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APPELLANT: Congregation Machna Shalva Zichron Zvi Dovid
1569-45th Street
Brooklyn, NY 11209

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

STATE: New York; Sullivan County

In the Matter of the Appeal by

CONGREGATION MACHNA SHALVA ZICHRON ZVI DOVID
SPONSOR LEA CODE: 8000000059150

from a decision by the New York State Education Department denying their application to participate in the 2011 Federal Summer Food Service Program

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 denied appellant's application to participate in the 2011 summer food service program.

This Decision is rendered this 9th day of November 2011.

Maureen Lavare
Hearing Officer

LIST OF REPRESENTATIVES

For the Appellant:
Baruch S. Gottesman, Esq.
185-12 Union Turnpike
Fresh Meadows, NY 11366-1732

For the Respondent:
Frances O'Donnell
Coordinator
Child Nutrition Program Administration
One Commerce Plaza
99 Washington Avenue, Room 1623
Albany, NY 12234

Paula Tyner-Doyle
School Food Programs Specialist III
Child Nutrition Program Administration
One Commerce Plaza
99 Washington Avenue, Room 1623
Albany, NY 12234

DOCUMENTS SUBMITTED AND REVIEWED

FOR THE APPELLANT:

1. August 17, 2011 Memorandum in Support of Appeal submitted by Baruch S. Gottesman, Esq., including as Exhibits:
   a. July 7, 2011 letter from Kimberly B. Vumbaco, School Food Program Specialist II of the New York State Education Department (NYSED), Child Nutrition Program Administration (CNP) denying Congregation Machna Shalva Zichron Zvi Dovid's Summer Food Service Program (SFSP) 2011 application
   b. July 25, 2011 letter from Hearing Officer Maureen Lavare acknowledging timely receipt of a request for appeal by Congregation Machna Shalva Zichron Zvi Dovid and scheduling the hearing for August 11, 2011
   c. August 3, 2011 letter from Hearing Officer Maureen Lavare rescheduling hearing for September 1, 2011
   d. United States Department of Agriculture (USDA) memo dated November 7, 2005 regarding questions and answers on the serious deficiency process in the Child and Adult Care Food Program (CACFP)
   e. August 17, 2011 affirmation in support of appeal by Mordechai Fasten

f. August 16, 2011 affirmation in support of appeal by Jonathon Mueller
g. August 15, 2011 letter from Zomick's Food Products Ltd.
h. August 15, 2011 notarized letter from The Dependable Food Corp
i. August 15, 2011 notarized letter from the Board of Directors of Congregation Machna Shalva Zichron Zvi Dovid
j. Rule 958-810-25 Recognition of Not for Profits
k. June 16 and 17, 2011 emails between Baugh Marbie and Benzoin Wachsman regarding A-133 requirements for related organizations
l. Memorandum to Congregation Machna Shalva Zichron Zvi Dovid from Sushil Sadh, CPA
m. August17, 2011 affirmation in support of appeal by Professor Aaron Twerski
n. Wikipedia Article of Bobov Chassidus Hasidic Dynasty
o. Professor Aaron Twerski's professional biography
p. Greenfield v. Bornstein, et al. consent to arbitration
q. Interim award by arbitrators translated from the Hebrew language
r. Greenfield v. Bornstein, et al., Rule 75 Order confirming interim award

2. October 10, 2011 letter from Baruch S. Gottesman to Hearing Officer Maureen Lavare and Frances O'Donnell, Coordinator of NYSED's CNP, submitting additional information for consideration in accordance with Hearing Officer Maureen Lavare's September 27, 2011 letter and including as attachments:
   a. April 18, 2005 Certificate of Incorporation of Congregation Machna Shalva Zichron Zvi Dovid
   b. May 16, 2011 amended Certificate of Incorporation of Congregation Machna Shalva Zichron Zvi Dovid
   c. Relevant portions of 7 CFR Part 225
   d. Relevant portions of 7 CFR Part 226
   e. Electronic Federal Tax payment System (EFTPS) registration, as proof of address
   f. Philadelphia Insurance Company invoice, as proof of address
   g. AmTrust North America Financial Company invoice as proof of address
   h. Certificates of title and New York State identification cards for corporate vehicles, as proof of address
   i. Invoice from Glenn L. Smith. P.E., as proof of address

