daycare participate in 12 to 15 Federal and State programs benefiting the needy, including the national School Lunch Program for the school-aged children, and the child and adult food care program (“CACFP”) for adults and children in daycare.

2. Mary Mathis, the Director of Operations for the daycare center, has been employed there for 27 years, and handles the administrative requirements for five aid programs for children,

including the CACFP program at Trinity since its inception some 20 years ago. That program serves 289 preschool children at Trinity with no- or low-priced meals daily. Trinity had not experienced any adverse actions, controversies or questions about the operations of any government programs during her tenure. Mary Anne Burghardt, the State Director of CACFP, affirmed that she was unaware of any prior problem with Trinity in her program. Ms. Mathis testified that she had never experienced difficulty preparing a satisfactory annual “application update” for CACFP, sometimes in a single meeting with Respondent’s Regional Consultant serving the Cumberland County area prior to the fall of 2018, Ms. Redd. All of the credible evidence tends to show that Trinity and Ms. Mathis had a long and consistent history of mastery of program compliance generally, and CACFP in particular.

3. Mary Anne Burghardt is the Head of Respondent’s Nutrition Services Branch, and in that capacity oversees CACFP in the State. She testified that the agency had “permanent” contracts with participating institutions but required them to furnish updated versions of the application for participation annually. Trinity Child Care II’s contract was accepted and signed by the agency in January of 2012.

4. The federal regulations require that “renewing institutions” (both food providers and organizations that “sponsor” them) provide specific information to agencies supervising the CACFP program in the states:

If a “sponsoring organization” monitoring multiple “sponsored facilities” -- unlike petitioners -- information enabling the state agency to determine it has adequate staff for its monitoring duties.

A “management plan,” patterned on that required and accepted in the institution’s original application for participation, likely requiring modest amendments of prior year’s submissions.

A statement listing any other “publicly funded programs” with which the institution or its principals have become involved since the prior update.

A certification that neither the institution nor its principals have been disqualified for from participation in other publicly funded programs, or if one has been, that full reinstatement has occurred.

A certification that neither the institution nor its principals have been convicted of crimes or engaged in activities “indicating a lack of business integrity.”

A certification that identifying information about the principals is correct.

A policy restricting employees from engaging in other employment that would conflict or interfere with performance of their duties with the institution.

Documentation showing that the institution remains “financially viable” and “administratively capable of operating the program.” This “performance standard” is paired with the following directive to state agencies:

In ensuring compliance with these performance standards, the State agency should use its discretion in determining whether the institution's application, **in conjunction with its past performance in CACFP**, establishes to the State agency's satisfaction that the institution meets the standards.

(Emphasis added.) 7 C.F.R. § 226.6(b)(2). This regulation also prohibits state agencies requiring re-applicants to restate their “reduced-price policy statement or a nondiscrimination statement unless they make substantive changes to either statement.”

5. With the approval of the federal Food and Nutrition Service, a state agency may require re-applicants to provide it with additional information, but the agency is prohibited from denying participation in the CACFP program to an otherwise eligible institution for failure to provide that additional information.

6. To reflect an internal reorganization, Trinity created a new corporation in 2017 – Cumberland Community Development Center, Inc. (“CCDC”), replacing Truth Outreach Center, Inc. (“TOC”) -- to house their daycare center, without changing the ownership or governance of the daycare center. Prompted by the reapplication process for FY 2017-18, Ms. Mathis contacted the agency on October 16, 2017, received forms for the purpose of documenting the change, and sent them in October and again in December 2017. Petitioners duly notified the agency of the change in October 2017, notwithstanding that the change was not brought to Ms. Burghardt’s attention at the time, apparently because there was no regional consultant assigned to Petitioner’s area at that time. Respondent approved Trinity Child Care II / CCDC’s renewal application and paid CCDC’s CACFP claim reimbursements for the 2017-2018 fiscal year. Petitioners were not advertent to the fact that their 2012 contract provided for termination if there was a change in “legal entity,” and they did not request a new contract.

7. Glynnis Acklin¹ had become Respondent’s regional consultant for the Cumberland County area by the time Petitioners submitted their application update for FY 2018–19. Ms. Acklin had previously had her children attending Trinity’s elementary school, while employed as daycare director for another church in the community. Her employer received a grant enabling them to replace their playground equipment, and she arranged to have it to Trinity’s daycare. She brought this up to Pastor Vandervender when discussing tuition for her children. He felt that no *quid pro quo* was due because the equipment was a gift from the church, but based on her apparent expectations, he gave her a discount. She did not pay the balance of the tuition due. When she applied for readmission of her children the following year, they were not admitted.

