

UNITED STATES DEPARTMENT OF EDUCATION  
REHABILITATION SERVICES ADMINISTRATION

**In the Matter of the Arbitration between**

**Docket No. R-S/ 10-4**

**OPINION AND AWARD**

**MICHAEL JONES**

**Petitioner**

**v.**

**PENNSLYVANIA OFFICE OF  
VOCATIONAL REHABILITATION**

**Respondent**

**Before:**

Stephen F. O'Beirne, Impartial Chairperson

Frederick J. Wurtzel, Petitioner Appointed Panel Member

William D. Gross, Respondent Appointed Panel Member

**APPEARANCES:**

**For the Petitioner**

J. Mathew Wolfe, Esq., Philadelphia, PA

Michael Jones, Petitioner

Joanne Jones, Petitioner's Wife

**For the Respondent**

Robert C. Schramm, Esq., Assistant Counsel, PA Department of Labor & Industry

David De Notaris, Director, PA BBVS/OVR

Katherine Riley, Chairperson, Elected Committee of Blind Vendors

Edward Moore, Witness

Tonda R. Miller, BEP Business Agent

Nan Bonnett-Foik, BEP Business Agent

Court Reporter: Sargents Court Reporting Services, Inc., by Nicole Montagano.<sup>1</sup>

Hearing Date: March 4, 2013

### **OPINION**

The Randolph-Sheppard Vending Stand Act, 20 U.S.C. Section 107 et seq., (hereinafter the “Act”) gives blind persons preference to operate vending facilities in federal and other properties. The United States Department of Education’s Rehabilitative Services Administration is charged with administration of the Act. The Act is a federal statute, administered on the state level by state licensing agencies (SLAs), who agree to comply with certain requirements set forth in the Act and in the sections of the United States Code and Pennsylvania regulations implementing the Act. In the State of Pennsylvania, the SLA is the Bureau of Blindness and Visual Services, Office of Vocational Rehabilitation (hereinafter “Respondent”). Through its Business Enterprise Program (BEP), Respondent acts as a facilitator between the owners/operators of federal or other properties and blind vendors trained and licensed by the State to operate vending facilities such as snack bars, cafeterias and/or vending machines in those locations. Respondent will typically secure a permit from the owner/ property manager of the location and place the vending site(s) up for bid to all licensed blind vendors in the State.

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<sup>1</sup> Prior to the commencement of the arbitration hearing, Respondent raised objection to Petitioner’s stated intention to videotape the proceeding. After consultation with my Panel colleagues, I sustained Respondent’s objection and directed the video camera not be used. Witnesses were sequestered by agreement of the parties.

Petitioner Michael Jones is a licensed blind vendor in Pennsylvania. This arbitration concerns Petitioner's claim Respondent violated the Act, the United States Code of Federal Regulations implementing the Act, and/or Pennsylvania law by failing/ refusing to award Petitioner vending site # 816 when it became available during 2009-2010.<sup>2</sup> Respondent denied Petitioner the site because he did not possess a valid ServSafe food service safety certification. Petitioner asserts Respondent did not have authority to condition the awarding of the vending site on his possession of a ServSafe certification, as opposed to any of the other food service safety certifications meeting the standards of the Pennsylvania Department of Agriculture's Regulations. He further contends Respondent denied him a fair and reasonable opportunity to pass the ServSafe certification examination in time to submit a qualifying bid. He seeks retroactive money damages or, in the alternative, an order directing Respondent to award him the site prospectively.

Under Respondent's Business Enterprise Program, new and newly available vending sites are awarded through a bidding process. Respondent sends a bid solicitation letter to all blind licensed vendors in the State, listing the conditions/ qualifications a bidder must meet to qualify for consideration. Any blind licensed vendor in Pennsylvania may submit a bid to run a particular site.<sup>3</sup> A committee comprised of one representative from the BEP, one from the Elected Committee of Blind Vendors (ECBV)<sup>4</sup>, and one neutral party

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<sup>2</sup> As found by the State Hearing Officer, vending site 816 is located at Interstate 81, North Lackawanna County; Interstate 81, South Susquehanna County; and Welcome Center Great Bend, Susquehanna County, Pa.

<sup>3</sup> Bids from vendors on disciplinary probation are not eligible for consideration.

<sup>4</sup> The Elected Committee of Blind Vendors is comprised of vendors elected by all blind licensed vendors in the State. As per the Federal and State implementing regulations, the committee is, to the greatest extent possible, fully representative of all blind licensed vendors in the State. The committee is charged with

is tasked with opening the bids and checking whether the bidder has met the conditions set forth in the bid solicitation letter. All other things being equal, the licensed blind vendor with the most time in the program (seniority) will be awarded the site.

