

BEFORE THE

UNITED STATES DEPARTMENT OF EDUCATION

REHABILITATION SERVICES ADMINISTRATION

Case No. R-S/10-07

ARBITRATION DECISION

STATE OF CALIFORNIA, DEPARTMENT OF REHABILITATION,

COMPLAINANT

v.

UNITED STATES GENERAL SERVICES ADMINISTRATION,

RESPONDENT

Arbitration Panel:

Joseph Gentile (Chair)

Jeff Tom

Martin Hom

The arbitration of the above captioned matter was held January 7-8, 2012, in the Federal Building located at 300 North Los Angeles Street, Los Angeles, California. Complainant STATE OF CALIFORNIA, DEPARTMENT OF REHABILITATION ("DOR") was represented by Daisy Hughes and respondent UNITED STATES GENERAL SERVICES ADMINISTRATION ("GSA") was represented by Charles McCarthy. The arbitration panel consisted of Joseph Gentile (Chair), Jeff Thom (Designated by DOR), and Martin Hom (Designated by GSA).

Both documentary and oral evidence was presented by DOR and GSA and the following exhibits were admitted as part of the record: 1, 2, 4, 5, 6, 7, 9, 10, 11, 30, 31, 32, 33, 35, 36, 37, 38A, 38B, 39, 40, 41, 42, 43, 44, 52, 56, 58, 59, 61, 65, 68, B, C, D, E, F, I, J, K, M, N, O, P, R, S, T, U, V, and W.¹ Additionally declarations from Douglas, Jiggins, Ciprazo, and Theriault were admitted as part of the record.

I. INTRODUCTION

This arbitration arises out of a permit for the establishment and operation of a vending facility under the Randolph-Sheppard Act ("the Act") in the Federal Building located at 300 North Los Angeles Street, Los Angeles, California 90012. The permit contemplated that the vending facility would be a

¹ Prior to the arbitration DOR pre-marked its proposed exhibits starting with the number 1, and GSA pre-marked its proposed exhibits starting with the letter A.

lobby coffee cart and a third floor snack shop. Based on this permit DOR entered into an agreement in February 2002 with Michael Fields (“Fields”) to operate the vending facility and Fields began operating the lobby coffee cart and snack shop soon thereafter. Fields continues to operate the lobby coffee cart and snack shop.

DOR complains that GSA violated The Act when GSA altered the lobby coffee cart location and configuration in September 2009, and when GSA moved the storage and office facilities from the third floor to the sub-basement in April 2011.

GSA denies that it violated The Act in any manner and asserts that it merely sought to restore the lobby coffee cart vending facility so that it would be in compliance with the permit and that GSA has the right to manage the property in the best interest of the government.

II. ISSUE PRESENTED FOR ARBITRATION

The parties agreed that the central issue in this arbitration was, whether GSA violated the Randolph-Sheppard Act, 20 U.S.C. 107 et seq., and the implementing regulations, 34 C.F.R., part 395, when it altered the vending facility at 300 North Los Angeles Street, Los Angeles, California 90012, in September 2009 and in April 2011.

III. STATEMENT OF FACTS

1. In March 1996, DOR and GSA executed a permit to establish and operate a vending facility at the Federal Building at 300 North Los Angeles Street, Los Angeles, California 90012. The vending facility was described in the permit as “wet vending” and established a third floor snack shop and a lobby espresso cart as the vending facility. The permit provided for a vending facility of 935 square feet. (Ex. 1.)
2. On November 15, 2001, DOR advertised the vending facility to all licensees and vendors of the Business Enterprise Program. The advertisement does not mention or attach a copy of the permit. The advertisement identifies the following areas: (1) lobby espresso/food bar; (2) third floor wet stand; (3) third floor. (Ex. 2.)
3. Fields toured and visited the proposed site at the Federal Building several times after he viewed the advertisement. (Tr. at 20.) At the time Fields viewed the proposed site at the Federal Building the lobby coffee cart was already configured with table and chairs. (Tr. at 30).
4. On February 4, 2002, DOR granted Fields the exclusive rights to operate the vending facility in accordance with the permit. (Ex. 3)
5. After Fields was granted the right to operate the vending facility, Fields made some modifications to the lobby coffee cart which included additional storage cabinets, a nacho machine, and chili, among other things. (Tr. at 33-38.)
6. On July 28, 2009, at the quarterly meeting, GSA raised the issue with DOR that the lobby coffee cart had expanded beyond the scope of the permit without authorization. GSA was encouraged to issue a written statement to DOR. (Ex. 27.)