3. October 17, 2011 letter from Baruch S. Gottesman to Hearing Officer Maureen Lavare and Frances O'Donnell, Coordinator of NYSED's CNP, addressing the additional information and documentation submitted by NYSED's CNP by letter dated October 11, 2011 and including as attachments:
   a. New York State Workers' Compensation Board Certificate of Insurance Coverage under the NYS Disability Benefits Law effective 6/17/11 for Congregation Machna Shalva Zichron Zvi Dovid
   b. New York State Workers' Compensation Board Certificate of NYS Workers' Compensation Insurance Coverage effective 6/17/11
   c. New York State Workers' Compensation Board, Employer Coverage Search
   d. New York State Workers' Compensation Board web information on Workers' Compensation Coverage for nonprofit organizations

e. Relevant portions of 7 CFR Part 225
f. Email from Alaska on the provision of year-round services
g. Email from Arizona on the provision of year-round services
h. Email from California on the provision of year-round services
i. Email from Maine on the provision of year-round services
j. Email from Tennessee on the provision of year-round services
k. Email from Virginia on the provision of year-round services
l. NYSED SFSP 2009 Sponsor Agreement (blank)
m. June 1, 2011 renewal application for a permit to operate from the New York State Department of Health
n. New York State Department of Health permit to operate a children's camp issued to Congregation Machna Shalva Zichron Zvi Dovid effective June 30, 2011
o. Employer profile of Congregation Machna Shalva Zichron Zvi Dovid from the Department of Labor web site

FOR THE RESPONDENT:

1. Undated letter to Hearing Officer Maureen Lavare received on August 8, 2011, from Paula Tyner-Doyle, School Food Program Specialist III of NYSED's CNP explaining NYSED's position, including as Exhibits:
   a. July 7, 2011 letter from Kimberly B. Vumbaco, School Food Program Specialist II of NYSED's CNP denying Congregation Machna Shalva Zichron Zvi Dovid's SFSP2011 application
   b. December 23, 2010 decision rendered by Hearing Officer Maureen Lavare in the matter of the appeal by Congregation Machna Shalva Zichron Zvi Dovid
   c. Portion of the USDA National Disqualified List
   d. Emails between Paula Tyner-Doyle, School Food Program Specialist III of NYSED's CNP and John Magnarelli of the USDA
   e. Copies of relevant portions of 7 CFR Part 225

2. October 11, 2011 letter to Hearing Officer Maureen Lavare from Frances O'Donnell, Coordinator of NYSED's CNP submitting additional information for consideration in accordance with Hearing Officer Maureen Lavare's September 27, 2011 letter and including as attachments:
   a. March 20, 2010 renewal application for a permit to operate submitted to the New York State Department of Health by Congregation Machna Shalva Zichron Zvi Dovid, including certificate of New York State Workers' Compensation Insurance Coverage and Certificate of Insurance Coverage under the New York State Disability Benefits Law
   b. Relevant portions of 7 CFR Part 225
   c. Emails between Paula Tyner-Doyle, School Food Program Specialist III of NYSED's CNP to Walter Peretti of the New York State Workers' Compensation Board regarding requirements
   d. Workers' Compensation Board Employer Coverage Search of Bobover Yeshiva Bnei Zion

e. Workers' Compensation Board Employer Coverage search of Congregation Machne Shalva Zichron Zvi Dovid
f. Information on disability benefits from the New York State Workers' Compensation Board web site
g. Information from the New York State Department of Labor regarding required insurance
h. Information from the New York State Workers' Compensation Board for Employers operating in New York State