8. The 2012 contract provides that, “A change in ownership or legal entity automatically terminates the Agreement and requires the submission of a new application for participation.” Relying on this provision, Respondent blocked Petitioners’ ability to upload documentation for CACFP reimbursement until an “application update” was approved. With Ms. Acklin as the agency’s primary contact and apparently the only person making comprehensive evaluations of the Petitioners’ submissions, the Petitioners’ proposed updates were rejected seven times. Ms. Burghardt testified that this was the only time in her experience that an institution had been unable to present the agency with a satisfactory update. On the date of the hearing, Petitioners were continuing to provide CACFP quality meals to the eligible children they serve, but under great financial stress.

¹ In later correspondence, “Acklin-Newkirk.”

9. Respondent failed to give Petitioners notice of their right to request administrative review of the agency's denial of their claims for reimbursement by preemptively blocking their ability to tender claims.

10. Respondent repeatedly failed to give Petitioners notice of their right to request an administrative review of the agency's denials of their applications.

11. Respondent is correctly characterized the Petitioners' Trinity Child Care II as an active participating institution. However, they failed to temporarily extend the expired agreement and reimburse Petitioner for eligible meals and expenses until the conclusion of administrative review. When the Respondent initiated their action to terminate and disqualify Petitioners, the obligation to do this was acknowledged. Petitioners' Exhibit 10, page 4 (hereinafter, "P Ex 10, p 4"). ("Valid claims ...will be paid.") Petitioners estimate that they are due reimbursement of \$145,515.61 for food served to CACFP eligible children from October 2018 through September 2019. P Ex F.

12. The preponderance of the credible testimony and documentary evidence tends to show that the application update process in 2018 and 2019 was critically hampered by inordinate delays, repeated requests for information and documents already provided, demands for trivial and redundant information, and hypercritical analysis of Petitioner's submissions. See, *e.g.*, P Ex 8, p 2. Petitioners employees were able to go into Respondent's server and find documents that they had uploaded that are being demanded again.

13. Ms. Burghardt testified that she learned of Ms. Acklin's former interactions with the Petitioners on the first day of the hearing, and that she was "disturbed" by the consultant's failure to disclose them to her. She had personally looked only at only "specific documents that were brought to my attention."

14. The fact that Petitioners did not alert the Head of the Nutrition Services Branch to Ms. Acklin's history with Trinity is indicative of the fact that, in the absence of an avenue to appeal, they felt that the only way to resolve the existential threat to their food program was to win the agency's goodwill. Even at the hearing, Pastor Vandervender would not disclose the names of other CACFP providers that had complained of negative experiences with the agency, and such concerns apparently inhibited petitioners at other times. P Ex 16, p 3.

15. Other circumstances affected the application update process. North Carolina required a very significant amount financial information, and restatement as well as updates of policy information. See, *e.g.*, R Ex 6. In large part, these amount to comprehensive statistical surveys of funds spent and meals served. Federal regulations require these reapplications only once every three years, and the USDA recommends requiring "resubmission of information ... only when changes are made" as a "best practice." 7 C.F.R. § 226.6(b)(2); P Ex B, p 434-35.

16. Ms. Burghardt testified that the agency transitioned to their current computerized system for interfacing with participant institutions, "NC CARES," three fiscal years ago, and that the new system worked so poorly that FNS instructed the agency to "auto approve" annual updates received in FY 2016-17 and 2017-18, *i.e.*, any update received was approved. There was credible

testimony at the hearing that participating institutions continue to have problems with the system during the FY 2018-19 update cycle. P Ex 15. Ms. Mathis described a glitch that prevented entry of data on parts of the form, and a long delay in getting agency assistance to overcome it.

17. Ms. Burghardt testimony tended to show that after essentially forgoing any scrutiny of application updates for two years, the agency was particularly vigilant in reviewing application updates. She noted that during this period, one of four federally sponsored training sessions staged across the nation for State CACFP agencies was held in Raleigh, and there was discussion of the independence of boards of directors which are required by regulation to be capable of firing the director of CACFP provider programs. In an apparent attempt to mollify the agency, Petitioners removed Linda Vandevender from a list of directors, prompting additional questions by the agency.