Respondent advertised the availability of Site #816 by sending a bid advertisement letter dated December 23, 2009 to all licensed blind vendors in the State (Respondent Exhibit 3). Among other qualifications, the bid solicitation required prospective bidders possess a valid ServSafe certification. Petitioner did not have a valid ServSafe certification when he bid on Site #816. He did have another food safety certification - recognized by the Pennsylvania Department of Agriculture as meeting its standards (Petitioner Exhibit A). The committee opening the bids disqualified Petitioner based on his failure to possess a valid ServSafe certification. Respondent awarded Site #816 to a less senior licensed blind vendor.

Petitioner claims Respondent's actions were not sanctioned by the relevant laws and regulations; were arbitrary and capricious; violated his seniority rights; and caused him financial harm. Petitioner seeks an Award directing Respondent to compensate him for revenue he would have earned from the time he should have been awarded the site through the date he took over his current location, which he concedes is preferable to Site #816.<sup>5</sup> Petitioner also claims Respondent denied him a fair opportunity to obtain a ServSafe certification by, amongst other things, failing/ refusing to provide him with an

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actively participating with the State licensing agency in major administrative decisions and policy and program development decisions affecting the overall administration of the State's vending facility program.  
<sup>5</sup> Petitioner estimates his damages at approximately five to six thousand dollars (\$5,000.00 - \$6,000.00) per month for a period of twenty-seven (27) months. The parties agreed at arbitration that in the event this Arbitration Panel finds Respondent liable to Petitioner for monetary damages, they would meet to calculate and discuss his actual damages.

independent reader for the ServSafe certification exam and/or not engaging an independent party to proctor the exam.

Respondent asserts its decision to require all vendors bidding on available sites to possess a valid ServSafe certification was within its discretion under governing laws and regulations. Respondent points out its actions were affirmatively sanctioned by the Elected Committee of Blind Vendors; Petitioner had adequate notice of the ServSafe certification requirement; Respondent provided Petitioner with two sets of books and a compact disc version of the course free of charge; paid for Petitioner to attend the classroom course; and paid for the examination. Respondent contends Petitioner's failure to possess a ServSafe certification in time to qualify for Site #816 was his own fault.

Respondent further contends that even if the Tripartite Arbitration Panel were to find in Petitioner's favor on the merits of this dispute, our remedial powers are severely circumscribed by the doctrine of sovereign immunity set forth in the Eleventh Amendment to the United States Constitution.<sup>6</sup> Therefore, Respondent argues, this Board is without authority to award Petitioner money damages and, at most, could direct Respondent to place Petitioner in vending facility # 816 prospectively. Petitioner disagrees with Respondent's interpretation of sovereign immunity, arguing the law in this Federal judicial circuit allows retroactive money damages and attorneys' fees in arbitration proceedings under the Act. Alternatively, if the Panel is inclined to award

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<sup>6</sup> The Eleventh Amendment to the United States Constitution provides: *"The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any foreign state."* Although on its face the Amendment prohibits only suits against a State by citizens of other States, the courts have interpreted it to bar citizens from suing their own state in federal court. Many states' constitutions, including Pennsylvania's, have sovereign immunity clauses barring such suits against the state in state courts as well.

only prospective relief on a finding in his favor, Petitioner asks that the disputed vending site be awarded to him prospectively.<sup>7</sup>

Pursuant to the Act and the federal and state regulations, the State fair hearing on Petitioner's claim took place on or about May 18, 2010. In a decision dated November 27, 2010, Hearing Officer Jackie Wiest Lutz, Esq. dismissed Petitioner's claims in full.<sup>8</sup> Following the issuance of the State Hearing Officer's decision, Petitioner requested the United States Department of Education convene a tripartite arbitration panel to hear this dispute. Petitioner selected Mr. Frederick J. Wurtzel for the Panel. Respondent selected Mr. William D. Gross. I was selected as Impartial Chairperson of the Panel. I convened a hearing in this matter on Monday, March 4, 2013, at the Pennsylvania Office of Vocational Rehabilitation, located at 444 North Street Philadelphia, Pa. Both parties appeared by counsel and had full opportunity to adduce evidence, cross-examine each other's witnesses, and make argument in support of their respective positions. A certified court reporter transcribed the hearing. Both parties submitted post-hearing briefs as well as briefs in reply thereto. Neither party objected to the fairness of this proceeding.

