

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2006 CA 2048

NURSERY RHYME, INC.

VERSUS

**STATE OF LOUISIANA,
DEPARTMENT OF EDUCATION**

**On Appeal from the 19th Judicial District Court
Parish of East Baton Rouge, Louisiana
Docket No. 502,617, Division "J"
Honorable Curtis A. Calloway, Judge Presiding**

**William H. Cooper, Jr.
Baton Rouge, LA**

**Attorney for
Plaintiff-Appellant
Nursery Rhyme, Inc.**

**Barbara M. Ballard
Baton Rouge, LA**

**Attorney for
Defendant-Appellee
State of Louisiana,
Department of Education**

*** * * * ***

**CHARLES R. JONES
JUDGE, AD HOC**

*** * * * ***

BEFORE: JONES, MURRAY, AND TOBIAS, JJ.¹

AFFIRMED

Judgment rendered AUG - 1 2007

¹ The Honorable Charles R. Jones, Judge, the Honorable Patricia Rivet Murray, Judge, and the Honorable Max N. Tobias, Jr., Judge, all members of the Fourth Circuit Court of Appeal, are serving as judges *ad hoc* by special appointment of the Louisiana Supreme Court.

CAJ
JRM
mtb

The Appellant, Nursery Rhyme, Inc., (hereinafter "Nursery Rhyme"), seeks review of the district court judgment upholding the Decision and Order of the Division of Administrative Law to terminate Nursery Rhyme from participation in the Child and Adult Care Food Program.

Since 1994, Nursery Rhyme has been a participant in the Child and Adult Care Food Program, (hereinafter "CACFP"). CACFP is a state sponsored federally funded program which provides meals to individuals on a free, reduced, or full payment basis. The applicable regulations for CACFP are found at 7 C.F.R. §226.6(c)(3)(i), which provides, in pertinent part,

...If the State agency determines that a particular institution has committed one or more serious deficiency listed in paragraph (c)(3)(ii) of this section, the State agency must initiate action to terminate the agreement of a participating institution and initiate action to disqualify the institution and any responsible principals and responsible individuals.

Additionally, 7 C.F.R. §226.6(c)(3)(ii) provides, in pertinent part,

Serious deficiencies for participating institutions are:
...(f)ailure to maintain adequate records ... (c)laiming reimbursement for a significant number of meals that do not meet Program requirements... (f)ailure to perform any of the other financial and administrative responsibilities required by this part...

Each institution must also establish procedures to collect and maintain adequate program records, as provided for in 7 C.F.R § 226.15(e).

As of June 23, 1994 until July 9, 2001, Nursery Rhyme was notified on various occasions of its non-compliance with the Code of Federal Regulations.

These violations include: maintaining documentation of financial expenditures which lack adequate details, specifically of transactions; failing to itemize milk receipts (this violation being the most prevalent and consistent); documentation revealing shortages of milk invoices; and incomplete time and attendance records.

On August 9, 2001, Nursery Rhyme sent a Corrective Action Plan to the Division of Nutrition Assistance or the Department of Education (hereinafter the "DNA" or "DOE"), in which Nursery Rhyme represented that "all future milk receipts would be itemized." Thereafter, on August 29, 2001 Nursery Rhyme ignored previous letters from the DNA, further ignored its own Corrective Action Plan and failed to itemize milk receipts.

On September 24, 2001, Nursery Rhyme's records were audited by Thomas, Ragusa, Uffman & Co. Nursery Rhyme did not receive the Agreed Upon Procedures Report prepared by the auditors until one week prior to the Administrative hearing.

Then on July 2, 2002, the DOE issued a letter to Nursery Rhyme, terminating their participation in the CACFP program. The letter listed numerous reasons for the termination beginning with Administrative Reviews dating back as far as June 1, 1994. Specific deficiencies and regulations, policies, and procedures which were violated include, but are not limited to the following: (1) failing to itemize milk receipts, (2) failing to maintain adequate records, (3) missing receipts, (4) shortages of fruit, milk, and meat components, and (5) filing receipts indicating purchases of non-reimbursable items.

The Administrative Law Judge on October 24, 2002, upheld the termination of Nursery Rhyme and this ruling was affirmed by the 19th Judicial District Court. Nursery Rhyme appeals to this court.

