

**STATE OF NORTH CAROLINA**  
**COUNTY OF WAKE**

**IN THE OFFICE OF**  
**ADMINISTRATIVE HEARINGS**  
**18 DHR 05598**

<p>E C Canada &amp; Associates Inc Petitioner,</p> <p>v.</p> <p>NC Department of Health and Human Services, Nutrition Services, Child &amp; Adult Care Food Program Respondent.</p>	<p><b>FINAL DECISION</b></p>
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**THE ABOVE MATTER** came on for hearing on November 2, 2018, before the undersigned Augustus B. Elkins II, Administrative Law Judge in Raleigh, North Carolina. The record was left open for the parties' submission of materials, including but not limited to proposals. Mailing time was allowed for submission including the day of mailing as well as time allowed for receipt by the Administrative Law Judge. Submissions were due on or before December 7, 2018, at which time the record was closed.

**APPEARANCES**

**For Petitioner:** Clayton B. Krohn  
Shope Krohn Attorneys at Law, P.A.  
Greensboro, North Carolina

**For Respondent:** Ryan C. Zellar  
Assistant Attorney General, North Carolina Department of Justice  
Raleigh, North Carolina

**ISSUES**

Whether Respondent properly issued cost disallowances for Petitioner for May 2016, October 2016, December 2016, and October 2015 through September 2016 as described in the August 27, 2018,, Informal Conference Decision Letter, or whether Respondent exceeded its authority, acted erroneously, failed to use proper procedure, acted arbitrarily or capriciously or failed to act as required by law when it disallowed certain expenses and costs.

**APPLICABLE STATUTES AND RULES**

(including but not limited to)

42 U.S.C. 1766    7 CFR Part 226    N.C.G.S. § 130A-361    10A N.C.A.C. 43J.0101

## EXHIBITS

### **For Petitioner**

- A.** Timeline
- B.** Annual Application: Budget for Sponsoring Organizations for program year October 1, 2015-September 30, 2016
- C.** Disallowance Forms dated October 30, 2016 for: (1) Administrative Expenditures and Operating costs for the month of May 2016 in the amount of \$15,207.68; (2) Administrative Expenditures and Operating costs for the month of June 2016 in the amount of \$9,561.56; (3) Administrative Expenditures and Operating costs for the month of October 2016 in the amount of \$1,649.11; and (4) Administrative Expenditures and Operating costs for the month of December 2016 in the amount of \$1,095.16.
- D.** Budget Item Approval and Denial of Costs from Respondent dated March 13, 2017
- E.** Disallowance Forms dated October 30, 2017 for: (1) IRS payments in the amount of \$211,450.65; (2) Excessive bank balance in the amount of \$373,349.16; and (3) Administrative Expenditures for the months of October 2015-September 2016 in the amount of \$99,906.00 & Revised versions of the following: (1) Summary of Findings Page 21; (2) Summary of Findings Page 22; (3) Summary of Findings Page 23; (4) Expense Validation Supplemental Findings Page 14A; (5) Expense Validation Supplemental Findings Page 14B; (6) Expense Validation Supplemental Findings Page 14C
- F.** Correspondence from Respondent, dated October 30, 2017, requesting records
- G.** Correspondence from Respondent, dated November 3, 2017, notifying Canada of corrections made to the Summary of Findings based on “re-review of the administrative review”
- H.** Correspondence from Canada, dated November 9, 2017, informing Respondent of its plan to file an appeal of the review and request for records
- I.** Correspondence from Canada’s Counsel informing Respondent of the firm’s representation of Canada and request for an informal conference
- J.** Correspondence from Respondent, dated November 30, 2017, requesting records
- K.** Correspondence from Respondent, dated December 11, 2017, notifying Counsel of the date of the informal conference
- L.** (1) Correspondence from Canada’s Counsel formally objecting to the scheduling of the informal conference; and (2) CACFP Institution Review and Appeal Procedures webpage
- M.** Correspondence from Respondent regarding Notice of Serious Deficiency