At the arbitration hearing, the parties agreed to submit the following issues for decision by the Tripartite Arbitration Board:

Whether the Respondent State Licensing Agency violated the Randolph-Sheppard Act or the state regulations implementing the Act by denying Petitioner Vending Site #816, by, amongst other things, requiring blind licensed vendors seeking that site to secure and maintain a ServSafe

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<sup>7</sup> This alternative claim for relief seems somewhat in conflict with Petitioner's assertion that his current site is more profitable than Site #816. Be that as it may, this Panel considered all potential remedies, both legal and equitable, in deciding this case.

<sup>8</sup> In the opinion of a majority of this Arbitration Panel, the decision of the Hearing Officer was extremely comprehensive and insightful - particularly her discussion of state law. However, this Panel considers the facts and the law concerning this dispute de novo.

Certification; and/or by failing/ refusing to provide Petitioner a reasonable, fair opportunity to pass the ServSafe Certification test?

Whether this Randolph-Sheppard Act Tripartite Arbitration Panel has the authority under sovereign immunity jurisprudence to award money damages and retroactive damages?

The relevant Federal Regulations that guide the Board's decision in this matter are as follows:

***C.F.R. Section 395.4 State rules and regulations.***

*(a) The State licensing agency shall promulgate rules and regulations which have been approved by the Secretary and which shall be adequate to ensure the effective conduct of the State's vending facility program (including State licensing agency procedures covering the conduct of full evidentiary hearings) and the operation of each vending facility in accordance with this part and with the requirements and conditions of each department, agency, and instrumentality in control of the maintenance, operation and protection of federal property, including the conditions contained in permits, as well as in all applicable Federal and State laws, local ordinances, and regulations.*

***C.F.R. Section 395.14 The State Committee of Blind Vendors***

*(a) The State licensing agency shall provide for the biennial election of a State Committee of Blind Vendors which, to the extent possible, shall be fully representative of all blind vendors in the State program on the basis of such facts as geography and vending facility type with a goal of providing for proportional representation of blind vendors on Federal property. Participation by any blind vendor in any election shall not be conditioned upon the payment of dues or any other fees.*

*(a) The State Committee of Blind Vendors shall:*

- (1) Actively participate with the State licensing agency in major administrative decisions and policy and program development decisions affecting the overall administration of the State's vending facility program;*
- (2) Receive and transmit to the State licensing agency grievances at the request of blind vendors and serve as advocates for such vendors in connection with such grievances.*

- (3) *Actively participate with the State licensing agency in the development and administration of a state system for the transfer and promotion of blind vendors.*

**Section 107d-1. Grievances of blind licensees**

**(a)Hearing and arbitration**

*Any blind licensee who is dissatisfied with any action arising from the operation or administration of the vending facility program may submit to a State licensing agency a request for a full evidentiary hearing, which shall be provided by such agency in accordance with section 107b(6) of this title. If such blind licensee is dissatisfied with any action taken or decision rendered as a result of such hearing, he may file a complaint with the Secretary who shall convene a panel to arbitrate the dispute pursuant to section 107d-2 of this title and the decision of such panel shall be final and binding on the parties except as otherwise provided in this chapter.*

The Pennsylvania Administrative Code provides in relevant part as follows:

**CHAPTER 2430. BUSINESS ENTERPRISE PROGRAM**

**Section 2430.3 Definitions**

*Elected Committee of Blind Vendors - A State committee of blind vendors, which is elected and fully representative of blind operators in this commonwealth.*

*Office of Blind and Visual Services (BVS) – The office in the Department which is responsible for providing essential management, supervision and licensing of the Business Enterprise Program (BEP). BVS includes the six district offices within assigned geographical areas.*

**Section 2430.4. Elected Committee of Blind Vendors.**

*Under the Randolph Sheppard Act, 20 U.S.C.A Sec. 107 et seq., an elected committee of blind vendors shall actively participate with the Office of Blindness and Visual Services (BVS) in major administrative and policy decisions and assist BVS to implement procedures for the operation of the program. The Committee is organized on a geographical basis and cooperates with the district manager in the administration of the program in that district.*

**ADVERTISEMENT OF FACILITY VACANCY**

**Section 2430.41. Generally.**

*The Office of Blindness and Visual Services (BVS) will advertise vacancies with request for submission of bids to fill the vacancy. Upon receipt of the bids, the process outlined in Sections 2430.42 – 2430.52 (relating to advertisement of a*

*facility vacancy) will be followed until the senior vendor or qualified trainee is awarded the facility.*

***Section 2430.42 Advertisement of Vacancy.***

*Except as provided in Sections 2430.81 and 2430.82 (relating to district office roster) the Office of Blindness and Visual Services (BVS) will notify qualified vendors and qualified trainees of a vacancy. The notification is by standard letter accompanied by a bid proposal form and detailed information regarding the facility and instructions for action to be taken by interested vendors/ trainees. The letter includes, but is not limited to, information about location, sales volume and hours of operation.*

