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APPELLANT: Ach Tov V'Chesed
160 Franklin Avenue
Brooklyn, NY 11205 and

123 South 8th Street, #7C
Brooklyn, NY 11211

RESPONDENT: New York State Education Department
Child Nutrition Program Administration
99 Washington Avenue, Room 1623
Albany, NY 12234

STATE: New York; County of Sullivan

In the Matter of the Appeal of ACH TOV V' CHESED LEA CODE: 331400225751 from a decision by the New York State Education Department's Child Nutrition Program to reclaim their 2011 Federal Summer Food Service Program payments	**DECISION**

I find that respondent acted in accordance with the Federal Child Nutrition Program's regulations, specifically, those that pertain to the Summer Food Service Program found at 7 CFR Part 225, when it reclaimed all funds ($143,052.00) paid to appellant during the operation of its 2011 Summer Food Service Program

This Decision is rendered this 16th day of July 2012

Maureen Lavare

Maureen Lavare
Hearing Officer

LIST OF REPRESENTATIVES:

For the Appellant
Mr. Elozer Porges and
Dr. Steven Bernardo
Ach Tov V'Chesed
160 Franklin Avenue
Brooklyn, NY 11205, and

123 South 8th Street, #7C
Brooklyn, NY 11211

For the Respondent
Frances O'Donnell, Coordinator and
Kimberly Vumbaco, School Food Program Specialist III and
Kylie Smith, School Food Program Specialist I
New York State Education Department
Child Nutrition Program Administration
99 Washington Avenue, Room 1623
Albany, NY 12234

DOCUMENTS SUBMITTED AND REVIEWED

For the Appellant

1) June 1, 2012 letter to Hearing Officer Maureen Lavare from Joel Roth of Ach Tov V'Chesed requesting a hearing and explaining appellant's position
2) New York State Education Department Summer Food Service Program Appeal Procedures
3) New York State Education Department – Child Nutrition Program Administration - Program Site Review Form of sponsor Ach Tov V'Chesed for review conducted on August 2, 2011
4) New York State Education Department – Child Nutrition Program Administration - Summer Food Service Program Administrative Review Form for sponsor Ach Tov V' Chesed – date of review January 10, 2012
5) May 4, 2012 Notice of Action letter from Kylie Smith, School Food Program Specialist I of the New York State Education Department's Child Nutrition Program to Joel Roth of Ach Tov V'Chesed
6) May 14, 2012 letter from Joel Roth of Ach Tov V'Chesed to Kylie Smith, School Food Program Specialist I of the New York State Education Department's Child Nutrition Program responding to the May 4, 2012 letter

7) Copy of May 25, 2012 Email from Joel Roth of Ach Tov V'Chesed to Kylie Smith, School Food Program Specialist I of the New York State Education Department's Child Nutrition Program requesting a meeting or other response to his May 14, 2012 letter
8) May 23, 2012 Notice of Action letter from Kylie Smith, School Food Program Specialist I of the New York State Education Department's Child Nutrition Program to Joel Roth of Ach Tov V'Chesed stating that they will now process the reclaim of $143,052
9) Copy of 7 CFR §225.14
10) Copy of form entitled New York State Education Department - Summer Food Service Program – New Site Information Sheet – Camp Sites
11) April 8, 2011 SFSP memo (code SFSP- 13-2011) issued by the United States Department of Agriculture
12) Blank Site Selection Worksheet form
13) Staffing Chart (submitted on July 3, 2012)
14) Employee time report (submitted on July 3, 2012)
15) Payroll check report (submitted on July 3, 2012)
16) W2 records (submitted on July 3, 2012)