- N. FedEx receipts for the copies and mailing of records to Respondent
- O. Correspondence from Canada, dated January 11, 2018, responding to the Notice of Serious Deficiency
- P. Correspondence from Respondent, dated February 2, 2018, rescheduling the informal conference to March 5, 2018
- Q. Correspondence from Respondent, dated August 27, 2018, notifying Canada of the Agency's final decision of the Disallowances after the informal conference
- R. Petitioner's Prehearing Statement
- S. June 2016 Disallowance form
- T. (1) Disallowance form, dated October 30, 2017, regarding IRS tax payments; (2) Expense Validation Supplemental Findings Page 14B; (3) Expense Validation Supplemental Findings Page 14C; (4) Payroll Summary
- U. (1) Disallowance form dated October 30, 2017, regarding Excessive Bank Balance; (2) Email from Arnette Cowan regarding delay in claim payments.
- V. (1) Statement from Respondent regarding regulation violated and evidence for May 2016 Disallowance; (2) May 2016 Disallowance form dated October 30, 2017; (3) Revised May 2016 Disallowance form dated August 21, 2018; (4) Revised May 2016 Disallowance form dated August 24, 2018; (5) Monthly Receipt Totals Report
- W. (1) Statement from Respondent regarding regulation violated and evidence for October 2016 Disallowance; (2) October 2016 Disallowance form dated November 1, 2017; (3) Revised October 2016 Disallowance form dated December 18, 2017; (4) Revised October 2016 Disallowance form dated August 24, 2018; (5) Payroll records
- X. (1) Statement from Respondent regarding regulation violated and evidence for December 2016 Disallowance; (2) December 2016 Disallowance form dated October 30, 2017; (3) Revised December 2016 Disallowance form dated December 18, 2017; (4) Revised December 2016 Disallowance form dated August 24, 2018; (5) Payroll records
- Y. (1) Statement from Respondent regarding regulation violated and evidence for Salaries Disallowance; (2) Disallowance form dated October 30, 2017; (2) Revised Disallowance form dated December 18, 2017; (3) Revised Disallowance form dated August 24, 2018; (4) Unapproved Wages document; (5) Specific Prior Written Approval Request Form – raise in salaries; (6) Worksheet D; (7) Specific Prior Written Approval Request Form – administrative equipment
- Z. Summary of expenses prepared by Canada's Accountant

**For Respondent:**

1. Revised Disallowance Form for May 2016 (Dated August 24, 2018)
2. 090 Report from NC Cares for Fiscal Year 2016
3. Payroll Records from May 2016
4. General Ledger from May 2016 (filtered for all non-center and salary expenses)
5. Minute Menu from May 2016
6. Revised Disallowance Form for October 2016 (Dated August 24, 2018)
7. 090 Report from NC Cares for Fiscal Year 2017
8. Payroll Records from October 2016
9. General Ledger from October 2016 (filtered for all non-center and salary expenses)
10. Revised Disallowance Form for December 2016 (Dated August 24, 2018)
11. Payroll Records from December 2016
12. General Ledger from December 2016 (filtered for all non-center and salary expenses)
13. Revised Disallowance Form from October 2015 through September 2016 (Dated August 24, 2018)
14. Petitioner E C Canada & Associates, Inc. Annual Budget Application for October 2015 through September 2016
15. Respondent State Agency Budget Item Approval for October 2015 through September 2016
16. Unapproved Wages for Daniel Canada, Ethelean Canada and Dwight Canada for October 2015 through September 2016
17. Complete Payroll Records from October 2015 through September 2016
18. Complete Payroll Records from July 1, 2015 through June 30, 2017
19. Complete General Ledger from July 2015 through June 2017
20. Informal Conference Decision Letter dated August 27, 2018
21. Permanent CACFP Agreement for E C Canada & Associates, Inc.
22. USDA Handbook entitled "Guidance for Management Plans and Budgets - A Child and Adult Food Program Handbook"

## WITNESSES

**For Petitioner:** Bonita Sherrod Daniel Canada Ethelean Canada

**For Respondent:** Mary Anne Burghardt

**BASED UPON** careful consideration of the sworn testimony of the witnesses presented at the hearing, the documents and exhibits received and admitted into evidence, and the entire record in this proceeding, the Undersigned makes the following findings of fact. In making the findings of fact, the Undersigned 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 interest, 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 of the witness is reasonable and whether the testimony is consistent with all other believable evidence in the case.

## FINDINGS OF FACT

1. Petitioner, E C Canada & Associates Inc. ("Canada") is a sponsoring organization with the Child and Adult Care Food Program. Canada's principal place of business is in Greensboro, North Carolina. Canada has been a sponsoring organization since early 2000. Canada has six (6) employees and sponsors over 100 centers throughout the central and western parts of North Carolina. Ms. Ethelean Canada is the Chief Operating Officer (COO), Mr. Daniel Canada is the President, and Ms. Bonita Sherrod is the accountant for E C Canada & Associates Inc.
2. The Child and Adult Care Food Program ("CACFP") is a nutrition program that reimburses participating institutions for meals served at daycare centers. The CACFP is regulated and funded by the United States Department of Agriculture ("USDA"), Food and Nutrition Service ("FNS").
3. Respondent, the North Carolina Department of Health and Human Services ("NCDHHS"), Division of Public Health ("DPH"), Nutrition Services Branch ("NSB"), is the State agency that administers the CACFP in North Carolina (hereinafter referred to as "Respondent"). Respondent is responsible for protecting the integrity of the CACFP by ensuring that each participating institution complies with all of the relevant rules and regulations governing the CACFP.
4. Petitioner's current Permanent CACFP Agreement became effective on or about December 28, 2011, and was in effect during all relevant times of Petitioner's appeal. Pursuant to the terms of the Agreement, signed by Ms. Ethelean Canada, Petitioner agreed to the following: 1. Comply with the terms of the Agreement and all applicable federal and state laws and regulations governing the CACFP; 2. Allow the State Agency to make announced or unannounced reviews of its CACFP operations; 3. Accept final financial and administrative responsibility for management of the Program; 4. Allow the Respondent and other State or Federal officials to make announced or unannounced reviews of its CACFP operations during normal hours of child or adult care