In the present appeal, Nursery Rhyme specifies two assignments of errors. In the first assignment of error Nursery Rhyme argues that the lower courts, both the

Administrative Law Judge and the district court, erred in failing to properly apply the law where the DOE imposed an ex post facto penalty against Nursery Rhyme, which penalty was based on flawed evidence. In its second assignment of error, Nursery Rhyme argues that the lower courts did not recognize that the final charge of the DOE was not given to Nursery Rhyme in time for Nursery Rhyme to remedy the so-called “deficiencies” in that the last report was handed to Nursery Rhyme’s counsel a week before the hearing.

LAW AND DISCUSSION

It is settled law that in Administrative hearings “the hearing officer’s findings of fact [on review] will not be set aside unless those findings are clearly wrong or manifestly erroneous in light of the record reviewed in its entirety.” *Carver, Inc. v. State, Dep’t of Pub. Safety and Corrections, Office of State Police, Video Gaming Div.*, 951664 (La. App. 1 Cir. 4/4/96), 672 So.2d 1141, 1144.

Nursery Rhyme claims that the Administrative Law Judge and the district court erred in failing to properly apply the law where the DOE imposed an ex post facto penalty against Nursery Rhyme. The United States Constitution at Article I, Section 9, and the Louisiana State Constitution at Article I, Section 23, precludes the use of ex post facto punishment. Nursery Rhyme cites *George v. Baker*, 99-0234 (La. App. 1 Cir. 11/5/99), 746 So.2d 783, in which the court found that “for a criminal or penal law to fall within [the prohibition of ex post facto] the law must apply to events occurring before its enactment and must disadvantage the offender affected by it.” *Id.* p.5, 746 So.2d at 786

The case at bar is a civil, administrative hearing, in which laws can be applied retrospectively. Additionally, the *Baker* case is inapplicable because the “prohibition against ex post facto laws [only apply] to laws that are criminal or penal in nature.” *Fernandez v. Barnhart, Comm’r of Soc. Sec.*, 200 Fed. Appx. 325, 327, 2006 WL 2660619 (C.A. 5 (La.)). In *Fernandez*, the court dismissed the

ex post facto claim because the Social Security Act was not criminal or penal in nature, and thus did not violate the constitution. *Id.* Similarly, the present case and the CACFP regulations do not violate the United States or the Louisiana Constitution.

Furthermore, the DOE did not apply the new law, but rather used the law applicable during the time the letter of termination was received by Nursery Rhyme on July 2, 2002. Nursery Rhyme's contention that the DOE failed to use the applicable law to terminate its participation in the CACFP lacks merit. Although the Code of Federal Regulations was amended to provide for immediate termination where an institution was "seriously deficient," the amendment did not take effect until July 29, 2002. The letter notifying Nursery Rhyme of its termination was issued on July 2, 2002 prior to the amendment. The applicable regulation in effect at the time of Nursery Rhyme's termination called for termination, but only after the State agency afforded an institution every reasonable opportunity to correct problems. In any case, those reasonable opportunities have been afforded to Nursery Rhyme by the DOE.

Since Nursery Rhyme started the CACFP the DOE has made numerous attempts to guide Nursery Rhyme into compliance, but to no avail. Examples of these attempts are found throughout the record. The first notice to Nursery Rhyme of its violations of the CACFP regulations began on September 23, 1994, continuing on throughout 2001. Nursery Rhyme was aware of these notifications and acknowledged the violations by responding with its own Corrective Action Plan, which it also failed to comply with. We find that the ex post facto claim lacks merit and as such the district court decision in regard to this issue is affirmed.

Nursery Rhyme further claims that the district court erred in affirming the termination of Nursery Rhyme's participation in CACFP since Nursery Rhyme did not receive a copy of the Agreed Upon Procedures Report until approximately one

week prior to the Administrative hearing on the matter. As per their brief, Nursery Rhyme claims that “[it was] unable to comply with corrective action because the DOE did not furnish a copy of the Agreed Upon Procedures Report” timely. However, this contention is unmerited. The letter of termination lists a number of regulations Nursery Rhyme failed to comply with over the years, each of which they received notification of and were supposed to comply with prior to their 2002 termination. By failing to comply with the DOE’s request and regulations on those many occasions, Nursery Rhyme risked being terminated from the CACFP. Through those various letters, Nursery Rhyme received notice of its non-compliance and as such, did not need to wait for the Agreed Upon Procedures Plan from the DOE to take corrective action. In fact, Nursery Rhyme had already drafted its own Corrective Action Plan, but failed to follow its own initiated plan. Additionally, Nursery Rhyme was provided a handbook, which described the procedures necessary to maintain adequate records.

DECREE

For the reasons stated herein, the judgment of the Administrative Judge and the district court are affirmed.

AFFIRMED