For the Respondent

1) June 22, 2012 letter from Frances O'Donnell, Coordinator of the New York State Education Department's Child Nutrition Program to Hearing Officer Maureen Lavare explaining respondent's position
2) New York State Education Department – Summer Food Service Program (SFSP) 2011 Sponsor Application/Agreement submitted by Ach Tov V'Chesed
3) New York State Education Department – Summer Food Service Program New Site Information Sheet-Camp Sites submitted by Joel Roth on behalf of Ach Tov V'Chesed and dated June 6, 2011
4) Ach Tov V'Chesed Staffing Chart for Summer 2011
5) Ach Tov V'Chesed board meeting agendas for February 20, 2011, March 27, 2011 and May 1, 2012
6) New York State Education Department – Summer Food Service Program Non Profit Organization Financial Administrative Form certified and signed by Joel Roth on behalf of Ach Tov V'Chesed
7) Permit issued by the New York State Department of Health to certify that Beer Hatorah/Ohel Eliezer is the operator of Ohel Eluzer Be'er Hatorah overnight camp, effective June 29, 2011 and expiring on September 5, 2011
8) Permit issued by the New York State Department of Health to certify that Beer Hatorah/Ohel Eliezer is the operator of Camp Be'er Hatorah, effective June 29, 2011 and expiring on August 31, 2011
9) State of New York, Worker's Compensation Board - certificate of insurance coverage under the NYS disability benefits law, listing Ohel Olozer d/b/a Yeshiva Beer Hatorah as the insured

10) New York State Insurance Fund, certificate of workers' compensation insurance, listing policyholder as Ohel Elozer T/A Yeshiva Beer Hatorah for the period January 1, 2011 to January 1, 2012
11) December 28, 2011 emails between Kylie Smith School Food Program Specialist I of the New York State Education Department's Child Nutrition Program to Neil Gilberg of the New York State Worker's Compensation Board stating that Ach Tov'Chesed Yeshiva Tiferes Israel claims no compensated individuals except teachers
12) New York State Education Department – Child Nutrition Program Administration - Summer Food Service Program Administrative Review Form dated January 10, 2012, pertaining to sponsor: Ach Tov V'Chesed
13) May 4, 2012 Notice of Action letter from Kylie Smith, School Food Program Specialist I of the New York State Education Department's Child Nutrition Program to Joel Roth of Ach Tov V'Chesed
14) May 14, 2012 letter from Joel Roth of Ach Tov V'Chesed to Kylie Smith, School Food Program Specialist I of the New York State Education Department's Child Nutrition Program responding to the May 4, 2012 letter
15) September 10, 2010 letter from Kylie Smith, School Food Program Specialist I of the New York State Education Department's Child Nutrition Program to Elozer Porges of Ohel Elozer stating that it is terminated from the summer food service program
16) Copy of 7 CFR Part 225

<u>For the Hearing Officer</u>

1) June 11, 2012 letter to Joel Roth of Ach Tov V'Chesed from Hearing Officer Maureen Lavare finding the request for appeal timely and scheduling the hearing for June 27, 2012
2) June 28, 2012 letter from Frances O'Donnell, Coordinator of the New York State Education Department's Child Nutrition Program to Hearing Officer Maureen Lavare explaining when, and to what address, a copy of their documents were sent to appellant

PROCEDURAL BACKGROUND

On June 7, 2012 I received a request for appeal and hearing from Joel Roth on behalf of Ach Tov V'Chesed (hereinafter "appellant") (appellant #1). Appellant appeals the decision of the New York State Education Department's Child Nutrition Program (hereinafter "respondent"), to reclaim all funds ($143,052.00) paid to appellant during the operation of its 2011 Summer Food Service Program (hereinafter "SFSP") (appellant # 5, #8, respondent #13). By letter dated June 11, 2012 I found that the appeal request was made timely and scheduled the hearing for June 27, 2012. Additionally, I required the parties to submit any written documentation that it wanted considered as part of the appeal to my office by June 22, 2012. Both sides were directed to copy each other on any submitted documentation. An informal hearing was held on this matter on June 27, 2012 at the offices of the New York State Education Department (NYSED) located at 89 Washington Avenue, Albany, New York.

At hearing, appellant immediately asserted that it had not received any documentation from respondent and it therefore requested that respondent be prohibited from using any of the documents it submitted on June 22, 2012 to my office. Further, appellant requested that respondent be directed to immediately return to its office and provide documentation that it copied appellant on its June 22, 2012 submission. Respondent's June 22, 2012 letter lists appellant's representative, Joel Roth, as a person copied. Respondent stated that it sent a copy of its June 22, 2012 letter and attached documents to appellant via over-night mail service. I declined to direct appellant to immediately produce evidence that the documents were mailed to appellant, instead, I offered to adjourn the hearing so that respondent would have an opportunity to review the documents and letter submitted by respondent. Appellant declined to accept this offer and, upon a copy of respondent's documents being provided to appellant, the hearing proceeded[1].