operations or at any other reasonable time as deemed necessary by the reviewing official; 5. Maintain all program records, reports and other documents pertaining to the CACFP at the Institution and participating facility(ies), including claims for reimbursement and supporting documentation and records pertaining to the Institution's budget; and 6. Upon request, make all records pertaining to the Program available for administrative review by the Respondent at a reasonable time and place.

5. In approximately August 2017, Respondent conducted an administrative review of EC Canada & Associates, Inc. This was an announced review that was intended to assess the CACFP operations and management of EC Canada & Associates, Inc. Such administrative reviews are a routine requirement for all Institutions who choose to participate in the CACFP to ensure the Institution's compliance with the regulations. Randomly selected "test months" are used as representative samples for this review. Respondent's routine practice for administering administrative reviews is to compare the administrative and operating costs claimed by an Institution with the administrative and operating costs that the State Agency is able to verify based on the documentation provided by the Institution.

6. Violations were discovered after Respondent had an opportunity to review the documentation received from the August 2017 administrative review. As a result, Respondent conducted a second follow up administrative review of EC Canada & Associates, Inc. in approximately October 2017. Follow up administrative reviews are routine when numerous errors are revealed in the initial review. Final review of the two routine administrative reviews revealed that the costs claimed by Petitioner exceeded the costs that Respondent was able to verify for the test months of May 2016, October 2016, and December 2016.

7. As a result of these discrepancies, Revised Cost Disallowance Forms were issued on or about August 24, 2018, for May 2016 in the amount of \$14,931.96, October 2016 in the amount of \$1,649.11 and December 2016 in the amount of \$1,095.16.

8. At the hearing, Respondent alerted the Undersigned to an accounting error in the May 2016 revised disallowance form. The correct disallowed amount should be \$14,931.87 rather than the \$14,931.96 that is listed on the August 24, 2018, Revised Cost Disallowance Form.

9. On a Costs Allowance/Disallowance Form ("CAC") dated October 30, 2016, Respondent disallowed Administrative Expenditures and Operating Costs for the month of May 2016 ("May CAC") in the total amount of \$15,207.68. The May CAC shows that the Claimed Amounts were greater than the Verified Amounts.

10. On a CAC dated October 30, 2016, Respondent disallowed Administrative Expenditures and Operating Costs for the month of June 2016 ("June CAC") in the total amount of \$9,561.56. The June CAC shows that the Claimed Amounts were less than the Verified Amounts.

11. On a CAC dated October 30, 2016, Respondent disallowed Administrative Expenditures and allowed Operating Costs for the month of October 2016 ("October CAC"). The October CAC disallows Administrative Expenditures in the amount of \$1,649.11. The October CAC shows that the Claimed Amounts of Administrative Expenditures were greater than the Verified Amounts.

The October CAC allows Operating Costs in the amount of \$19,832.83. The October CAC shows that the Claimed Amounts of Operating Costs were less than the Verified Amounts.

12. On a CAC dated October 30, 2016, Respondent disallowed Administrative Expenditures and allowed Operating Costs for the month of December 2016 (“December CAC”). The December CAC disallows Administrative Expenditures in the amount of \$1,095.16. The December CAC shows that the Claimed Amounts of Administrative Expenditures were greater than the Verified Amounts. The December CAC allows Food Costs in the amount of \$124.60. The December CAC shows that the Claimed Amounts of Food Costs were greater than the Verified Amounts.

13. On a CAC dated October 30, 2017, Respondent disallowed IRS payments for the period of October 2015 through December 2016 (“October through December CAC”). The October through December CAC disallows IRS Payments in the amount of \$211,450.65.

14. On a CAC dated October 30, 2017, Respondent disallowed Excessive Bank Account Balance for the period of October 2015 through September 2016 (“September CAC”). The September CAC disallows Excessive Bank Account Balance in the amount of \$343,349.16.

15. On a CAC dated October 30, 2017, Respondent disallowed Administrative Expenditures for the period of October 2015 through September 2016 (“Salary Disallowance”). The Salary Disallowance is in the amount of \$99,906.00.