7. On September 1, 2009, Rebecca O'Dell, GSA's Director of Facilities Management and Services Division, informed Debra Meyer, DOR's Program Manager, that the lobby coffee cart had expanded beyond the scope of the permit causing problems for emergency egress, and accessibility problems for persons with disabilities, and causing damage to the lobby mosaic mural. GSA further informed DOR that it would address these problems by downsizing the lobby coffee cart to a maximum size of six feet with no tables, display cases, or periphery equipment. The lobby coffee cart was to be relocated to a different location in the lobby and be limited to coffee and prepackaged pastries. GSA provided DOR with the necessary information to prepare an updated permit. (Ex. 27.)
8. On September 17, 2009, Rebecca O'Dell, GSA's Director of Facilities Management, confirmed in a September 15, 2009, teleconference with Anthony Candela, DOR's Deputy Director of the Specialized Services Division, wherein GSA informed DOR of the need to modify the lobby coffee cart operation and location due to the following:
 - The operation had expanded beyond the scope of the existing permit beyond that Mr. Fields was serving food items beyond the permissible items for sale in the permit and that the configuration of the lobby coffee cart had expanded beyond what was envisioned in the permit.
 - Lobby coffee cart operation had an adverse impact on the emergency egress from the lobby.
 - Lobby coffee cart had "unsatisfactory" ratings from the Federal Occupational Health Inspections in July and August 2009.

GSA requested that BEP relocate the lobby coffee cart to the new lobby location and dimensions by September 21, 2009. (Ex. 29.)

9. On September 21, 2009, Anthony Candela informed GSA that due to a furlough day, DOR did not have sufficient time to respond to the September 17, 2009 correspondence and wanted to present GSA with some alternative possibilities for the lobby coffee cart and the third floor snack shop. (Ex. 30.)
10. GSA extended the deadline to relocate the lobby coffee cart until September 23, 2009. (Ex. 30.)
11. On September 23, 2009, Anthony Sauer, DOR's Director, sent correspondence to John Tate, GSA's Deputy Regional Commissioner, wherein Mr. Sauer urged Mr. Tate to meet with Anthony Candela so that Mr. Candela could provide information to GSA that the operations were not contrary to permit and should not be changed. (Ex. 31.)
12. The lobby coffee cart was relocated to its current location in the lobby in front of the alcove on the southwest side of the lobby on September 23, 2009. (Tr. at 53.)
13. On October 2, 2009, GSA forwarded a new permit to DOR for signature for the lobby coffee cart, which provided that the lobby coffee cart would be located in front of the alcove on the southwest side of the lobby and that items approved for sale were, hot beverages, espresso service, iced coffee/espresso, commercially pre-packaged baked goods from an approved source, and fresh whole fruit. (Ex.34.)