On June 28, 2012, I received a letter from respondent stating that it mailed the documents to appellant's address listed in its 2011 SFSP Sponsor Application/Agreement, which is different than the address appellant used in its June 1, 2012 hearing request letter. The address used in appellant's 2011 SFSP Sponsor Application/Agreement is the same address listed in the checks and W2s appellant provided on July 3, 2012 (appellant #s 15 and 16). It therefore appears that the address used by respondent to send its documents to appellant is valid, however, respondent left the apartment number off of the address and the overnight mail service was unable to deliver the package. Appellant has offered no explanation for having two addresses nor has appellant requested that one particular address be used by respondent and/or my office. Because appellant was given an opportunity to adjourn the hearing to a later date providing it with time to review the documents submitted by respondent, I find that appellant was not prejudiced by receiving the documents the day of the hearing.

On Monday, July 2, 2012 I receive a phone message from Dr. Bernardo who represented appellant at hearing, requesting that he be allowed to submit additional documentation in response to the documents submitted by respondent. A conference call with all parties was held later that day and respondent stated that it did not object to the submission of additional documents. Thus, by phone conference held on July 2, 2012, I allowed appellant to submit time sheets, payroll documentation and W2's of it employees via overnight mail service to my office and respondent's office. These documents were hand-delivered to my office on July 3, 2012.

FACTUAL BACKGROUND

The primary purpose of the SFSP is to provide food service to children from needy areas during periods when area schools are closed for vacation (7 CFR §225.1). For the summer of 2011 appellant applied to be a SFSP "sponsor" meaning that it would provide summer food service similar to that made available to children during the school year under the National School Lunch and School Breakfast programs (7 CFR §225.2). 2011 was respondent's first year

[1] Appellant did not communicate with me, previous to the hearing, that it did not receive any documentation from respondent.

as a SFSP sponsor. In the form entitled "New Site Information Sheet-Camp Sites" appellant stated that it was a "self preparation sponsor" meaning, in accordance with 7 CFR §225.2, that it prepares the meals that will be served at its site and does not contract with a food service management company (respondent #3). Specifically, appellant stated that it would be preparing meals at the Ohel Eluzer Be'er Hatorah camp, located in Monticello, New York and that the meals would be served there, as well as its other camp, Be'er Hatorah located in Loch Sheldrake, New York (respondent # 3). Notably, Ohel Elozer[2], the previous SFSP sponsor at these two camps, was terminated from the SFSP by letter dated September 10, 2010 (respondent #15).

On August 2, 2011, respondent conducted a site review at the Ohel Eluzer Be'er Hatorah camp and found that meals were served outside of the approved meal service times (7 CFR §225.16 [c][2]), that food safety procedures were not being strictly followed (7 CFR §225.16 [a]), and that some meals did not meet meal pattern requirements (7 CFR § 225.16[d]) (appellant #3). At hearing, respondent stated that it had a difficult time finding anyone in charge of the SFSP when it conducted its site review. Neither the listed SFSP administrator nor the director, were available when it conducted the site review. Upon completion of its site review, respondent left appellant with a program site review form that stated "corrective action must be applied to all sites operated by the sponsor" (appellant #3). Appellant never submitted any evidence of corrective action to respondent after receiving the form from respondent.

On January 10, 2012 respondent conducted an administrative review of appellant's 2011 SFSP and determined that appellant did not demonstrate administrative control or fiscal accountability of the program in accordance with 7 CFR §225.14(c) (respondent #1, #12, appellant #4). Appellant asserts that it made this determination because appellant's SFSP director, Mr. Abraham [Avrom]Strasser, "was unable to demonstrate that the sponsor had the capacity to implement systems, take corrective action and train staff to ensure program requirements are met" (respondent #1, #12, appellant #4). At hearing, Kylie Smith, School Food Program Specialist I, who conducted the administrative review with Raemi Swain, stated that Mr. Strasser knew little, if anything, about appellant's SFSP even though he is listed as the SFSP director for appellant (appellant #13, respondent # 4). Further, Joel Roth, appellant's SFSP administrator and the person who signed the 2011 SFSP Sponsor Application/Agreement was unavailable to assist or answer questions during the administrative review. Additionally, at hearing, respondent stated that there was no evidence that appellant incurred the costs of preparing the meals or that it was overseeing its SFSP staff.