16. On October 30, 2017, Respondent also revised the following: (1) Summary of Findings Page 21; (2) Summary of Findings Page 22; (3) Summary of Findings Page 23; (4) Expense Validation Supplemental Findings Page 14A; (5) Expense Validation Supplemental Findings Page 14B; and (6) Expense Validation Supplemental Findings Page 14C

17. In a letter dated November 3, 2017, Respondent informed Canada that “[b]ased on review of the administrative review it was noted that corrections were made to the Summary of Findings.” The letter further describes the revisions: (1) revisions to the Summary of Mal Observation Violations for Wade’s Infant-Toddler Center, Wallburg Academy, and Wishview Children Center; (2) revisions to the Summary of Meal Adjustments for Wallburg Academy; (3) revision to the Fiscal Accountability for the month of December 2016 for food; and (4) Expense Validation Supplemental Findings page for October 2016

18. In a letter dated November 9, 2017, Canada informed Respondent of its plan to file an appeal of the review and request for records. In a letter dated November 15, 2017, Counsel for Canada requested an informal conference to review the request for additional records and the cost disallowances

19. On or about December 13, 2017, Canada was first notified of the informal conference scheduled for December 18, 2017. The notification was made by email forwarded to Counsel on December 12, 2017. The FedEx version arrived on December 14, 2017. Notice is required to be at least ten (10) days from the hearing date, certified mail, return receipt requested. On December 14, 2017, Counsel for Canada formally objected to the scheduling of the informal conference due to insufficient service

20. On or about December 18, 2017, Respondent revised the October CAC. While the total amount disallowed remains the same as the original version dated November 1, 2017, (\$1,649.11),

the Verified amount is one dollar less. Also, on or about December 18, 2017, Respondent revised the December CAC, disallowing an additional \$124.60, changing the total disallowance from \$1,095.16 to \$1,219.76. On or about December 18, 2017, Respondent revised the Salary Disallowance form; however, when comparing the October 30, 2017 version with the December 18, 2017 version, there appears to be no difference between the two documents

21. On or about December 19, 2017, Respondent sent to Canada a Notice of Serious Deficiency. Said Notice provided that the following were serious deficiencies: (1) a bank balance of \$373,349.16 as of September 30, 2016; (2) overpayment of salaries above the approved budget amount totaling \$99,906.00; and (3) Canada's payment of the employee's share of Federal taxes with CACFP funds in the amount of \$211,450.65.

22. On or about December 27, 2017, at the request of the Agency, Canada sent approximately 18,000 pages of documentation to the Agency

23. In a letter dated January 11, 2018, Canada responded to the Notice of Serious Deficiency. First, in regard to the bank balance, Canada disputed the excessive bank balance claim, citing the Agency's policy to keep at least one month's payments to centers in the bank account at any time. Canada's average monthly disbursements for 2016 were over \$368,000.00 per month. Additionally, previous experience and budget requirements necessitated Canada to have a fund balance to cover payments in the event the State could not make a timely reimbursement, which had happened in the past. Second, in response to the overpayment of salaries, Canada cited the disallowance of generally allowable costs per FNS Instruction 796-2, Rev 4, Section VII, of rent, utilities, office equipment, etc. from approved budgets. Due to the disallowance of the foregoing in their entirety, the officers had to pay for these operating expenses personally through their salaries as business expenses. Finally, in response to the Federal tax allegation, Canada disputed the contention that CACFP funds were used to pay Federal employee taxes. Canada provided the Intuit Online Payroll System reports, which clearly indicate the payment of taxes from employee salaries.

24. At Petitioner's request and in an attempt to resolve the dispute, an informal conference involving the Respondent and Canada occurred on March 5, 2018.

25. On or about August 21, 2018, Respondent revised the May CAC, changing the total disallowance amount from \$15,207.68 to \$14,931.96. On August 24, 2018, Respondent again revised the May CAC; however, when comparing the August 21, 2018 version with the August 24, 2018 version, there appears to be no difference between the two documents.

26. On or about August 24, 2018, Respondent revised the October CAC. In the revised version, the Verified amount was changed from \$346,577.99 to \$326,744.16, and the Allowed Amount illustrated on the November 1, 2017 version was deleted in its entirety.

27. On or about August 24, 2018, Respondent revised the December CAC. This version of the December CAC had a "Verified" amount, with a total disallowance of \$1,095.16. Also, on or about August 24, 2018, Respondent revised the Salary Disallowance form. When comparing this version with the previous two versions, there appears to be no difference between the three documents



28. On or about August 27, 2018, Respondent issued a decision letter, which set forth its determination of the cost disallowances on the CACFP disallowance forms dated October 30, 2017. The May 2016 Disallowance of \$14,931.96 remained in effect. The June 2016 Disallowance of \$9,561.56 was withdrawn in full. The October 2016 Disallowance of \$1,649.11 remained in effect. The December 2016 Disallowance of \$1,095.16 remained in effect. The Disallowance of Salaries from October 2015-September 2016 totaling \$99,906.00 remained in effect. The Disallowance of the IRS payments for October 2015-December 2016 was withdrawn in full. The Excessive Bank Balance Disallowance of \$373,349.16 was withdrawn in full.