3. October 18, 2011 letter to Hearing Officer Maureen Lavare from Frances O' Donnell, Coordinator of NYSED's CNP addressing the additional information and documentation submitted by Baruch S. Gottesman by letter dated October 10, 2011

FOR THE HEARING OFFICER

1. December 23, 2010 decision in the matter of the appeal by Congregation Machna Shalva Zichron Zvi Dovid, including all documents submitted and reviewed, as listed, therein

2. September 27, 2011 letter to Mordeichai Fasten of Congregation Machna Shalva Zichron Zvi Dovid, Frances O' Donnell, Coordinator of NYSED's CNP and Baruch S. Gottesman, attorney for Congregation Machna Shalva Zichron Zvi Dovid from Hearing Officer Maureen Lavare allowing both parties to submit additional documentation by October 11, 2011 and a response to each party's submission by October 18, 2011

PROCEDURAL BACKGROUND

By letter dated July 19, 2011 appellant appealed respondent's decision to deny their application for the 2011 SFSP and requested a hearing. Appellant was notified of respondent's decision by letter dated July 7, 2011 (appellant's document #1[a] and respondent's document #1[a]). By letter dated July 25, 2011, I acknowledged timely receipt of the request for appeal and scheduled a hearing for Thursday, August 11, 2011 (appellant's document #1[b]). The hearing was rescheduled several times at the request of appellant and was eventually held on Monday, September 26, 2011 at NYSED's offices located at 89 Washington Avenue, Albany, New York. Both parties submitted written documentation it wanted considered as part of the appeal to my office, with a copy to the opposing party, by August 18, 2011.

At hearing, both parties discussed documentation that was not submitted previous to the hearing. Therefore, by letter dated September 27, 2011, I allowed both parties to submit certain additional documentation to my office and each other by October 11, 2011. Additionally, each party was given an opportunity to respond to the other's submission by October 18, 2011.

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). Appellant was a SFSP "sponsor" from 2005 to 2010, meaning that it was a public or private, nonprofit, residential summer camp which provided 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). Appellant operates a camp located at 653 Heiden Road, South Fallsburg, New York, Sullivan County. In 2010, appellant's application to be a SFSP sponsor was denied by respondent on the basis of its identification with Bobover Yeshiva Bnei Zoin, an organization that was disqualified from participating in the Child Adult Care Food Program (CACFP) effective June 30, 2010. A hearing was held on the 2010 SFSP denial on December 14, 2010 and a decision was rendered on December 23, 2010, upholding respondent's determination (respondent's document #1 [b] and hearing officer's document #1). Appellant is currently appealing that decision in a federal Court case against respondent and the United States Department of Agriculture (USDA). Both parties incorporate by reference, evidence and arguments made in the 2010 hearing.

SFSP 2011 DENIAL

Respondent states that on June 9, 2011, it received a 2011 SFSP application/agreement from appellant (respondent document #1). Relying primarily on the evidence obtained and submitted in its SFSP 2010 denial, and after checking that Bobover Yeshiva Bnei Zoin ("Bobover") remained on the national disqualified list for being seriously deficient, respondent denied appellant's 2011 application by letter dated July 7, 2011 (appellant's document #1[a] and respondent's document #1[a]). Respondent's denial is based on 7 CFR §225.11(c), which states, in part:

> Denial of applications and termination of sponsors. Except as specified below, the State agency shall not enter into an agreement with any applicant sponsor identifiable through its corporate organization, officers, employees or otherwise, as an institution which participated in any Federal child nutrition program and was seriously deficient in its operation of any such program.

Respondent's July 7, 2011 letter states that appellant is identifiable with Bobover because they share the same business address, appellant utilizes a camp owned by Bobover, and the two entities have common employees, "not limited to Mr. Jonathan Mueller and Mr. Mordechai Fasten" (appellant's document #1[a] and respondent's document #1[a]).