Based on our review of the entire record presented, including our assessment of the credibility of witness testimony, and the probative value of evidence, a majority of this Tripartite Arbitration Panel finds Petitioner has not shown Respondent's decision to require all blind licensed vendors bidding on Site #816 possess a valid ServSafe certification was in violation of the Act, the Federal and State regulations implementing the Act, and/or Pennsylvania law. Petitioner has not shown Respondent acted in an arbitrary, capricious, and/or bad faith manner. A majority of the Panel is convinced Respondent's decision was reasonable; was within its decision making authority under the Act and the implementing regulations; was approved by the ECBV; and was done in furtherance of the best interests of all licensed blind vendors in the State of Pennsylvania. A majority also finds Petitioner has failed to show Respondent denied him a reasonable and fair opportunity to pass the ServSafe certification test. To the contrary, Respondent went to great lengths to assist Petitioner in preparing for and passing the test. The evidence strongly supports the conclusion that Petitioner's failure to pass the test in a timely manner was entirely his own fault. A majority finds no merit whatsoever in his claims that the reader assigned to assist him during the examination and/or the proctor of the exam somehow negatively impacted his test score. Accordingly, Petitioner is not

entitled to any remedy whatsoever, whether in law or in equity. We reach those conclusions for the following reasons:

With regard to this Panel's remedial powers, I suggested to the parties at arbitration that in order to possibly streamline this arbitration, we might bifurcate the proceeding, allowing the Panel to decide first whether Respondent was culpable of some statutory or other violation giving rise to any sort of liability to Petitioner. Only if this Panel were to find culpability on Respondent's part would we then wade into the fairly complex issues involving the effect of sovereign immunity jurisprudence on this Panel's power to award money damages and/or other relief. The parties declined my suggestion and agreed to have the Panel address both Respondent's culpability/liability and the limits of the Panel's remedial powers.

The parties addressed the federal courts' jurisprudence on state sovereign immunity under the Eleventh Amendment in their post-hearing briefs. After an exhaustive review of the voluminous legal authority proffered by the parties, a majority of the Panel finds we have plenary authority to award whatever relief we find appropriate based on the facts presented at arbitration. We are mindful the United States Supreme Court's decisions on state sovereign immunity have severely circumscribed a plaintiff's ability to obtain relief, whether legal or equitable, retroactive or prospective, against a state entity. However, the Court has not specifically addressed the authority of a Randolph-Sheppard arbitration panel to award money damages and/or other relief. And there is a split in the federal judicial circuits on that issue, with some courts holding a Randolph-Sheppard panel has no authority to direct a state sovereign entity to pay damages; other courts holding there is such authority; and still other courts limiting a panel's authority to equitable and/or

prospective relief. A majority of this Panel believes we have authority to remedy any proven violation of the Act and/or the State and Federal implementing regulations. And we believe that remedial power extends to the awarding of money damages and retroactive damages where appropriate.

Notwithstanding the foregoing, because a majority of this Panel ultimately finds there is no culpability on Respondent's part and Petitioner is not entitled to any relief whatsoever, we do not provide a detailed explanation of our analysis of the parties' sovereign immunity arguments in this Opinion and Award. By virtue of our ruling on the merits of Petitioner's claim, our view of our remedial powers is rendered dicta.

Petitioner's case consists of two parts. First, he asserts Respondent exceeded its authority under the Act and the implementing regulations by requiring successful bidders on Site # 816 to possess a valid ServSafe certification. Second, he contends Respondent did not provide him a fair and reasonable opportunity to pass the ServSafe certification test by, amongst other things, failing/refusing to provide him with an "independent" reader when taking the test and failing to ensure the test was administered by an "independent" proctor. We address Petitioner's claims in reverse order.

A majority of this Panel is convinced beyond question Petitioner's claim Respondent denied him a fair opportunity to pass the ServSafe certification examination is completely without merit. Respondent first published notice of the ServSafe certification requirement to all vendors in the State by means of a Policy Memorandum dated December 16, 2007. That Memorandum was reviewed by a Policy Memorandum dated October 6, 2009 (Respondent Exhibit 1). Petitioner was aware that in order to be