29. In its May 2016 claim for reimbursement, Petitioner claimed \$57,636.97 in Administrative Expenditures and \$150,000.00 in Operating Costs. Petitioner actively entered these claims for reimbursement into the NC Cares software system. The documentation provided to Respondent by Petitioner to support these claims for reimbursement, Petitioner's payroll records and general ledger for May 2016, verify \$53,946.61 in corrected administrative expenses, resulting in a disallowance in corrected administrative expenditures in the amount of \$3,690.18. Similarly, EC Canada's May 2016 Minute Menu records verify \$138,758.31 in operating costs. The total difference between costs claimed by Petitioner and costs verified by Respondent for May 2016 was \$14,931.87.

30. In its October 2016 claim for reimbursement, Petitioner claimed \$73,393.27 in Administrative Expenditures. Petitioner actively entered these claims for reimbursement into the NC Cares software system. The documentation provided to Respondent by Petitioner to support these claims for reimbursement, Petitioner's payroll records and general ledger for October 2016, verify \$71,744.16 in administrative expenses, resulting in a disallowance in administrative expenditures in the amount of \$1,649.11. The total difference between costs claimed by Petitioner and costs verified by Respondent for October 2016 was \$1,649.11.

31. In its December 2016 claim for reimbursement, Petitioner claimed \$58,235.29 in Administrative Expenditures. Petitioner actively entered these claims for reimbursement into the NC Cares software system. The documentation provided to Respondent by Petitioner to support these claims for reimbursement, Petitioner's payroll records and general ledger for December 2016, verify \$57,140.13 in administrative expenses. The total difference between costs claimed by Petitioner and costs verified by Respondent for December 2016 was \$1,095.16.

32. Respondent is responsible for reviewing all institution budgets and is required to limit allowable administrative claims by each sponsoring organization to the administrative costs approved in its budget. It is the Respondent's usual and customary practice to review each participating Institution's budget every year to confirm that the actual salaries throughout the year did not exceed the salary amount approved in the Institution's annual budget.

33. On or about January 13, 2016, Canada submitted its Annual Application: Budget for Sponsoring Organizations for program year October 1, 2015-September 30, 2016 to Respondent. Respondent advised that it had determined that the salaries of Daniel Canada, Ethelean Canada, Dwight Canada, and Brenda Sutton were unapproved on the grounds that the salaries were not consistent with the Bureau of Labor Statistic and were unreasonable in nature. On or about January 27, 2017, Respondent issued a Final Budget Item Approval Letter, which included the approved budgeted amount of salaries available to be paid during the fiscal year of 2015-2016, which encompassed the months of October 2015 through September 2016. Respondent approved the

following salaries for the 2015-2016 fiscal year: Daniel Canada: \$154,047.37; Ethelean Canada: \$147,265.20; Dwight Canada: \$116,581.68; Brenda Sutton: \$51,372.84; Patricia Holt: \$55,344.00; and Bruce Canada: \$21,030.72.

34. Institutions are required to adhere to the approved salaries listed in the Final Budget Item Approval. In the event that an Institution disagrees with the salaries listed in the Final Budget Item Approval, an Institution may object by filing a formal petition with the Office of Administrative Hearings within fifteen (15) days of receipt of the Final Budget Item Approval Letter. An Institution may also request the State Agency to reconsider the salaries included in the Final Budget Item Approval beyond the fifteen-day appeal deadline by submitting amended proposed budgets, with justification, to the State Agency. Petitioner neither appealed the salaries listed in the Final Budget Item Approval Letter within fifteen (15) days of Respondent's January 27, 2017, Final Budget Item Approval Letter nor did they submit any amended proposed budgets to Respondent with documentation supporting an increase in salaries for the 2015-2016 fiscal year.

35. Respondent's routine line-item review of Petitioner's budget revealed that Petitioner's salaries exceeded the salary amount approved in the Petitioner's Final Budget Item Approval Letter. Pursuant to the payroll records provided to Respondent by Petitioner, three of the six employees listed on the Final Budget Item Approval Letter received salaries in excess of the approved amount: Daniel Canada: \$187,900.11; Ethelean Canada: \$150,000.00; and Dwight Canada: \$179,900.00. Those combined excess wages total \$99,905.89 greater than the amount previously approved by Respondent in the Final Budget Item Approval Letter.

36. Neither Temekia Cyrus nor Joyce Bonner had performed an administrative review of Canada before this Administrative Review. Neither Temekia Cyrus nor Joyce Bonner had performed an administrative review of a company working with as many daycare centers as Canada.

