

**United States Small Business Administration
Office of Hearings and Appeals**

PAYCHECK PROTECTION
PROGRAM APPEAL OF:

Lawndale Christian Health Center

Appellant

Appealed from:

SBA PPP Loan Number 5819168004

Issued: May 31, 2022

Docket No. PPP - 5819168004

Appearances:

Christopher Dons, Chief Financial Officer, Chicago, IL, and Nick Jellum, Esq., Stillwater, MN, for Lawndale Christian Health Center

Sameena Nabijee, Esq., Small Business Administration, Office of the General Counsel, Washington, DC, for the Small Business Administration.

Before: Daniel J. McGinn-Shapiro, Administrative Law Judge

DECISION

On December 8, 2021, Lawndale Christian Health Center (Appellant) received a final Paycheck Protection Program (PPP) loan review decision issued by the U.S. Small Business Administration (SBA).¹ That decision concluded that Appellant was ineligible for the PPP loan it had received and, therefore, ineligible for the forgiveness of any portion of that PPP loan. SBA's Office of Hearings and Appeals (OHA) received Appellant's timely appeal petition and the undersigned was assigned to preside over this matter. OHA conducts PPP appeals under the authority of 13 C.F.R. part 134, Subpart L. Appellant requests that OHA reverse the final SBA

¹ See Lawndale Christian Health Center's Response to Order to Show Cause

loan review decision and find that Appellant is eligible for PPP loan forgiveness. For the reasons discussed below, SBA's final loan review decision is reversed, and Appellant's request is granted.

I. Facts and Procedural History

A. Background

Appellant is designated as an organization that is exempt from paying income taxes under Section 501(c)(3) of the Internal Revenue Code.² It applied for, and was approved for, a PPP loan in the amount of \$5,476,200.³ CRF Small Business Loan Company, LLC (Lender) disbursed the loan and, later, Appellant applied for forgiveness of the PPP loan.⁴ The Lender recommended that entirety of the PPP loan be forgiven.⁵

SBA reviewed the PPP loan made to Appellant and issued a final loan review decision (FLRD). In the FLRD, SBA does not accept the Lender's determination but rather concludes that none of the loan will be forgiven.⁶ SBA explains that it determined that Appellant was ineligible for the PPP loan because SBA concluded that Appellant "exceeds the maximum allowable number of employees and the SBA small business size standards."⁷

B. Appeal Proceeding

Appellant submitted its appeal petition to OHA. After the matter was assigned to me and Appellant submitted additional necessary information, as ordered, I issued a Notice and Order directing SBA to file the administrative record and providing both parties opportunities to submit other filings. SBA filed the administrative record. SBA also filed a response to Appellant's petition. The record is now closed, and this matter is now ready for a decision.

In its appeal petition, Appellant contends that when it submitted its application for a PPP

² See Admin. Record at 4839, 4851, 4859, 4871, 4887, 4892, 4954, 4961, 4972, 6115, 6120.

³ Final SBA Loan Review Decision at 1; Administrative Record at 2, 21, 6115-6116.

⁴ Final SBA Loan Review Decision at 1; Admin. Record at 1, 21, 6120, 6122-6124.

⁵ Final SBA Loan Review Decision at 1, Admin. Record at 2.

⁶ See Id.

⁷ Final SBA Loan Review Decision at 1.

loan, it made a “good faith determination that it had [REDACTED] employees.”⁸ Appellant, however, also acknowledges that it counted only full-time employees, and that if it had known to count “individuals employed on a full-time, part-time, or other basis separately,” it had an average of [REDACTED] employees during the time used in its PPP loan application.⁹