Relying on a USDA question and answer document for the CACFP, appellant argues that the overlap in employees is inconsequential since, it asserts, it must be ascertained whether the overlapping employees "bore responsibility for the disqualified entity's serious deficiency," and respondent did not submit that Fasten and Mueller bore such responsibility (appellant's document #1). Additionally, appellant asserts that the use of the same address by both entities was merely for administrative convenience (appellant's document #1). Appellant also states that use of the Bobover campground is a technicality due to succession litigation that Bobover is a party to, and that, as soon

as practicable, the camp grounds will be transferred to appellant (appellant's document #1). As evidence that it is a separate organization from Bobover, appellant submits a determination by the USDA that it may submit a separate A-133 audit than Bobover for fiscal year 2010, an analysis by a certified public accountant, an overview of the history and practice of Bobov institutions and several letters from various businesses stating that appellant and Bobover are separate entities (appellant's document #1 [a through r]).

DOCUMENTATION SUBMITTED AFTER HEARING

At hearing, appellant explained that it had begun taking steps to separate itself from Bobover. As an example, appellant stated that on May 16, 2011, it amended its certificate of incorporation to reflect that Jonathan Mueller is no longer on the board of directors and changed appellant's house of worship address so that it is no longer the same as Bobover's (appellant's document #2[b]). As described above in the procedural background section, I allowed appellant to submit this documentation after the hearing. Appellant also submitted numerous bills and invoices documenting that it is using the new address of 1569- 45th Street in Brookyln, rather than the address it previously shared with Bobover. Also after the hearing, and in response to additional submissions made by respondent, appellant submitted evidence that it had obtained workers' compensation insurance coverage and disability benefits insurance coverage effective June 17, 2011, and obtained a permit from the New York State Department of Health effective June 30, 2011 to operate it's children's camp at 653 Heiden Road, South Fallsburg, New York (appellant's documents #3[a][b] and [n]).

During the hearing, respondent stated that it had obtained information that the New York State Department of Labor had no documentation that appellant was an employer. As described above in the procedural background section, I allowed respondent to submit this documentation after the hearing. Respondent submitted appellant's 2010 application for a permit to operate a children's camp which states that the legal operator of the camp, as well as the owner and permit applicant was Bobover. The documentation also included evidence that Bobover was the holder of the worker's compensation insurance and disability benefits coverage for the camp (respondent's document #2[a]).

ARGUMENTS

Ownership

Respondent asserts that appellant is identifiable with Bobover because Bobover owns the property at which appellant operates its summer camp. There is no dispute that Bobover owns the camp property. Appellant explained in its submitted documentation and at hearing, that the camp was created as a requirement of a 2005 interim arbitration decision which was a result of litigation arising out of a succession dispute and the disposition of the Bobover Hasidic community entities (see appellant's documents #1[n through r]). Appellant asserts that as soon as practicable, the camp grounds will be transferred from Bobover to appellant. At hearing, appellant explained that the children who attend its summer camp are the children who attend the Bobover congregation and Bobover's school during the regular school year. Therefore, although appellant may intend to own

the camp property after the Bobover litigation is resolved, it is evident that it is identified with Bobover since Bobover owns the camp property and the nature of the camp is to provide summer services to Bobover's students and congregation.

Address

Respondent also points to the shared business address of appellant and Bobover as evidence that the two entities are identifiable with each other. At hearing, appellant explained that on May 16, 2011 it amended its certificate of incorporation to change its house of worship address to be different than Bobover's (appellant's document #2[b]). This information was not shared with respondent until appellant submitted documentation for this appeal. Also, at hearing, respondent stated that the SFSP application submitted by appellant continued to use the old, Bobover address. While appellant stated that the electronic filing system did not allow them to place a new address on the form, respondent insists that a phone call to respondent's office would have enabled a change in the form to allow the new address. After the hearing, appellant submitted multiple documents evidencing that it is using its new business address of 1569-45th Street, Brooklyn (appellant's document #2[e through i]). Thus, when appellant submitted its 2011 SFSP application, respondent was not yet made aware that appellant had changed its address, however, appellant is now using a new address that is different than Bobover's address.