37. Neither Temekia Cyrus nor Joyce Bonner was present for the November 2 hearing nor did either of them submit an affidavit. The witness for the Agency was Mary Burghardt. She has worked with the Department of Health and Human Services for 17 years. She is a Registered Dietician and has a master's Degree in nutrition. She did not attend the Administrative Review.

38. Canada's Accountant, Bonita Sherrod, ("Sherrod") testified. She is a certified public accountant and has worked with Canada for over fifteen years. She has many years of accounting and financial experience with several North Carolina corporations. Petitioner presented the argument that \$99,905.89 was too large of a salary excess if one looked at the whole of salaries paid for the year in question.

39. For 2015-2016, the difference in the Respondent's approved amount and the amount that Canada paid was as follows: (1) Daniel Canada was paid \$33,853.00 in excess of the Respondent's approved amount; (2) Ethelean Canada was paid \$2,735.00 in excess of the Respondent's approved amount; (3) Dwight Canada was paid \$63,318.00 in excess of the Respondent's approved amount; (4) Brenda Sutton was paid \$32,998.00 less than the Respondent's approved amount; (5) Patricia Holt was paid \$13,764.00 less than the Respondent's approved amount; and (6) Bruce Canada was paid \$14,151.00 less than the Respondent's approved amount

40. Sherrod concluded that the Respondent should consider the total amount of salary when determining whether Canada complied with the budgeted amount. The total budgeted amount of salary for 2015-2016 was \$545,642.00 and the total gross salary paid was \$584,645.00. The difference between the budgeted amount and the amount paid was \$39,003.00.

41. In explaining the excess, Petitioner offered further explanations citing that employees of Canada used a portion of their salary increases to pay business costs that were not approved in the 2015-2016 budget. The total amount of payments made in this manner was \$32,150.73 leaving a difference between the Salary Overage and the business costs at \$6,852.27.

42. Petitioner asserted that consideration should be given regarding the fact that Canada did not provide health insurance, life insurance or retirement benefits to its employees for the 2015-2016 time period. Petitioner also asserted that salaries paid by Canada for 2015-2016 were consistent with rates paid for similar work in the same area in which Canada is located and those salaries are consistent with the amounts reported by the U.S. Department of Labor or State labor department for compensation for that field of employment in the same or comparable geographic location

43. Testifying on behalf of Petitioner, Ms. Sherrod admitted at hearing that the actual salaries received by Daniel Canada, Ethelean Canada, and Dwight Canada exceeded the salaries that were approved in the Final Budget Item Approval Letter. Petitioner failed to consult with or otherwise request formal approval from Respondent prior to increasing these salaries.

### **CONCLUSIONS OF LAW**

1. The Office of Administrative Hearings has jurisdiction over the parties and the subject matter of this action. The parties received proper notice of the hearing in the matter. To the extent 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.

2. To the extent that certain portions of the foregoing Findings of Fact constitute mixed issues of law and fact, such Findings of Fact shall be deemed incorporated herein by reference as Conclusions of Law. A court need not make findings as to every fact, which arises from the evidence, and need only find those facts that are material to the settlement of the dispute. *Flanders v. Gabriel*, 110 N.C. App. 438, 440, 429 S.E.2d 611, 612, aff'd, 335 N.C. 234, 436 S.E.2d 588 (1993).

3. 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. The Respondent administers the CACFP in North Carolina pursuant to N.C.G.S. § 130A-361 and 10A N.C.A.C. 43J.0101, which incorporates by reference 7 C.F.R. Part 226. 7 C.F.R. § 226.2 provides that “*Institution*” means a sponsoring organization, child care center, at-risk afterschool care 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. Petitioner E C Canada & Associates Inc. is a “*Sponsoring Organization*” pursuant to an agreement with Respondent and is subject to the requirements of 7 C.F.R. Part 226,

which governs institutions participating in the CACFP.

4. 7 C.F.R. § 226.2 provides that “*Principal*” means any individual who holds a management position within or is an officer of, an institution or a sponsored center, including all members of the institution’s board of directors or the sponsored center’s board of directors.

5. Ms. Ethelean Canada, as Chief Operating Officer, and Mr. Daniel Canada, as President, are principals of Petitioner E C Canada & Associates Inc.

6. 7 C.F.R. § 226.10(d) states that “all records to support the claim shall be retained for a period of three years after the date of final submission of the final claim for the fiscal year to which they pertain, except if audit findings have not been resolved, the records shall be retained beyond the end of the three year period as long as may be required for the resolution of the issues raised by the audit. 7 C.F.R. § 226.10(d) also states that all accounts and records pertaining to the Program shall be made available, upon request, to representatives of the State agency, of the USDA, and of the U.S. Government Accountability Office for audit or review, at a reasonable time and place.”

7. 7 C.F.R. § 226.14(a) states that State agencies shall disallow any portion of a claim for reimbursement and recover any payment to an institution not properly payable under this part. This includes an institution’s failure to comply with the recordkeeping requirements contained in the regulations.