18. Based entirely on the allegation that Petitioners were incapable of presenting “a complete application update packet for the continued participation of Trinity Child Care II on the CACFP,” Respondent notified the Petitioners on May 20, 2019, that it had “determined that Trinity Child Care II is seriously deficient in the operation of the CACFP,” and that if Trinity Child Care II did not “fully and permanently correct all the serious deficiencies,” the agency intended to “terminate Trinity Child Care II agreement to participate in CACFP,” and disqualify the institution and the individual Petitioners. The disqualification would prevent them from being involved in other federal aid programs. See 7 C.F.R. § 226.6(2)(iii). In taking this action, Respondent relied on the “performance standard” referenced in paragraph 4, *supra*, requiring the finding that Petitioners were not “capable of operating the *Program*” when taking into account the institution’s “past performance in CACFP.”

19. At the hearing, Courtney Jones, a project manager, testified on behalf of the Respondent that Petitioners’ proposed “Corrective Action Plan” was rejected because it was not accompanied by a “signed contract” with a consultant proposed by Petitioners. When asked the authority for requiring a signed contract, she pointed to the final item on the checklist of “Criteria for an Acceptable CAP,” which reads, “Is supporting documentation provided to demonstrate the program violation(s)/serious deficiency(ies) have been corrected?” When asked why this requirement was never disclosed to the Petitioners, she replied that, “They never asked.”

20. The preponderance of the credible evidence of record -- notably including Petitioners’ 20-plus years of successful “performance in CACFP” -- shows that Respondent erred in making this determination.

21. On July 26, 2018, Trinity Child Care II timely filed a Petition for a contested case hearing, appealing the Respondent’s proposed participation termination and disqualifications pursuant to 7 C.F.R. § 226.6(k)(5)(ii).

22. The Office of Administrative Hearings gave the parties due notice of the hearing on October 23, 2019.

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

CONCLUSIONS OF LAW

1. The Office of Administrative Hearings has jurisdiction of the parties and the cause. N.C. Gen. Stat. §§ 130A-24(a) &(b); 130A-361; 7 C.F.R. § 226, incorporated by 10A NCAC 43J .0101.

2. This Final Decision is “based solely on the information provided by the State agency, the institution, and the responsible principals and responsible individuals, and based on Federal and State laws, regulations, policies, and procedures governing” the Child and Adult Care Food Program, in accordance with 7 C.F.R. § 226.6(k)(5)(viii).

3. In this contested case, subject to Article 3 of the Administrative Procedure Act, the Petitioner has the burden of proving the facts alleged in the Petition by a preponderance of the evidence, “giving due regard to the demonstrated knowledge and expertise of the agency with respect to facts and inferences within the specialized knowledge of the agency.” N.C. Gen. Stat. § 150B-25.1; 150B-34(a). In this case, the agency’s decisions did not demonstrate or predominantly involve the specialized knowledge of the agency.

4. The “Child and Adult Care Food Program” (CACFP) is governed by Title 7, Part 226 of the Code of Federal Regulations. The agency was wholly obligated to abide by Part 226 in its dealings with the Petitioners. 10A NCAC 43J .0101.

5. A state agency may impose additional requirements for program participation consistent with this Part, if approved by a regional office of U.S. Department of Agriculture’s Food and Nutrition Service. However, notwithstanding approval, no such “additional requirement” may be used to deny participation to an eligible institution. 7 C.F.R. § 226.25(b). As a participating institution for more than two decades, the Petitioner Trinity Child Care II was an “eligible institution” within the meaning of 7 C.F.R. § 226.25(b).

6. A state agency is required to give an institution notice of its right to administrative review of the agency decision when it denies “all or part of the institution’s claim for [CACFP] reimbursement.” 7 C.F.R. § 226.6(k)(2)(ix). The Respondent failed to act as required by rule and law in neglecting to give Petitioners of their right to “request administrative review of the action,” and “the procedure, and the time limit to file a contested case petition” in the Office of Administrative Hearings when Respondent blocked Petitioner’s ability to file claims. 7 C.F.R. § 226.6(k)(5)(i); N.C. Gen. Stat. § 150B-23(f).

7. Although unannounced, the Respondent’s refusal to process their reimbursement claims placed Petitioners in the position characterized by the applicable federal regulations as, “Suspension of an institution’s participation.” 7 C.F.R. § 226(c)(5)(i)(D).

8. A state agency administering CACFP is required to give an institution notice of its right to an administrative review of the agency decision when it denies an application. 7 C.F.R. § 226.6(k)(2)(i). The Respondent failed to act as required by rule and law in neglecting to give

Petitioners of their right to “request administrative review of the action,” and “the procedure, and the time limit to file a contested case petition” in the Office of Administrative Hearings on each occasion when their applications were denied. 7 C.F.R. § 226.6(k)(5)(i); N.C. Gen. Stat. § 150B-23(f).