14. On October 31, 2009, DOR provided GSA with a counter proposal that included the third floor snack shop (600 sq. ft.), third floor office and storage (900 sq. ft.), lobby espresso cart and basement storage (350 sq. ft.), parking space, access and usage of two janitor closets. The lobby espresso cart was in front of the same alcove on the southwest side of the lobby but with an expanded cart size. (Ex. 35.)
15. On November 12, 2009, John Tate informed Anthony Candela that the third floor storage was no longer available and Mr. Fields would have to move, but that he would be in Los Angeles on November 23 and would look at the operations, locations, and storage area before making any final decisions. (Ex. 35.)
16. On December 15, 2009, John Tate informed Anthony Candela that he had viewed the operations and responded to DOR's November 2, 2009, proposal. Mr. Tate stated that the third floor storage area currently used by Mr. Fields was needed by the current tenants who expressed critical space needs, but that GSA would make available 345 sq. ft. of storage space in the sub-basement immediately adjacent to the freight elevator in addition to the 325 sq. ft. of basement storage/office space currently being used. GSA also agreed to install a water line in the third floor snack shack and to provide, until such time as critical needs would require the parking space's reassignment, a parking space in the building for Mr. Fields. However, the size, location, and offerings of the lobby coffee cart had to be based of health and safety concerns, impact on the ability to evacuate the building, and satisfaction of the tenants that the reconfigured location addressed those needs. (Ex. 37.)
17. On December 24, 2009, DOR informed GSA that the sub-basement area being offered for storage as replacement for the third floor storage area was a poor replacement and not adequate for Mr. Fields to run his business. If there was no alternative, a list of necessary modifications needed to be performed. (Ex. 38A.)
18. On January 6, 2010, GSA informed DOR that DOR's proposal to move the third to move the third floor storage area to the first floor would not work due to tenant critical office space requirements, but that GSA would remove the cabinets, install outlets and lights, and paint the proposed sub-basement storage area. GSA further state that it would not install phone lines, video, intercom, or music lines in the sub-basement storage area, but had no objection to the State installing such items. (Ex. 40.)
19. On February 16, 2010 BEP stated that Mr. Fields cannot be forced to move to the sub-basement storage area because he cannot manage his business from this location. (Ex. 41.)
20. In April 28, 2010, GSA complained that Mr. Fields had improperly installed additional equipment to the lobby coffee cart without authorization which caused safety and egress concerns. When the equipment was not moved, GSA moved the equipment to the storage area that Mr. Fields had access. (Ex. 47.)
21. On March 21, 2011, GSA informed DOR that this was final notice regarding the need to relocate from the third floor office/storage space to the sub-basement area by April 22, 2011, so that the space will be available for USDA by May 5, 2011. GSA informed DOR that this move did not involve the third floor snack shop. GSA further stated that if the contents were not moved by April 22, 2011, GSA would arrange for the relocation of the items. Finally, GSA pointed out that there is nothing in the permit which grants the use of the 917 sq. ft. of the third floor

office/storage space, and the current configuration exceeds the 935 sq. ft. granted in the permit. (Ex. 53.)

22. On April 9, 2011, DOR informed GSA that it did not agree with the third floor office/storage relocation and requested that GSA withdraw its “final notice” for the relocation of the third floor office/storage space. (Ex. 56.)
23. On April 15, 2011, GSA again informed DOR that if Mr. Field’s possessions were not moved from the third floor office/storage area by close of business April 22, 2011, that GSA had arranged for movers to move the possessions to the sub-basement storage area beginning at approximately 10 a.m. on April 25, 2011. (Ex. 57.)
24. In response to GSA’s April 15, 2011, letter, DOR again requested that GSA refrain from relocating the third floor office/storage facility which DOR believed was a violation of the Randolph-Sheppard Act. (Ex. 58.)
25. On April 21, 2011, GSA responded to DOR’s April 15, 2011, correspondence stating that the issue was first raised in July 2009 and had been the topic of many weeks of discussions and that GSA would proceed with the relocation on April 25 to be able to satisfy critical Recovery Act renovations in the building. (Ex. 59.)
26. The vending facility is currently comprised of the following areas: (1) lobby coffee cart, 165 sq. ft.; (2) third floor snack shop, 513 sq. ft.; (3) basement storage area, 325 sq. ft.; and (4) sub-basement office and storage, 345 sq. ft. (Joint Stipulations)