8. 7 C.F.R. § 226.15(e) states that “each institution shall establish procedures to collect and maintain all program records required . . . by the State Agency.” Specifically, “copies of invoices, receipts, or other records required by the State Agency to document administrative and operating costs.” 7 C.F.R. § 226.15(e)(6). Pursuant to this section, “failure to maintain such records shall be grounds for the denial of reimbursement for meals served during the period covered by the records in question and for the denial of reimbursement for COSTS associated with such records.”

9. Section VIII(A) of the FNS Instruction 796-2, Rev. 4 (Financial Management Guide) states that “institutions are responsible for accounting for costs correctly and for maintaining records and sufficient supporting documentation to demonstrate that the costs claimed have been incurred, are allocable to the Program, and comply with State agency financial management requirements. . . . Costs that are not properly documented and recorded. . . are unallowable.”

10. Section VII(G) of the Financial Management Guide further explains that “unallowable costs cannot be charged to the Program or claimed for reimbursement (and) Institutions must fund unallowable costs from non-program sources.

11. 7 C.F.R. § 226.7 states that “the State agency must review institution budgets and must limit allowable administrative claims by each sponsoring organization to the administrative costs approved in its budget.”

12. Part 2 of the USDA Handbook entitled “Guidance for Management Plans and Budgets – A Child and Adult Food Program Handbook” instructs that “once the initial budget has been

approved, the institution is expected to adhere to it or to submit appropriate amendments to the State agency for approval should the need arise. The institution's actual expenditures will be submitted to the State agency for review and approval with the institution's monthly claim for reimbursement."

13. Part 2(A)(5) of the USDA Handbook entitled "Guidance for Management Plans and Budgets – A Child and Adult Food Program Handbook" further explains that "costs that are not approved in the CACFP budget or a budget amendment" are considered "unallowable costs" that may not be charged to the CACFP or claimed for reimbursements.

14. Section VIII(I)(23)(b)(4) of the FNS Instruction 796-2, Rev. 4 (Financial Management Guide) states that "retroactive salary or wage increases" are considered "unallowable costs" which cannot be charged to the Program or claimed for reimbursement. Institutions must fund unallowable costs from non-program sources.

15. The burden of proof rests on the Petitioner challenging an agency decision. *Overcash v. N.C. Dept. of Env't & Natural Res.*, 179 N.C. App. 697, 704, 635 S.E.2d 442, 447 (2006). The Petitioner bears the burden of proof by a greater weight or preponderance of the evidence of showing that the Agency has substantially prejudiced its rights as well as whether the agency acted outside its authority, acted erroneously, acted arbitrarily and capriciously, used improper procedure, or failed to act as required by law or rule. See N.C. Gen. Stat. § 150B-23. See also *Surgical Care Affiliates, LLC v. NC. Dep't of Health & Human Servs., Div. of Health Serv. Regulation, Certificate of Need Section*, 762 S.E.2d 468, 474-75 (N.C. Ct. App. 2014), *review denied*, 768 S.E.2d 564 (N.C. 2015).

16. In accordance with *Painter v. Wake County Bd of Ed.*, 217 S.E.2d 650, 288 N.C. 165 (1975), absent evidence to the contrary, it will be presumed that "public officials will discharge their duties in good faith and exercise their powers in accord with the spirit and purpose of the law. Every reasonable intendment will be made in support of the presumption." The burden is upon the party asserting the contrary to overcome the presumption by competent and substantial evidence. "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Rusher v. Tomlinson*, 119 N.C. App. 458, 465, 459 S.E. 2d 285, 289 (1995), *aff'd*, 343 N.C. 119, 468 S.E.2d 57 (1996); *Comm'r of Ins. V Fire Ins. Rating Bureau*, 292 N.C. 70, 80, 231 S.E.2d 882, 888 (1977). "It is more than a scintilla or a permissible inference." *Lackey v. Dept. of Human Resources*, 306 N.C. 231, 238, 293 S.E.2d 171, 177 (1982).

17. In weighing evidence which detracts from the agency decision," "[i]f, after all of the record has been reviewed, substantial competent evidence is found which would support the agency ruling, the ruling must stand." *Little v. Bd. of Dental Examiners*, 64 N.C. App. 67, 69, 306 S.E.2d 534, 536 (1983) (citations omitted).

18. Respondent properly disallowed, in part, Petitioner's claims for reimbursement for May 2016, October 2016 and December 2016 pursuant to 7 C.F.R. § 226.14, 7 C.F.R. § 226.15 and Sections VIII(A) and VIII(G) of the Financial Management Guide.

19. The May 2016 Cost Disallowance Form dated August 8, 2018, represents the difference

between the administrative and operating costs claimed by Respondent, and the administrative and operating costs that could be verified by Petitioner from the documentation provided by Petitioner. This Cost Disallowance Form lists a disallowance of \$14,931.96. After careful examination of the evidence, the proper disallowed amount for May 2016 is \$14,931.87.