Appellant asserts that, even if it should have counted part-time employees and, therefore, had a total of approximately [REDACTED] employees in total, SBA should forgive the PPP loan that it received. Appellant’s argument is based on an Interim Final Rule (IFR) that SBA published in the Federal Register on March 22, 2021 (March 2021 IFR), which directed that a 501(c)(3) entity “that employs not more than 500 employees per physical location of the organization is eligible to receive a [PPP] loan.” Appellant asserts that it has at all times been a 501(c)(3) organization and that, at the time of its application, Appellant had [REDACTED] physical locations and did not employ more than 500 employees per location. While acknowledging that this IFR was published after Appellant’s application and loan origination, Appellant asserts that it met this requirement for eligibility at all times between when it applied for a PPP loan through when it applied for forgiveness of the loan. Appellant notes that there were many changes to the rules governing the PPP in the effort to maximize the benefit to businesses and their employees and to “carry out Congressional intent of [PPP].”¹⁰ Appellant argues that it is eligible for a PPP loan under the rules published in the IFR in March 2021 and it should not be penalized “simply due to the timing of the rule change.”¹¹

In its response to the Petition, SBA argues that Appellant was ineligible for a PPP loan when it applied for its PPP loan because it had more than 500 employees. Specifically, SBA asserts that (1) Appellant has acknowledged that it had more than 500 employees counting both

⁸ Appeal Pet. at 1.

⁹ Id.

¹⁰ Appeal Pet. at 2.

¹¹ Id.

full time and part time employees; (2) although Appellant contends that it was not aware that it was required to count both full-time and part-time employees, the Frequently Asked Questions that were publicly available instructed that both should be counted; and (3) regardless of Appellant’s actual knowledge, it is charged with notice of the provision. SBA additionally argues that the March 2021 IFR is inapplicable to the PPP loan that Appellant applied for in June 2020. SBA asserts that the March 2021 IFR “explicitly states” that the IFR was effective March 18, 2021 and SBA did not intend for the rule to be retroactive.¹² SBA further contends that Appellant’s “equity argument” fails, stating that accepting the argument would “effectively invalidate SBA regulations and interpretations thereof,” which SBA attests OHA cannot do. Additionally, SBA asserts that it would be inequitable to reward Appellant for applying for a PPP loan when it was ineligible at the time of application because there were businesses that did not apply for a PPP loan in June 2020 because they had too many employees. Finally, SBA argues that under the CARES Act and the regulations implementing the Act, because Appellant was ineligible for the PPP loan it received, it is ineligible for forgiveness of that loan.

II. Issue

The issue to be addressed is:

Whether SBA’s determination that the number of employees that Appellant employed at the relevant time made it ineligible for a PPP loan was based on a clear error of fact or law.

III. Summary of Decision

Because Appellant submitted its application for loan forgiveness after March 11, 2021, the changes to the PPP program articulated in the American Rescue Plan Act of 2021 and the Interim Final Rule published on March 22, 2021 apply to Appellant’s PPP loan. Under those changes, it was a clear error to conclude that Respondent was ineligible for a PPP loan because it employed

¹² SBA’s Resp. to Appeal Pet. at 6.

too many individuals.

IV. History of PPP Program and Statement of Law

In March 2020, in response to economic challenges resulting from the COVID-19 pandemic, Congress created the PPP under the CARES Act to provide small businesses with access to low-interest, forgivable loans to pay their employees and meet other costs during the COVID-19 crisis.¹³ The CARES Act amended Section 7(a) of the Small Business Act to establish the PPP and placed administration of the PPP under the SBA. PPP loans were made by private lenders but guaranteed by the SBA. 15 U.S.C. § 636(a)(36)(B).

PPP loans were made available to borrowers, through lenders, in two draws. The first draw PPP loans were made pursuant to 15 U.S.C. § 636(a)(36). The second draw PPP loans were made pursuant to 15 U.S.C. § 636(a)(37). Congress authorized SBA to forgive the first draw loans under 15 U.S.C. § 636m and the second draw loans under 15 U.S.C. § 636(a)(37)(J). A borrower of PPP loans is required to apply for forgiveness with the private lender who was servicing the loan.¹⁴ Borrowers cannot appeal a decision made by a lender directly to OHA.¹⁵ Rather, the lenders' decisions and the PPP loans are reviewed by SBA's Office of Capital Access and that office issues a final loan review decision. The SBA's final loan review decision can then be appealed to OHA if the decision finds that the borrower:

(1) Was ineligible for a PPP loan; (2) Was ineligible for the PPP loan amount received or used the PPP loan proceeds for unauthorized uses; (3) Is ineligible for PPP loan forgiveness in the amount determined by the lender in its full approval or partial approval decision issued to SBA; and/or (4) Is ineligible for PPP loan forgiveness in any amount when the lender has issued a full denial decision to SBA.”¹⁶

The standard of review for this proceeding is to determine whether the Appellant has shown

¹³ See P.L. 116-136 (March 27, 2020).

¹⁴ See 15 USC §§ 636m(e), 636m(f), and 636m(l).

¹⁵ See 13 C.F.R. § 134.1201(c).

¹⁶ 13 C.F.R. § 134.1201(b).

that the final SBA loan review decision was based on clear error of fact or law.¹⁷

V. Analysis

The CARES Act states that for first draw PPP loans, like the loan that Appellant received:

During the covered period, in addition to small business concerns, any business concern, nonprofit organization. . . shall be eligible to receive a covered loan if the business concern, nonprofit organization . . . employs not more than the greater of—

(I) 500 employees; or

(II) if applicable, the size standard in number of employees established by the Administration for the industry in which the business concern, nonprofit organization . . . operates.¹⁸

The Statute then further defines “covered period” as the period between February 15, 2020 and June 30, 2021.¹⁹

13 CFR § 121.201 lists the size standards for different industries. Appellant lists different NAICS codes on different forms and documents, including specific NAICS codes for different aspects of business.²⁰ On its PPP loan application, however, it uses NAICS code 621498.²¹ 13 CFR § 121.201 does not indicate an alternative number of employees for any of the NAICS codes listed by Appellant, including 621498. Because there is no applicable alternative number of employees for the industry which Appellant operates within, Appellant is eligible if it employs 500 employees or less.

13 CFR § 121.106 addresses how SBA calculates how many people a business employs. The current version of the regulation has been in effect since January 6, 2020. It states that the “the method for determining a concern’s size includes the following principles . . . Part-time and

¹⁷ See 13 C.F.R. § 134.1210.

¹⁸ 15 U.S.C. § (a)(36)(D)(i).

¹⁹ 15 U.S.C. § 636(a)(36)(A)(iii). Initially, “covered period” was defined as the time between February 15, 2020 and June 30, 2020. See P.L. 116-136 (March 27, 2020).

²⁰ See Admin Record at 4970, 4981-4982

²¹ See Admin. Record at 6122.

temporary employees are counted the same as full-time employees.”²² In other words, when Appellant applied for a PPP loan on June 30, 2020²³ and when Lender disbursed a PPP loan to Appellant on July 9, 2020²⁴ the law was clear that full-time and part-time employees are counted to determine the total number of people that a business employs.

On its application, Appellant stated that it had [REDACTED] employees at the time it applied for a PPP loan.²⁵ Appellant states, however, that when it provided that number, it believed that it was only to count full time employees and that if both full time and part time employees are counted, it employed an average of [REDACTED] employees per pay period for the time period used in completing Appellant’s PPP loan application.²⁶ In short, under the law at that time, Appellant employed more than 500 people in total across its business when it applied for a PPP loan.

As Appellant notes, however, in the IFR promulgated on March 22, 2021 (March 2021 IFR), SBA stated that a non-for-profit entity organized under 501(c)(3) of the Internal Revenue Code (a 501(c)(3) entity) with more than 500 total employees could be eligible for a PPP loan if the entity had multiple locations and none of the locations employed more than 500 employees. Specifically, that IFR states that “a tax-exempt non-profit organization described in section 501(c)(3) of the Internal Revenue Code that employs not more than 500 employees per physical location of the organization” is eligible for a PPP loan.²⁷ As noted, Appellant is a 501(c)(3) entity.²⁸

The March 2021 IFR revised the PPP rules to incorporate the American Rescue Plan Act of 2021’s (ARPA) amendments to the PPP.²⁹ One of the amendments to the PPP that ARPA made

²² 13 C.F.R. § 121.106(b).