considered for a new or newly available site he was required to have a ServSafe Certification. Petitioner previously possessed a ServSafe certification, but allowed it to lapse. At arbitration, he offered a couple of explanations for not renewing his ServSafe certification. He testified he would have obtained a ServSafe certification but for Bill Hallman, a member, or former member, of the Elected Committee of Blind Vendors advising him at some point in 2009 to obtain a different food service safety certification, ostensibly because he should not trust the BEP in any regard (Tr. pp. 54, 99 and 266).<sup>9</sup> A majority of this Panel finds Petitioner's testimony hard to fully credit. And, even if true, Respondent repeatedly advised all licensed vendors, including Petitioner, in writing, they must obtain a ServSafe certification. This apparent conflict between what Hallman was telling him and what was contained in official written policy statements and bid solicitation letters issued by the BEP since as far back as December 2007 should, at the very least, have led Petitioner to inquire as to what type of food safety certification he was required to possess. And he clearly did know the ServSafe certification was required. He testified former BEP Director Robert Anderson advised him of the requirement in the fall of 2009. He even consulted an attorney about it and decided to go along with the program (Respondent Exhibit 7; Tr. p. 59).

Petitioner also testified his BEP Business Agent Nan Bonnett-Foik told him the food safety certifications<sup>10</sup> he did have were sufficient (Tr. p. 56). Bonnett-Foik directly contradicted Petitioner in this regard, testifying she told him that he, like every other vendor in the program, would have to obtain a ServSafe certification (Tr. p. 234). A

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<sup>9</sup> Hallman did not appear as a witness at arbitration.

<sup>10</sup> Petitioner actually had two certificates – one from the National Registry of Food Safety Professionals and one from the Philadelphia Department of Public Health (Petitioner's Exhibit A and B). The Philadelphia certificate has no relevance to this case.

majority of this Panel credits Bonnett-Foik's testimony. Petitioner maintains he has a long and litigious history with the BEP, including a three year battle to get into the program and numerous appeals of BEP decisions adverse to his interests (Tr. p. 52). He also recounted that Bonnet-Foik cursed him out at one time (Tr. p. 263). After assessing her testimonial demeanor, a majority of this Panel is convinced Bonnett-Foik would not, and did not, offer false testimony against Petitioner. Petitioner may truly believe Bonnett-Foik and the BEP were working against him in order to deny him Site #816. But he produced no credible evidence to support that belief.

The same goes for Petitioner's claims that having Bonnett-Foik's boyfriend Edward Moore read for him during the examination and the absence of a so-called "independent" proctor somehow thwarted his ability to pass the ServSafe certification test. A majority of the Panel credits the testimony of both Moore and Bonnett-Foik that Petitioner raised no protest against Moore serving as a reader before, during, or after the test (Tr. pp. 190 and 231). During his time as a witness at arbitration, Moore did not appear to be someone who would even think of sabotaging a blind person's efforts to take a written examination. Petitioner may suspect bias, but he presented no credible evidence to show it. A Panel majority also credits the testimony of BEP Acting Director David De Notaris that Respondent has never contracted with an independent organization to provide readers to BEP participants (Tr. p. 124). Test takers typically bring their own readers but sometimes BEP Business Agents or volunteers might serve as readers. Petitioner's wife and two of his employees accompanied Petitioner to the test. However, since all of them

were taking the test none could serve as a reader for him. And Petitioner testified his wife was not good enough of a reader to serve as his reader for the test (Tr. p. 65).<sup>11</sup>

The person proctoring the ServSafe examination was also the instructor for the two day class preceding the exam. A majority of the Panel does not see how that in any way impacts his independence. In support of his claim that the proctor was somehow biased, Petitioner testified former BEP Director Robert Anderson once told him he and the proctor had an outside business relationship in a security company (Tr. p. 265).<sup>12</sup> If true, that does not establish bias on the proctor's part. And there is no evidence to show the proctor had anything to do with Petitioner's failing the test. The tests are sent to Ohio for grading by the National Restaurant Association (Tr. p. 199). There is no merit to Petitioner's claim of bias by either the reader or the proctor.

While there are likely several reasons Petitioner did so poorly on the ServSafe examination<sup>13</sup>, a majority of this Panel finds that chief among them was Petitioner's own conduct. We credit the testimony of Bonnett-Foik that Petitioner arrived excessively late to class and spent a great deal of time talking on the telephone outside in the hall during class (Tr. p. 227). Petitioner concedes he was somewhat late for the classes, and did field at least two phone calls during class time (Tr. p. 90). But he denies that had anything to do with his failing the test. A majority of this Panel sees it differently. We think it far more likely than not Petitioner underestimated the rigor of the ServSafe course and

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<sup>11</sup> Curiously, while Petitioner relied on Hallman's advice concerning the type of food service safety certification he should get, he apparently ignored his suggestion to obtain his own reader when taking the ServSafe examination.