20. The October 2016 Cost Disallowance Form dated August 8, 2018, represents the difference between the administrative costs claimed by Respondent and the administrative costs that could be verified by Petitioner from the documentation provided by Petitioner. This Cost Disallowance Form properly lists a disallowance of \$1,649.11.

21. The December 2016 Cost Disallowance Form dated August 8, 2018, represents the difference between the administrative costs claimed by Respondent and the administrative costs that could be verified by Petitioner from the documentation provided by Petitioner. This Cost Disallowance Form properly lists a disallowance of \$1,095.16.

22. Respondent properly disallowed, in part, Petitioner's salaries of Daniel Canada, Ethelean Canada and Dwight Canada for the period of October 2015 through September 2016 pursuant to 7 C.F.R. § 226.7, Part 2 of the USDA Handbook entitled "Guidance for Management Plans and Budgets – A Child and Adult Food Program Handbook," and Section VIII(I)(23)(b)(4) of the Financial Management Guide.

23. The October 2015 through September 2016 Cost Disallowance Form dated August 8, 2018, represents the difference between the salaries approved in Petitioner's Annual Budget and the actual salaries received by Daniel Canada, Ethelean Canada, and Dwight Canada. This Cost Disallowance Form lists a disallowance of \$99,906.00. After careful examination of the evidence, the proper disallowed amount for the period of October 2015 through September 2016 is \$99,905.89.

**BASED UPON** the foregoing Findings of Fact and Conclusions of Law the Undersigned makes the following Final Decision.

### **FINAL DECISION**

The Undersigned finds and holds that there is sufficient evidence in the record to properly and lawfully support the Conclusions of Law cited above. The Undersigned enters the following Final Decision based upon the preponderance of the evidence, having given due regard to the demonstrated knowledge and expertise of the Agency with respect to facts and inferences within the specialized knowledge of the Agency as required under N.C. Gen. Stat. § 150B-34.

The Undersigned holds that Petitioner failed to carry its burden of proof by a greater weight of the evidence that the Respondent erred in its cost disallowances listed on Respondent's August 27, 2018, Informal Conference Decision Letter. The Respondent did not act in an arbitrary and capricious manner in administering the CACFP rules, regulations and law, did not fail to act as required by law or rule, did not fail to use proper procedure, did not act erroneously, nor did it exceed its authority or jurisdiction. The finder of fact cannot properly act upon the weight of

evidence, in favor of the one having the *onus*, unless it overbears, in some degree, the weight upon the other side. The weight of Petitioner's evidence does not overbear in that degree required by law the weight of evidence of Respondent to the ultimate issues.

The May 2016 Cost Disallowance Form dated August 8, 2018, representing non-verified administrative and operating costs lists a disallowance of \$14,931.96. After careful examination of the evidence, the proper disallowed amount for May 2016 is \$14,931.87. The October 2016 Cost Disallowance Form dated August 8, 2018, representing non-verified administrative costs is \$1,649.11 which is the proper cost disallowance amount. The December 2016 Cost Disallowance Form dated August 8, 2018, representing non-verified administrative costs is \$1,095.16 which is the proper cost disallowance amount. The October 2015 through September 2016 Cost Disallowance Form dated August 8, 2018, representing the excessive salaries of Daniel Canada, Ethelean Canada, and Dwight Canada lists a disallowance of \$99,906.00. After careful examination of the evidence, the proper disallowed amount for the period of October 2015 through September 2016 is \$99,905.89.

### **NOTICE**

This is a Final Decision under authority of the North Carolina General Statutes. Under the provisions of North Carolina General Statutes Chapter 150B, Article 4, 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 the county where the person aggrieved by the 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 copy of the Administrative Law Judge's Final Decision. N.C. Gen. Stat. §150B-46 describes the contents of the Petition and requires service of the Petition on all parties. This Final Decision was served on the parties as indicated on the Certificate of Service attached to this Final Decision. 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 18th day of January, 2019.

A handwritten signature in blue ink that reads "Augustus B. Elkins II". The signature is written in a cursive style and is positioned above a solid blue horizontal line.

Augustus B Elkins II  
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:

Ryan Christopher Zellar Esq.  
North Carolina Department of Justice  
rzellar@ncdoj.gov  
Attorney For Respondent

Clayton B Krohn  
Shope Krohn  
426 W Friendly Avenue  
Greensboro NC 27401  
Attorney For Petitioner

Served by e-file to Respondent on January 18, 2019

Served by USPS to Petitioner on January 22, 2019

This the 18th day of January, 2019.



Anita M Wright  
Paralegal  
Office of Administrative Hearings  
6714 Mail Service Center  
Raleigh NC 27699-6700  
Telephone: 919-431-3000