²³ See Admin. Record at 6116.

²⁴ See Admin Record at 2.

²⁵ See Admin Record at 6115.

²⁶ See Appeal Pet. at 1.

²⁷ 86 Fed. Reg. at 15085.

²⁸ See Admin. Record at 4839, 4851, 4859, 4871, 4887, 4892, 4954, 4961, 4972, 6115, 6120.

²⁹ 86 Fed. Reg. at 15083.

was to add that “a nonprofit organization shall be eligible to receive a covered loan if the nonprofit organization employs not more than 500 employees per physical location of the organization.”³⁰

SBA argues that the changes in the March 2021 IFR do not apply to Appellant’s PPP loan because Appellant applied for its loan in June 2020. SBA notes that the “Effective date” provision in the March 2021 IFR states that “the provisions of this interim final rule are effective March 18, 2021.”³¹ SBA argues that, therefore, the March 2021 IFR is “not retroactive and is not applicable to this appeal.”³² The question is not whether the changes are retroactively applied, however, but rather what event or events control whether the changes apply. The IFR also contains an “Applicability date” provision that states that “[t]he provisions of this interim final rule incorporating the American Rescue Plan Act changes to the PPP apply to PPP loans approved, **and loan forgiveness applications submitted**, on or after March 11, 2021.”³³ Appellant applied for a PPP loan on June 30, 2020³⁴ and Lender disbursed a PPP loan to Appellant on July 9, 2020,³⁵ both dates which fall before March 11, 2021. Appellant, however, applied for forgiveness of the loan on August 25, 2021, five months after March 11, 2021.³⁶

The critical issue then is whether the changes articulated in the ARPA and the March 2021 IFR apply to Appellant, whose loan was approved before March 11, 2021, but whose loan forgiveness application was submitted after March 11, 2021. In the “Applicability date” clause of the March 2021 IFR there is a comma before the phrase “and loan forgiveness applications submitted” and another comma before the modifier “on or after March 11, 2021.” When

³⁰ P.L. 117-2, Title V, Sec. 5001(a)(1)(B), 135 STAT. 82 (March 11, 2021)

³¹ 86 Fed. Reg. at 15083.

³² SBA’s Resp. to Appeal Pet. at 6.

³³ 86 Fed. Reg. at 15084 (emphasis added).

³⁴ See Admin. Record at 6116.

³⁵ See Admin Record at 2.

³⁶ See Admin Record at 6124; SBA’s Resp. to Appeal Pet. at 2.

examining the effect of commas, the United States Court of Appeals for the Second Circuit has said:

One of the methods by which a writer indicates whether a modifier that follows a list of nouns or phrases is intended to modify the entire list, or only the immediate antecedent, is by punctuation—specifically by whether the list is separated from the subsequent modifier by a comma. When there is no comma, as in the statute considered in [*Barnhart v. Thomas*, 540 U.S. 20 (2003)] the subsequent modifier is ordinarily understood to apply only to its last antecedent. When a comma is included, as in the [] provision [at issue in the case], the modifier is generally understood to apply to the entire series.³⁷

The existence of the comma before the modifier “on or after March 11, 2021,” dictates that the March 2021 IFR, and the changes therein, apply to PPP loans that were approved on or after March 11, 2021 and to PPP loans for which the business applied for forgiveness on or after March 11, 2021. In short, because Appellant did not apply for loan forgiveness until after March 11, 2021, the change to the rule that allowed an entity to have 500 employees per location apply to Appellant.