9. A state agency administering CACFP “must provide sufficient consultative, technical, and managerial personnel to: [p]rovide sufficient training and technical assistance to institutions,” and “ensure effective operation of the Program by participating institutions.” 7 C.F.R. § 226(a)(2) & (5). The Respondent failed to act as required by rule and law in neglecting to provide timely and efficacious assistance to Petitioner’s in preparing its fiscal year 2018-19 “application update.”

10. Trinity Child Care II’s status as a participating institution needing to renew its application, and/or having its prior agreement expire, and/or awaiting the conclusion of an administrative review, required that the State agency temporarily extend their agreement, and “continue to pay any valid unpaid claims for reimbursement for eligible meals served and allowable administrative expenses incurred.” 7 C.F.R. § 226(c)(3)(iii)(D). When the Respondent initiated their action to terminate and disqualify Petitioners, the obligation to do this was acknowledged.

11. Respondent erred in proposing to terminate and disqualify Petitioners from participation in CACFP by requiring that Petitioner enter into a binding contract for services before approving those services as a part of the Corrective Action Plan; and, by determining that Petitioners are not “capable of operating the Program,” within the meaning of Performance Standard 2, by failing to give due regard to Petitioner’s successful “past performance in CACFP” for more than 20 years. 7 C.F.R. § 226.6(b)(2)(vii).

12. Each of the foregoing agency errors or failures to act as required by rule or law substantially prejudiced the Petitioners.

13. To the extent that the foregoing Findings of Fact contain conclusions of law, or that these Conclusions of Law are findings of fact, they are intended to be considered without regard to their given labels. *Warren v. Dep’t of Crime Control*, 221 N.C. App. 376, 377, 726 S.E.2d 920, 923, *disc. rev. den.*, 366 N.C. 408, 735 S.E.2d 175 (2012); *In re Simpson*, 211 N.C. App. 483, 487-88, 711 S.E.2d 165, 169 (2011).

14. A judge is not required to find all the facts shown by the evidence, but only sufficient material facts to support the decision. *Green v. Green*, 284 S.E.2d 171,174, 54 N.C. App. 571, 575 (1981); *In re Custody of Stancil*, 179 S.E.2d 844,847, 10 N.C. App. 545, 549 (1971). Specific findings are not required on each piece of evidence presented. *See Flanders v. Gabriel*, 110 N.C. App. 438, 440, 429 S.E.2d 611, 612 (1993) (stating that the tribunal "need only find those facts which are material to the resolution of the dispute").

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

FINAL DECISION

The Respondent's decisions to deny the Petitioner Trinity Child Care II's application update and contract, and to terminate and/or disqualify the Petitioners are **REVERSED**, and Respondent shall pay all claims for reimbursement for eligible meals served and allowable administrative costs incurred by Petitioners during the period beginning October 2018 and through the date of the hearing, November 8, 2019. 7 C.F.R. §§ 226(c)(3)(iii)(D); 226(c)(5)(i)(D).

NOTICE OF APPEAL

This is a Final Decision issued under the authority of N.C. Gen. Stat. § 150B-34.

Under the provisions of North Carolina General Statute § 150B-45, any party wishing to appeal the final decision of the Administrative Law Judge must file a Petition for Judicial Review in the Superior Court of the county where the person aggrieved by the administrative decision resides, or in the case of a person residing outside the State, the county where the contested case which resulted in the final decision was filed. **The appealing party must file the petition within 30 days after being served with a written copy of the Administrative Law Judge's Final Decision.** In conformity with the Office of Administrative Hearings' rule, 26 N.C. Admin. Code 03.0102, and the Rules of Civil Procedure, N.C. General Statute 1A-1, Article 2, **this Final Decision was served on the parties as indicated by the Certificate of Service attached to this Final Decision.** N.C. Gen. Stat. § 150B-46 describes the contents of the Petition and requires service of the Petition on all parties. Under N.C. Gen. Stat. § 150B-47, the Office of Administrative Hearings 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.

IT IS SO ORDERED this the 3rd day of December, 2019.



J Randolph Ward
Administrative Law Judge

CERTIFICATE OF SERVICE

The undersigned certifies that, on the date shown below, the Office of Administrative Hearings sent the foregoing document to the persons named below at the addresses shown below, by electronic service as defined in 26 NCAC 03 .0501(4), or by placing a copy thereof, enclosed in a wrapper addressed to the person to be served, into the custody of the North Carolina Mail Service Center who subsequently will place the foregoing document into an official depository of the United States Postal Service:

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This the 3rd day of December, 2019.



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