Common Employees and Principals

In its July 7, 2011 letter, respondent also asserts that appellant is identifiable with Bobover because they share "common employees, including but not limited to Mr. Jonathan Mueller and Mr. Mordeichai Fasten" (appellant's document #1[a] and respondent's document #1[a]). Documentation submitted by appellant demonstrates that Mr. Mordeichai Fasten maintains a fundraising role with Bobover (appellant's documents #1[e], [g] and [h]) and that Mr. Jonathan Mueller is the English department principal at Bobover as well as appellant's camp director (appellant's document #1[f]).

Appellant relies on a USDA question and answer document for the CACFP, arguing that the overlap in employees is inconsequential since, it asserts, it must be ascertained whether the overlapping employees "bore responsibility for the disqualified entity's serious deficiency,'' and respondent did not submit that Fasten and Mueller bore such responsibility (appellant's document #1). I disagree that the advice proffered in the CACFP question and answer document is to be interpreted to limit 7 CFR §225.11(c) which states, in part, that the "the State agency ***shall not*** enter into an agreement with any applicant sponsor identifiable through its corporate organization, officers, employees or otherwise, as an institution which participated in any Federal child nutrition program and was seriously deficient in its operation of any such program" (emphasis added). The guidance document relied on by appellant pertains to institutions and family day care homes utilizing the CACFP, not the SFSP. Therefore, unlike the CACFP, respondent is not required to reach down Bobover's organization hierarchy and establish which principals and individuals were responsible for Bobover's seriously deficient status. Rather, respondent is implementing its SFSP in accordance with the requirements of the federal regulations which broadly disallow approval of any applicant who is identifiable with any institution found to be seriously deficient in any federal child nutrition program (7 CFR §225.11[c]). Accordingly, respondent's determination that appellant and Bobover are identifiable through overlapping employees was reasonable.

Workers' Compensation and Disability Insurance

In its post-hearing submission of additional documentation, respondent provided evidence that appellant did not maintain either New York State workers' compensation insurance coverage or the required certificate of insurance under New York State's disability insurance law (respondent's documents #2 [a through h]). Indeed, in accordance with appellant's 2010 application made to the New York State Department of Health to operate the camp, it was Bobover who maintained these requirements for appellant's employees (respondent's document #2[a]). Alternatively, however, appellant submitted documentation that it obtained a certificate of insurance coverage under the New York State disability benefits law effective June 17, 2011 and a certificate of New York State worker's compensation insurance coverage effective June 17, 2011 (appellant's document #3[a] and [b]). It also received the New York State Department of Health permit to operate the camp in its own name, effective June 30, 2011 (appellant's document #3[n]). Because respondent had no knowledge that appellant had obtained independent worker's compensation insurance coverage or the required certificate of insurance under New York State's disability insurance law it was not unreasonable for it to determine that, based upon its knowledge at the time appellant's 2011 SFSP application was pending, that appellant continued to remain identified with Bobover. However, it appears that, since submitting its 2011 SFSP application, appellant has obtained the necessary worker's compensation and disability insurance law coverage so that it may be recognized as the employer of the individuals working at its camp rather than Bobover, which was the actual employer in the past (appellant's document #3[a] and [b]).