<sup>12</sup> Anderson did not appear as a witness at arbitration.

<sup>13</sup> He scored only 27 out of a possible 100 points.

examination. He simply didn't do what was necessary in order to pass. He bears full responsibility for failing the exam.<sup>14</sup>

Petitioner asserts that even if he was aware of the requirement that all licensed vendors be ServSafe certified, Respondent was not enforcing that requirement at the time Site # 816 came up for bid. A majority of this Panel finds Petitioner is only half right. It is clear Respondent was not enforcing the requirement to the extent it was disciplining and/or removing vendors without ServSafe certification from their existing sites. But it is equally clear the certification was a required qualification in every bid solicitation letter issued by the BEP since December 2007. Acting BEP Director David De Notaris credibly testified no new or newly available vending site was awarded to any vendor since that date without proof of a valid ServSafe certification (Tr. p. 120). Petitioner offers nothing to counter that testimony.

In the opinion of a majority of this Panel, Respondent's conduct does not amount to some nefarious selective enforcement of its policy. Rather, we see it as a reasonable and balanced approach to implement the policy over time. Vendors were put on clear and unequivocal notice of the certification requirement but were not forced out of their existing locations or otherwise disciplined for not meeting that requirement. On the other hand, vendors wanting to move up in the program and obtain a more lucrative vending site would have to be ServSafe certified. Respondent is in the business of assisting licensed blind vendors to succeed in business. Depriving vendors of their livelihood would seem to be a last resort for this type of organization. It seems eminently

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<sup>14</sup> Petitioner was eventually able to pass the ServSafe examination and received his certification in June 2010 – too late to be considered for Site #816.

reasonable for Respondent to delay disciplinary enforcement to allow everyone time to get the mandated certification. At the same time, Respondent wanted to improve its image with existing and prospective owners/ property managers by requiring any new or newly available sites be operated by vendors meeting the highest standards of food safety. That seems like a reasonable business decision. It cannot be overemphasized that everything involving the ServSafe certification requirement was done with the full and active participation of the ECBV. The ECBV approved not only the policy but also every bid solicitation letter sent out by the BEP. All of those solicitations required successful bidders to possess and maintain the ServSafe certification. Petitioner was not the first or the only blind licensed vendor to be denied a vending site because he/she lacked a ServSafe certification (Tr. p. 135). And far from hindering Petitioner's progress, in an effort to assist him, Respondent paid for two sets of course books: a compact disc version of the course, two day's of college level instruction; and the examination itself.

A majority of the Panel similarly finds no merit in Petitioner's arguments that Respondent violated Federal and/or State laws by: implementing a policy instead of a Rule or Regulation; enforcing that policy (or proposed policy) without first getting approval from the Rehabilitative Services Administration; and/or enforcing a bid qualification purportedly in conflict with the Pennsylvania Department of Agriculture's Regulations. There is nothing in the Act or the implementing regulations prohibiting Respondent from taking the action it did. Food safety certifications are nowhere mentioned in the Act or in the Federal or State Regulations. The requirement that operators of vending facilities maintain a food service safety certification comes from Pennsylvania law. That the Pennsylvania Department of Agriculture recognizes more

than one food safety certification does not prohibit another State agency such as Respondent from raising the bar to require all of the vendors participating in its program successfully complete a college level, nationally recognized food safety course available in every county in the State. There is simply no conflict with the Pennsylvania Department of Agriculture's Regulations.

In addition to the deference that the law requires us to give to an administrative agency's decision making authority, Respondent's decision to require a successful bidder possess a ServSafe certificate must be afforded further deference due to the fact that it was with the full participation and approval of the Elected Committee of Blind Vendors, as contemplated by the regulatory scheme. The Federal Regulations require that, to the extent possible, the Committee will be "*fully representative*" of all blind vendors in the State program (C.F.R. Section 394.14). The State Regulations echo that sentiment. (Section 2430.3).

Petitioner paints a portrait of an agency run amok, exceeding its authority and riding roughshod over the Federal and State regulations. A majority of this Panel finds the reality far more benign. The drafters of the Federal Regulations clearly foresaw that, in addition to its rule making authority, a state licensing agency such as Respondent would, with the advice and consent of the ECBV, make and enforce policies. Section 395.14 of the Code of Federal Regulations specifically provides that the state committee of blind vendors would "*[a]ctively participate with the State licensing agency in major administrative decisions and **policy and program development decisions** affecting the overall administration of the State's vending facility program*" and "*[a]ctively*

*participate with the State licensing agency in the **development and administration** of a state system for the transfer and promotion of blind vendors.” (Emphasis supplied).*

Similarly, Section 2430.4 of the State Regulations contemplates the ECBV will “*actively participate with the Office of Blindness and Visual Services (BVS) in major **administrative and policy decisions** and assist BVS to implement procedures for the operation of the program.*” (Emphasis supplied).