Interpreting the “Applicability date” provision in the March 2021 IFR to apply the changes in the IFR to all PPP loans for which the business applied for forgiveness on or after March 11, 2021, regardless of when the PPP loan was approved, also follows the basic rule of construction that a provision should be interpreted in a way that avoids rendering any part of the provision superfluous.³⁸ An entity could not apply for loan forgiveness before its application for a PPP loan is approved.³⁹ It follows that for any PPP loan approved on or after March 11, 2021, the application for forgiveness would necessarily also be submitted after that date. Interpreting the “Applicability date” provision to mean that the changes promulgated in the March 2021 IFR only applied to PPP

³⁷ *American Intern. Group, Inc. v. Bank of America Corp.*, 712 F.3d 775, 781-782 (2d. Cir. 2013) (further citations omitted).

³⁸ *See Gillespie v. Trans Union, LLC*, 433 F. Supp. 2d, 908, 913-914 (N.D. Ill. 2006) (further citations omitted) (stating that courts “are to avoid interpretations” of “agency regulations” and “agency’s interpretive rules . . . which render words superfluous.”).

³⁹ *See* 15 U.S.C. § 636m (stating that a borrower is eligible for forgiveness of indebtedness of a “covered loan,” which in turn is defined as a loan that has been “guaranteed” under the PPP program).

loans approved on or after March 11, 2021 would render the words “and loan forgiveness applications submitted” superfluous.

SBA argues in this case a different interpretation of its own IFR than the language of the “Applicability date” provision dictates. SBA stated that the IFR only applies to PPP loans applied for after March 11, 2021. Accountability to the public requires that agencies be bound by the language of a regulation or rule that they promulgate, not an interpretation the agency later advances.⁴⁰

Appellant asserts that it has [REDACTED] physical locations, and no single location employs more than 500 employees.⁴¹ SBA does not dispute this assertion, which was made in the appeal petition that, by its submission, Appellant attested was “true to the best of [the author’s] knowledge,” and under risk of criminal penalties for a false statement.⁴² It is also supported by Appellant’s 2019 payroll information. The document lists approximately [REDACTED] employees spread over [REDACTED] locations, including corporate headquarters, none of which have more than [REDACTED] employees listed.⁴³

In short, because Appellant is a 501(c)(3) entity with multiple locations, none of which employs more than 500 employees, it is eligible for the PPP loan that it received. SBA explicitly based its determination that Appellant was ineligible on the erroneous conclusion that Appellant “exceed[ed] the maximum allowable number of employees and the SBA small business size standards.”⁴⁴

VI. Order

It is **HEREBY ORDERED** that Appellant’s appeal is **Granted** and the final SBA loan review decision is **Reversed**.

⁴⁰ See *Safe Air for Everyone v. EPA*, 488 F.3d 1088, 1098 (9th Cir. 2007).

⁴¹ Appeal Pet. at 1.

⁴² 13 C.F.R. § 134.209’ 13 C.F.R. § 134.1201(h).

⁴³ See Admin. Record at 3696-3707.

⁴⁴ Final SBA Loan Review Decision at 1.

This is an initial decision. This decision, however, will become SBA’s final decision 30 calendar days after it is served unless a request for reconsideration is filed or the SBA Administrator decides to exercise discretionary authority to review or reverse this decision.⁴⁵

Either the SBA or Appellant may request reconsideration of this Initial Decision by filing with OHA and serving a petition for reconsideration within 10 calendar days after service of this decision.⁴⁶ The request for reconsideration must clearly show an error of fact or law material to the decision.⁴⁷ A petition for reconsideration should be filed via email to OHAPPPinquiries@sba.gov.

Final decisions may be appealed to the appropriate Federal district court only. 13 C.F.R. §134.1211(g).

**Daniel
McGinn
Shapiro**

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Daniel McGinn Shapiro
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Daniel J. McGinn-Shapiro
Administrative Law Judge

⁴⁵ See 13 C.F.R. § 134.1211(b).

⁴⁶ If SBA files a petition for reconsideration, SBA shall serve a copy of the petition on the Appellant. If the Appellant files a petition for reconsideration, a copy of the petition shall be served upon SBA at pppappealsogc@sba.gov.

⁴⁷ See 13 C.F.R. §134.1211(c).