

LIST OF REPRESENTATIVES:

For the Appellant

Tzvi Perlstein
Zichron Chaim Inc.
18 Dover Terrace
Monsey, NY 10952

For the Respondent

Frances O'Donnell, Coordinator
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 18, 2012 letter to Hearing Officer Maureen Lavare from Tzvi Perlstein, President Zichron Chaim Inc. appealing the New York State Education Department - Child Nutrition Program's denial of their 2012 SFSP sponsor application and explaining appellant's position
- 2) June 11, 2012 letter to Tzvi Perlstein, President Zichron Chaim Inc. from Steve Hanson, School Food Program Specialist I of the New York State Education Department's Child Nutrition Program denying their 2012 SFSP sponsor application and attaching a copy of the appeal procedures
- 3) Copy of 7 CFR §225.6
- 4) July 16, 2012 letter to Hearing Officer Maureen Lavare from Tzvi Perlstein, President Zichron Chaim Inc. attaching additional documentation as per Hearing Officer Maureen Lavare's June 27, 2012 letter extending the time to submit documents until July 16, 2012
- 5) Permit issued by the New York State Department of Health to certify that Zichron Chaim, Inc. is the operator of Ruach Chaim a children's camp located at 641 Knickerbocker Road, Livingston Manor, NY 12758 beginning June 25, 2012 and expiring on August 16, 2012
- 6) Camp Ruach Chaim master roster of campers demonstrating eligibility for SFSP

For the Respondent

- 1) July 9, 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) Copy of 7 CFR §225.14
- 3) New York State Education Department, Summer Food Service Program, Non-profit Organization Financial Administrative Form submitted by Tzvi Perlstein for Zichron Chaim Inc.
- 4) Copy of 7 CFR §225.6

For the Hearing Officer

- 1) June 27, 2012 letter to Tzvi Perlstein, President of Zichron Chaim Inc. from Hearing Officer Maureen Lavare with a copy to Frances O'Donnell, Coordinator of the New York State Education Department's Child Nutrition Program finding the request for appeal timely and requiring that all documents either party wants to have considered be submitted to the hearing officer by July 9, 2012, with a copy to the other party
- 2) July 10, 2012 letter to Tzvi Perlstein, President of Zichron Chaim Inc. from Hearing Officer Maureen Lavare with a copy to Frances O'Donnell, Coordinator of the New York State Education Department's Child Nutrition Program allowing, pursuant to appellant's request, an extension until July 16, 2012 to submit documentation

PROCEDURAL BACKGROUND

On June 22, 2012 I received a request for appeal, dated June 18, 2012, from Tzvi Perlstein, on behalf of Zichron Chaim Inc. (hereinafter "appellant") (appellant #1). Appellant appeals the decision of the New York State Education Department's Child Nutrition Program (hereinafter "respondent"), to deny its 2012 Summer Food Service Program ("SFSP") application (appellant #2). By letter dated June 27, 2012 I found that the appeal request was made timely and I therefore required both parties to submit all documents it wanted considered as part of the appeal to my office by July 9, 2012 (hearing officer #1). Both sides were directed to copy each other on any submitted documentation (hearing officer #1).

On July 9, 2012 I received a phone message from appellant asking for an extension of time to submit documents. Upon my instruction, appellant formerly requested the extension in writing. By letter dated July 10, 2012, I granted an extension to both parties to submit documents to my office by July 16, 2012 (hearing officer #2). On July 23, 2012 I received a letter from appellant, via facsimile, with additional information for consideration. Because this information was submitted long after the extended date to submit documentation and there was no evidence that a copy was sent to respondent, I did not consider this letter.

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 2012 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). It appears that 2012 was the appellant’s first year applying to be a SFSP sponsor and it was therefore required by respondent to complete a Non-profit Organization Financial Administrative Form (respondent # 3). Attached to this form is appellant’s certificate of incorporation which states that one of the purposes of the corporation is:

“[T]o help people in New York affected by poverty and hardships. This will be done by providing financial assistance, food, clothing and supplies to the needy so they can have a better chance of leading productive lives” (respondent # 3).

By letter dated June 11, 2012 respondent notified appellant that it was denying appellant’s application to participate in the 2012 SFSP because it “failed to demonstrate that it provides the required year round services to the community that it intends to serve in accordance with 7 CFR §225.14(c)(5)” (appellant #2). 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 #2). This appeal ensued.

ARGUMENTS MADE ON APPEAL

On appeal respondent argues that it has determined that appellant has failed to demonstrate financial and administrative capability, as required under 7 CFR §225.14(c)(1) (respondent #1). Specifically, respondent states that the Non-profit Organization Financial Administrative Form submitted by appellant does not demonstrate “adequate organizational policies, procedures, and controls or demonstrate that the mission and projected benefit from the SFSP participation is reasonably related to the purpose of the organization” (respondent #1). Also, respondent argues that although 7 CFR §225.6(b)(4) authorizes it to approve “otherwise eligible” residential camps that do not provide year-round services to the community, it could not authorize such discretion in this instance because appellant is not “otherwise eligible” because it has failed to demonstrate financial and administrative capability , as required under 7 CFR §225.14(c)(1).