A majority of the Panel believes a blind vendor challenging a policy promulgated through this process would have to show, at the very least, the decision to implement the policy was arbitrary, capricious, and/or made in bad faith. Petitioner has shown none of that in this proceeding. To the contrary, a majority of this Panel finds Respondent’s decision to be reasonable and firmly rooted in the implementing regulations. Respondent provided a plethora of sound reasons to explain why this policy was implemented (Tr. pp. 120 - 133, 217 and 245). A majority finds Respondent’s justifications reasonable and persuasive. The policy was implemented with the full and active participation of the ECBV. The system set forth in the implementing regulations worked as designed. In the opinion of the majority, under the facts of this case, Respondent’s enforcement of the policy prior to it being approved by the Rehabilitative Services Administration does not rise to the level of arbitrary, capricious or bad faith conduct and is not in violation of law.<sup>15</sup>

Accordingly, a majority of the Tripartite Arbitration Board hereby issues the following

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<sup>15</sup> The RSA officially approved the policy in June 2012. It is unclear from the record of this proceeding when Respondent actually submitted the proposed policy for review by the RSA.

## **AWARD**

The Respondent State Licensing Agency did not violate the Randolph-Sheppard Act or the state regulations implementing the Act by denying Petitioner Vending Site #816, by, amongst other things, requiring blind licensed vendors seeking that site to secure and maintain a ServSafe certification; and/or by failing/ refusing to provide Petitioner a reasonable, fair opportunity to pass the ServSafe certification test.

A majority of the Tripartite Arbitration Board finds Respondent acted in a good faith and reasonable manner in furtherance of the best interests of all licensed blind vendors in the State of Pennsylvania. Petitioner's request for relief is denied.

This Randolph-Sheppard Act Tripartite Arbitration Panel has the authority under sovereign immunity jurisprudence to award money damages and retroactive damages.

**Stephen F. O'Beirne**

Dated: December 7, 2013

New York, NY

## **AFFIRMATION**

Pursuant to CPLR 7507, I hereby certify that I am the impartial arbitrator designated by the parties to hear and decide the above matter and that I executed the foregoing as and for the Opinion and Award of the Tripartite Arbitration Board.

**Stephen F. O'Beirne**

**William D. Gross**

Harrisburg, Pennsylvania.

Respondent Appointed Panel Member – concurring in the majority's Opinion and Award.

**Frederick J. Wurtzel**

Lansing, Michigan

Petitioner Appointed Panel Member - writing a separate dissent to the majority's Opinion and Award.

Gentlemen:

This correspondence is in dissent of our proposed decision finding in favor of the Pennsylvania Department of Rehabilitation and against Mr. Michael Jones, a Licensed Blind Vendor. This document does not introduce any new evidence nor does it rely on any information not a part of the record in this case. It is, rather a presentation of the facts which show that Mr. Jones was qualified to be awarded the contested facility and that the Agency did not have authority, on the date of the bid consideration, to require that Mr. Jones possess a Serve Safe certification from the National Restaurant Association.

Though this writer is not an attorney, he has received an education in Public Administration at the Bachelors and Masters levels. In addition, he has been an administrator of a Randolph Sheppard program from 1985 until 2006.

During those years of administration, this writer had many occasions to enforce laws, rules and regulations and policies related to the administration of the Randolph-Sheppard Act. The writer has participated in the defense of the Michigan rules and regulations and policies with the advice and representation of the Michigan Attorney General's office.

The fundamental issue at hand, notwithstanding any other arguments about tests, advice from the Elected Committee or any other issues presented in this case, is whether the Agency had the authority to enforce a policy (not a regulation) which set forth training requirements for licensed blind vendors with regard to food service sanitation. In this case, the Agency wishes to require that all licensed blind vendors be certified by the National Restaurant Association's "Serve Safe" testing program. There is no evidence that the Agency had such authority at the time of the denial of the promotion in dispute.