After the administrative review, respondent sought additional information regarding appellant's administrative control and fiscal accountability of its sponsorship of the SFSP at the Ohel Eluzer Be'er Hatorah and Be'er Hatorah camp sites. Respondent received documentation from the New York State Department of Health's Monticello office that both camps are operated by the same organization – Ohel Eluzer Be'er Hatorah and that it carried workers' compensation insurance and New York State disability insurance coverage for the employees at both camp sites (respondent #7, #8, #9 and #10). Further, emails with the New York State Worker's Compensation Board revealed that appellant "claims no compensated individuals except for teachers" (respondent #11). Based on this additional information, respondent concluded that appellant

[2] The documents use numerous different spellings of the word "Elozer" including Eliezer, Eluzer and Olozer.

> "did not operate the SFSP at Ohel Elozer-Be'Er Hatorah and Be'Er Hatorah sites during the 2011 summer as agreed in their application/agreement for the 2011 SFSP. The organization named Ohel Elozer, that we terminated from the SFSP in 2010 provided the food service, and they are not an approved sponsor" (respondent #1).

By letter dated May 4, 2012, respondent notified appellant that it determined that all funds paid for the 2011 SFSP were not properly payable and that it would reclaim $143,052 (appellant # 5, respondent #13). Appellant responded by letter dated May 14, 2012 stating that the applicable SFSP federal regulations do not state that "the camp site director must simultaneously be the food service sponsor" (appellant #6, respondent #14). By letter dated May 23, 2012, respondent notified appellant that it would begin processing the reclaim of $143,052 (appellant #8). The letter also notified appellant that it had 10 days to appeal and provided a copy of respondent's appeal procedures in accordance with the requirements of 7 CFR §225.13(b)(1) and (2) (appellant #8). This appeal ensued.

ARGUMENTS MADE AT THE HEARING

During the appeal process and at hearing, respondent argued that its decision to reclaim all funds paid to appellant for the 2011 SFSP is reasonable because it determined that appellant does not retain financial and administrative responsibility for the program in accordance with the requirements of 7 CFR §225.14(c) (respondent #1). Further, respondent argues that appellant did not operate the SFSP at the Ohel-Elozer-Be'Er Hatorah and Be'Er Hatorah sites during the 2011 but that Ohel Elozer did (respondent #1).

In its June 1, 2012 letter, appellant asserts that a summer camp may have an independent food service component (appellant #1). At hearing, appellant argued that because there was a SFSP in operation at the camp during the August 2, 2011 site visit, there was "control" of the SFSP as that term is defined in the dictionary. Appellant also argued that it was incumbent upon respondent to provide appellant with a list of what documentation would demonstrate that appellant had financial and administrative control over its 2011 SFSP.

FINDINGS

The regulations for the Summer Food Service Program are found at 7 CFR Part 225. 7 CFR §225.14 (c)(1) states that "[N]o applicant sponsor shall be eligible to participate in the Program unless it demonstrates financial and administrative capacity for Program operations and accepts final financial and administrative responsibility for total Program operations at all sites at which it proposes to conduct a food service." Additionally, in its New York State Education Department, Summer Food Service Program, 2011 Sponsor Application/Agreement appellant

agreed that it would "maintain financial and administrative responsibility for its program" (respondent document #2, page 6, statement 20).

In its New York State Education Department, Summer Food Service Program, New Site Information Sheet-Camp Sites form, appellant claimed that it was "running all activities and provisions on site. Sponsor is renting site for summer season" (respondent #3). Indeed, in further support of its statement that it was "running all activities at the camp" appellant also submitted to respondent agendas for board meetings for February, March and May 2011. These agendas list for discussion numerous camp preparation activities, other than food service, such as "removing the carpet from bunks", "electricity and plumbing repairs", swimming pool repairs", "summer curriculum", "activities, activity supply's, prizes", "hiring medical personnel" and "hiring counselors and teachers" among others (respondent #5). Clearly this information was submitted to respondent to provide evidence that appellant intended to fully operate the camp programs for the camps Ohel Eluzer Be'er Hatorah and Be'er Hatorah and not just the food service component of these camps.