In its June 18, 2012 letter appealing respondent's decision, appellant asserts that the federal regulations at 7 CFR §225.6(b)(4) authorize a state agency to approve a potential sponsor's SFSP application even if it does not provide year round services if the applicant is a residential camp, and/or if a significant number of needy children will not otherwise have reasonable access to the program (appellant #1). Further, in its July 16, 2012 letter, appellant states that it is a legally authorized residential camp as evidenced by its New York State Department of Health permit, which it attached to the letter (appellant #4). Appellant also provided documentation as evidence that 71% of its campers are needy children.

FINDINGS

The regulations for the Summer Food Service Program are found at 7 CFR Part 225. Section 225.14 specifically addresses the "requirements for sponsor participation." 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, 7 CFR §225.14 (c)(5) requires that an applicant sponsor must "[P]rovide an ongoing year-round service to the community which it proposes to serve under the Program except as provided for under §225.6(b)(4). Finally, 7 CFR §225.6(b)(4) states that:

"[T]he State agency shall determine the eligibility of sponsors applying for participation in the Program in accordance with the applicant sponsor eligibility criteria outlined in §225.14. However, State agencies may approve the application of an otherwise eligible applicant sponsor which does not provide year-round service to the community which it proposes to serve under the Program only if it meets one or more of the following criteria: It is a residential camp; it proposes to provide a food service for the children of migrant workers; a failure to do so would deny the Program to an area in which poor economic conditions exist; a significant number of needy children will not otherwise have reasonable access to the Program; or it proposes to serve an area affected by an unanticipated school closure during the period from October through April (or at any time of the year in an area with a continuous school calendar)."

Respondent's June 11, 2012 letter to respondent denying its sponsor application for the 2012 SFSP stated that in accordance with 7 CFR §225.14(c)(5), the denial was based on appellant's failure to provide year round services to the community that it intends to serve

(appellant #2). However, in the cover letter to its appeal documents, respondent asserts that appellant is primarily being denied because it has failed to demonstrate financial and administrative capability for Program operations in accordance with 7 CFR §225.14(c)(1) (respondent #1). Respondent is required to provide appellant with “the grounds upon which the State agency action is based” (7 CFR §225.13[b][1]). In this matter, I find that respondent failed to properly notify appellant of its grounds for denying appellant’s 2012 SFSP application. While the failure to provide year-round services may have been one of the grounds for denial, appellant rightfully questioned why an exception under 7 CFR §225.6(b)(4) would not be applied to it (appellant #1). In response, respondent asserts, what appears to be for the first time, that appellant has failed to demonstrate financial and administrative capability for Program operations (respondent #1). Thus, appellant was unfairly disadvantaged when it initiated this appeal. Although appellant was given an extra week to submit its documents which may have diminished its disadvantage (presuming it received respondent’s documents and cover letter of July 9, 2012 before it submitted its documents on July 16, 2012) that does not alleviate the fact that respondent failed to provide appellant with the grounds upon which it denied its 2012 SFSP application as it is required to do (7 CFR §225.13[b][1]).

Also, even in circumstances such as this where the appeal process is informal and the State Administrative Procedure Act does not strictly apply, the basic premise of due process requires that a party receive notice of the action. “An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise the interested parties of the pendency of the action and afford them an opportunity to present their objections” Alvarado v. State of New York, 110 A.D.2d 583, 584 (1st Dep’t 1985) *citing Mullane v. Central Hanover Trust Co.*, 339 US 306, 314.

Further, upon review of the documents submitted in this appeal, I cannot determine that respondent’s decision that appellant failed to demonstrate financial and administrative capacity to operate a SFSP, is reasonable. Respondent provides a copy of appellant’s Non-profit Organization Financial Administrative form and states that this form does not “include adequate organization policies, procedures and controls” (respondent #1, #3). What exactly is lacking in the form and what constitutes “adequate organization policies, procedures and controls” is not explained by respondent. Also, no explanation is proffered as to the necessity of this requirement and the potential danger of approving a SFSP sponsor who does not have “adequate organization policies, procedures and controls.” To simply provide a copy of a document to the hearing officer and state that it is not adequate, without further explanation, is insufficient to establish that the decision made by respondent was reasonable and rational. Additionally, I find respondent’s statement that appellant has not demonstrated that the “mission and projected benefit from SFSP participation is not reasonably related to the purpose of the organization” disingenuous when, as respondent itself points out, the first paragraph in appellant’s purpose section of its certificate of incorporation states “[T]o help people in New York affected by poverty and hardships. This will be done by providing financial assistance, *food* clothing and supplies to the needy so they can have a better chance of leading productive lives” (respondent #1, #3 [emphasis added]). Based on the record before me, I cannot determine that respondent’s decision that appellant failed to demonstrate financial and administrative capacity to operate a SFSP, as required by 7 CFR §225.14(c)(1), is reasonable.

CONCLUSION

I find that respondent failed to properly provide notice to appellant that it was denying appellant's 2012 Federal Summer Food Service Program sponsor application based on its inability to demonstrate financial and administrative capacity (7 CFR §225.14(c)(1)). I further find that respondent has failed to adequately demonstrate why or how appellant is not administratively and financially capable of operating a SFSP as required by 7 CFR §225.14(c)(1). Accordingly, respondent is directed to immediately approve appellant's 2012 SFSP sponsor application.