Each state Agency must agree to follow the Randolph-Sheppard Act and its requisite rules and regulations in order to be designated as the "State Licensing Agency" And utilize federal funds for its administration as follows:

"5) Designate

as provided in section 107b of this title the State agency for the blind in each state, or, in any State in which there is no such agency, some other public agency To issue licenses to blind persons who are citizens of the United States for the Operating of vending facilities on Federal and other property in such State for the vending of newspapers, periodicals, confections, tobacco products, foods, beverages, and other articles or services dispensed automatically or manually prepared on or off the premises in accordance with all applicable health laws, as determined by the State licensing agency, and including the vending or exchange of chances for any lottery authorized by State law and conducted by an agency of a State; and

(6) Through the Commissioner, (A) conduct periodic evaluations of the program authorized by this chapter, including upward mobility and other training required by section 107d-4 of this title, and annually submit to the appropriate committees of Congress a report based on such evaluations, and (B) take such other steps, including the issuance of such rules and regulations, as may be necessary or desirable in carrying out the provisions of this chapter. (b) The State licensing agency shall, in issuing each such license for the operation of a vending facility, give preference to blind persons who are in need of employment. Each such license shall be issued for an indefinite period but may be terminated by the State licensing agency if it is satisfied that the facility is not being operated in accordance with the rules and regulations prescribed by such licensing agency."

In this section, the law states, "d ... B) take such other steps, including the issuance of such rules and regulations, as may be necessary or desirable in carrying out the provisions of this chapter ..." Clearly, the law calls for the issuance of "rules and regulations," not policies. These are terms of law and have specific meaning in that rules and regulations are "promulgated" through a designated procedure and with the oversight of some authority as appropriate to each state. The Serve Safe requirement was not authorized in such a manner. It is merely policy and not regulation.

The Randolph-Sheppard Regulations, as required under the law  
Section 395 et seq

"Definitions: ... (v) "State licensing agency" means the State agency designated by the Secretary under

this part to issue licenses to blind persons for the operation of vending facilities on Federal and other property.

Section 395.3 Application for designation as State licensing agency; content.

(a) An application for designation as a State licensing agency under section 395.2 shall indicate:

(1) The State licensing agency's legal authority to administer the program, including its authority to promulgate rules and regulations to govern the program;...

. . . (11) The assurances of the State licensing agency that it will:

(i) Cooperate with the Secretary in applying the requirements of the Act in a uniform manner;

(ii) Take effective action, including the termination of licenses, to carry out full responsibility for the supervision and management of each vending facility in its program in accordance with its established rules and regulations, this part, and the terms and conditions governing the permit;

(iii) Submit promptly to the Secretary for approval a description of any changes in the legal authority of the State licensing agency, its rules and regulations, blind vendor agreements, schedules for the setting aside of funds, contractual arrangements for the furnishing of services by a nominee, arrangements for carrying general liability and product liability insurance, and any other matters which form a part of the application;..

(vi) Furnish each vendor a copy of its rules and regulations and a description of the arrangements for providing services, and take adequate steps to assure that each vendor understands the provisions of the permit and any agreement...

(a) The State licensing agency shall promulgate rules and regulations which have been approved by the Secretary and which shall be adequate to assure the effective conduct of the State's vending facility program (including State licensing agency procedures covering the conduct of full evidentiary hearings) and the operation of each vending facility in accordance with this part and with the requirements and conditions of each department, agency or instrumentality in control of the maintenance, operation, and protection of Federal property, including the conditions contained in permits, as well as in all applicable Federal and State laws, local ordinances and regulations."

"The State licensing agency promulgated no rules or regulations that had been approved by the Secretary dealing with the area of food certifications. It could have done so but exercised its discretion in not doing so. It did promulgate regulations specifying how the bidding process must work found at 55 Pa. Code §2430. It did not include in that regulation any specification regarding food certifications. Since the State licensing agency did not promulgate any rule regarding food certifications, Mr. Jones was required to meet the food certifications required by the regulations promulgated by the Department of Agriculture at 7 Pa. Code §76, which are applicable to vendors under the Randolph-Sheppard Act as well as other food vendors. He complied with those regulations."

It is impossible to interpret the above law and regulation in any way that excludes the federal approval of any policy or rule, which governs the bid and award of any facility in The Pennsylvania Vending Program. The policy at hand has 2 major flaws with regard to Mr. Jones' bid. First, it is a policy and not a promulgated rule as clearly preferred by the federal law. Second, the "policy" that is the pivotal reason for denying Mr. Jones the promotion was not in effect at the time of the bid award. The "policy" had been submitted to the Rehabilitation Services Administration for approval, but had not been approved. The award of the facility was made around January 2010. The Rehabilitation Services Administration did not approve the "policy" change until July of 2012. A

"policy" is not a "policy" if it is a "proposed policy" and has not been approved and promulgated. This was not even close. It is impossible for this writer to pass off the requirement that rules and "policies" must be approved in order for an agency to enforce them. To say that the Agency had been in the development of the policy for several years and that operators were aware of this process is not a defense for enforcing any rule or "policy" not fully vetted through the established federal procedures.