Appellant also provided respondents with a staffing chart for the 2011 SFSP (respondent #4). According to this chart Yoel Roth is the administrator of the program and Avrom Strasser is the SFSP director. During a site visit on August 2, 2011, however, appellant found that neither of theses individuals was available at the camp. At hearing, respondent stated that it had a difficult time finding anyone that could assist with the site review on August 2, 2011. Indeed, I note that the program site review form states that a "Mrs. Fred" or "Fried" was interviewed at the site, however, no such person is listed in appellant's staffing chart (respondent #4, appellant # 3 and 13).

Additionally, appellant submitted a New York State Education Department, Summer Food Service Program, Non Profit Organization Financial Administrative Form to respondent (respondent #6). This document also provides attachments that indicate that appellant is operating the entire camp program and not just the food service component of the program. For example, section D2 gives a chain of command that begins with the board of directors and ends with water safety instructor, kitchen help and life guard (respondent #6). Also included in this chain of command are numerous other positions that do not relate to food service such as "security guard", "aquatics director" and "assistant health director" (respondent #6).

During the August 2, 2011 site review several SFSP violations were documented by respondent (respondent #3). Appellant was notified of these violations in the program site review form which states "corrective action must be applied to all sites operated by the sponsor" (respondent #3). On appeal, there was no dispute that appellant has failed to undertake corrective action of these violations.

On January 10, 2012 respondent conducted an administrative review of appellant's 2011 SFSP(appellant #4 , respondent #12). Appellant's representative was Avrom Strasser, the listed SFSP director (appellant #4, #13 and respondent #4, #12). At hearing, respondent stated that Mr. Strasser was not very helpful at the administrative review and that Mr. Strasser stated that it was Yoel Roth who knew about the SFSP. Although the administrative review began on January 10, 2012 and ended on January 12, 2012, Mr. Roth was unavailable. During this review respondent

documented that appellant still had $19,121.43 of SFSP bills left to pay (appellant #4 , respondent #12). Respondent also documented that appellant was not "able to implement systems, take corrective action and train staff to meet the program [requirements]" (appellant #4 , respondent #12). According to respondent, appellant violated 7 CFR §225.15(d)(1) which requires sponsors to ensure that their administrative staff is thoroughly knowledgeable and are provided with sufficient information to carry out Program responsibilities (appellant #4 , respondent #12). Respondent also documented that appellant had not established procurement procedures, as required by 7 CFR §225.17(a) and (c) (appellant #4, respondent #12). Further, respondent documented that appellant did not have a system in place to safeguard its funds and that there was no system to ensure the timely payment of bills in violation of 7 CFR §225.25(c), as further clarified in the United States Department of Agriculture's, Food and Nutrition Services' FNS instruction 796-4, Rev.4 (appellant #4 , respondent #12). Finally, at hearing respondent stated that there was no evidence that appellant incurred the costs of preparing the meals.

After the administrative review, respondent investigated appellant's role in the Ohel Eluzer Be'er Hatorah and Be'er Hatorah summer camps. On January 19, 2012, the Monticello district office of the New York State Department of Health provided respondent with camp permits indicating that the camps were operated by Beer Hatorah/Ohel Elizer and not appellant, as appellant had stated in it's New Site Information Sheet-Camp Sites Form and it's Non Profit Organization Financial Administrative Form (respondent #3, #6, #7 and #8). Additional information provided by the Monticello district office of the New York State Department of Health documented that Beer Hatorah/Ohel Elizer maintained the certificate of worker's compensation insurance for the camps' employees (respondent #9 and #10). Also, emails with the New York State Worker's Compensation Board confirmed that appellant "claims no compensated individuals except teachers" (respondent document #11).