Year-Round Services

Finally, respondent also asserts that appellant's 2011 SFSP application is not approvable because it did not demonstrate that it "provides an ongoing year-round service to the community which it proposes to serve under the Program [SFSP]." This is a general requirement for an applicant sponsor to be eligible to participate in the SFSP (7 CFR §225.14[c][5]). State agencies, however may approve an application which does not provide year-round services if it meets certain criteria, such as being a residential camp (7 CFR §225.6[b][4]). Although appellant submits numerous emails providing insight as to how other states implement this provision (appellant's documents #3[f through k]), the decision as to whether or not year-round services are required, is within each State agency's discretion. Based on the documents submitted and the discussion at hearing, it is my understanding that respondent is requiring documentation from appellant that it provides an ongoing year-round service to the community. However, I note that respondent's July 7, 2011 letter to appellant, denying its 2011 SFSP application, does not state that one of the reasons for denial is appellant's failure to meet the requirements of §225.14(c)(5) and I therefore decline to address the matter further except to advise the parties that they should discuss this requirement before submission of the next SFSP application.

FINDINGS

Upon review, I find respondent's July 7, 2011 letter of denial to appellant, based upon a determination that appellant was identifiable with Bobover, to be reasonable. Relying on the information it had available at the time, respondent correctly determined that the two entities remained identifiable with each other through address, officers and employees, and ownership of the camp property. Appellant did not contact respondent to share any new information with respondent that, after the denial of its 2010 SFSP application, would change the outcome of its SFSP 2011 application from that of the previous year's.

However, as discussed above, I nevertheless accepted numerous submissions after the hearing relating to certain claims made at hearing regarding whether or not appellant was still identifiable with Bobover. This documentation included facts and information obtained after the submission of appellant's 2011 SFSP application to respondent. Both sides became aware of much of this information for the first time after the hearing. A review of this new and additional information does not change the outcome that appellant's 2011 SFSP application must be denied.

While, as appellant admitted at hearing, it is taking active steps to separate itself from Bobover, such as changing its mailing address, obtaining worker's compensation and disability insurance coverage for its employees, removing Jonathan Mueller from its board of directors, and ensuring that its New York State Department of Health permit lists appellant as the operator of the camp, it has not clearly articulated what its relation is to Bobover. Indeed, at the hearing, appellant's representatives asked, in seeming frustration, "what do we need to do to separate ourselves?" The question, however, is not what ministerial tasks need to be undertaken to have sufficient evidence of an independent entity, but are the two entities sufficiently unrelated that they can not be considered "identifiable" with each other?

In a SFSP appeal, appellant has the burden of demonstrating a clear legal right to the relief requested. In this case, appellant admits that its primary purpose is to provide summer camp for the students who attend Bobover and that because of their religious sect, these students will not attend another summer camp. I note that appellant's amended certificate of incorporation provides a new house of worship address so that it is no longer the same as Bobover's, yet appellant offered no explanation as what the new address is and whether appellant is now affiliated with a different house of worship, which seems unlikely in light of its statement that the Bobover students would not attend another camp.

Additionally, the amended certificate of incorporation did not change the purpose of the religious corporation to operate a summer camp, although appellant insists that the camp is its only business. Appellant submits email correspondence with the USDA stating that it was authorized to file a single audit as a separate entity from Bobover for the 2010 fiscal year (Appellant document #1[k]). However, the emails from USDA specifically advised that such information was "interim guidance for the FY 2010 A-133 audit ... because FNS could not guarantee that they could complete the research in time for the auditee(s) to meet its(their) June 30 deadline for completing the audit(s)" (Appellant document #1[k]). Therefore, this documentation hardly constitutes a finding by USDA that the entities are not identifiable with one another. In addition, I note that in its initial request for assistance from USDA, appellant concedes that it and Bobover are "two related entities." Further,

appellant's analysis from an accountant that appellant and Bobover are not required to "issue consolidated or combined financial statements" is again premised on an admission that the two entities share, at least "related party activities" which would make them "identifiable" with each other (appellant document #1[l]).

Based on the information and documentation submitted in this matter, I find that respondent's determination that appellant is identifiable with Bobover in accordance with 7 CFR §225.11 (c) is reasonable.

CONCLUSION

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 denied appellant's application to participate in the 2011 Summer Food Service Program.