Based on the information described above, respondent determined that appellant did not retain financial and administrative responsibility of the 2011 SFSP and that funds paid to it for the 2011 SFSP were not properly payable (respondent # 13, appellant #5). I find respondent's determination to be reasonable and rational. Although appellant submitted evidence that it has paid the eleven employees listed in its staffing chart (appellant documents #14, #15 and #16), this documentation alone cannot overcome the evidence submitted by respondent that appellant did not retain financial and administrative responsibility of its 2011 SFSP. Additionally, I note that the paychecks submitted by respondent as evidence that it is an employer, are issued from Yeshiva Tiferes Torah, with the same address as appellant. Appellant does not provide an explanation as to who Yeshiva Tiferes Torah is or what its relationship with this entity is[3]. Nor is there any evidence to suggest that appellant's eleven employees actually worked as foodservice providers for the camps. Further, appellant admitted at hearing that it has not paid worker's compensation insurance for its employees. Even if appellant legitimately operated the food services at the camps, failure to provide worker's compensation insurance coverage for employees, a New York State requirement, clearly demonstrates a lack of financial and administrative responsibility. This information, along with its outstanding SFSP bills as of January 2012; inability to implement corrective action for violations found at the camps; failure

[3] I note, however, that the name is similar to that provided in the email between respondent and the New York State Worker's Compensation Board (respondent #11).

to establish procurement procedures; failure to implement a system to safeguard its funds; failure to demonstrate that it has adequately trained staff to implement the program and failure to implement a system to ensure the timely payment of bills demonstrates that appellant did not retain financial and administrative responsibility of its 2011 SFSP. While appellant submitted evidence that it paid eleven employees, it did not submit any evidence that it implemented corrective action, properly trained its employees, implemented a fiscal system to safeguard its SFSP funds or address any of the other multiple findings made by respondent.

Further, appellant's argument that it was respondent's duty to provide appellant with a list of documents that would demonstrate that it retained financial and administrative responsibility is without merit. The days spent at appellant's Brooklyn facility in January 2012 conducting an administrative review with the listed SFSP director who was unable to provide much information on the program, evidenced appellant's inability to retain the required responsibility of the program. Since its first site review on August 2, 2011 appellant had ample opportunity to provide any and all documentation it deemed helpful to respondent. However, even after receiving violations at both the August 2, 2011 review and the January 10, 2012 administrative review, the documents suggest that appellant did not reach out to respondent until after it received its first notice of action letter dated May 4, 2012 (appellant #5 , respondent #13). This lack of response from appellant also demonstrates its inability to retain financial and administrative responsibility of its 2011 SFSP.

In its June 1, 2012 letter appealing respondent's determination and requesting a hearing, appellant argued that the camp operator does not have to be the same entity as the SFSP sponsor at the camp. At hearing, respondent agreed with appellant but stated that in this case, appellant has always held itself out as the camp operator for the food service and all other camp operations (see discussion above and respondent #3, #4, #5 and #6). In light of appellant's multiple documents indicating that it intended to operate all aspects of both camps, I find its argument that the federal regulations allow camps to maintain a separate food service operator, to be disingenuous. Appellant offers no explanation as to why it did not contact respondent, if and when, it determined that it would only run the food service at the camps and not the entire operation of both camps. While it is within the discretion of respondent to approve a separate entity to be the SFSP sponsor for a camp, the applicant sponsor must be truthful in its application and other submissions to respondent as to what its role is. In this matter, where appellant held itself out as the operator of the entire camp, but now claims to have only operated the food service component, appellant was not truthful about its role in the Ohel Eluzer Be'er Hatorah and Be'er Hatorah summer camps.

I note that respondent also claims that appellant did not operate the 2011 SFSP at Ohel Eluzer Be'er Hatorah and Be'er Hatorah. While this allegation may be true, I cannot reach the same determination based on the documentation provided in the case before me. It is evident that appellant paid eleven employees, who it held out as its 2011 SFSP staff, albeit without the legally required worker's compensation coverage. One site visit by respondent, with little documentation as to who was working the food services portion of the program at both camps, cannot lead me to the conclusion that appellant had no role in the operation of the 2011 SFSP at camp Ohel Eluzer Be'er Hatorah and Camp Be'er Hatorah. However, as explained above, respondent's determination that appellant did not demonstrate financial and administrative

capability to operate the 2011 SFSP is well documented and therefore its decision to reclaim all of appellant's funds for the 2011 SFSP is reasonable.

CONCLUSION

Based on the above, I find that respondent acted in accordance with the Federal Child Nutrition Program's regulations, specifically, those that pertain to the Summer Food Service Program found at 7 CFR Part 225, when it reclaimed all funds ($143,052.00) paid to appellant during the operation of its 2011 Summer Food Service Program.