IV. DISCUSSION

- A. The Randolph-Sheppard Act (“The Act”) creates a cooperative program between the Federal Government and the States for blind persons to operate vending facilities on Federal property. (See 20 U.S.C. § 107.) The Rehabilitation Services Administration within the U.S. Department of Education administers The Act through state agencies. (20 U.S.C. §§ 107(b), 107a(a).) Participation by the states in the program is voluntary, and a state agency must apply to the Secretary of the U.S. Department of Education to be designated as a state licensing agency. (See, 20 U.S.C. § 107b.) Each state licensing agency issues licenses to blind persons to make them eligible to operate the vending facilities of Federal property. (20 U.S.C. § 107a(b).) The state licensing agency must apply to the Federal agency that controls the property for the proposed location of a vending facility for a permit to establish and operate the vending facility at that location. (20 U.S.C. § 107a(c); 34 C.F.R. § 395.16.) Generally, the permit shall describe the location of the vending facility, including the location of any vending machines, and is also subject to a number of other requirements, including,
 - That the permit is issued in the name of the state licensing agency.
 - That the permit is for an indefinite period of time
 - That the permit provides that articles sold at the vending facility may consist of newspapers, periodicals, publications, confections, tobacco products, foods, beverages, lottery tickets if authorized by state law, and other articles and services as are

determined by the state licensing agency in consultation with the on-site official for the federal agency responsible for managing the property.

- That the permit provides that the installation, modification, relocation, removal, and renovation of vending facilities shall be subject to prior approval of the on-site official for the federal agency responsible for managing the property and the state licensing agency.

(34 C.F.R. § 395.35.)

When issues arise over the operation of a vending facility, the regulations provide that,

- (a) The state licensing agency shall attempt to resolve day-to-day problems pertaining to the operation of the vending facility in an informal manner with the participation of the blind vendor and the on-site official responsible for the property if the property managing department, agency, or instrumentality as necessary.
- (b) Unresolved disagreements concerning the terms of the permit, the Act, or the regulations in this part and any other unresolved matters shall be reported in writing to the State Licensing agency supervisory personnel by the Regional or other appropriate official of the Federal property managing department, agency, or instrumentality in an attempt to resolve the issue.

(34 C.F.R. § 395.36.)

In the event that there is a disagreement, depending on who brings the action, The Act provides for two different methods to resolve disputes. If the licensee of the vending facility is dissatisfied with any action arising from the operation or administration of the vending facility program, the licensee may submit a request to the state licensing agency for a full a full evidentiary hearing. If the licensee is dissatisfied with the decision, the licensee may file a complaint with the Secretary who will convene a panel to arbitrate the dispute. (20 U.S.C. § 107d-1(a).) If the state licensing agency determines that the federal agency that has control of the maintenance, operation, and protection of the federal property has failed to comply with The Act, or its implementing regulations, the state licensing agency may file a complaint with the Secretary who will convene a panel to arbitrate the dispute. (20 U.S.C. § 107d-1(b).) Here, DOR filed a complaint with the Secretary alleging the GSA failed to comply with The Act and its implementing regulations when the vending facility was relocated without DOR's approval.

B. RELOCATION OF THE COFFEE CART IN SEPTEMBER 2009

The California Department of Rehabilitation, Business Enterprise Program for the Blind is the state licensing agency for California and was granted a permit from GSA to establish a vending facility in the Federal Building located at 300 North Los Angeles Street, Los Angeles, California in March 1996. The permit describes the vending facility as a "WET VENDING FACILITY". (Ex. 1.) The type location and size of the vending facility are described as follows:

Type of facility defined in instructions for form OHD-RSA-15): WET VENDING; Facility Location: THIRD FLOOR AND ESPRESSO CART SERVICE LOBBY; Facility size: 935 square feet (floor plan Attachment B). The types of articles to be sold and services to be offered are enumerated in Attachment C. The fixtures and equipment for this facility, including the responsibility for the provisions thereof, are set forth in Attachment D. The location , type, and number of vending machines which constitute all or part of this facility are noted in Attachment E. The facility will operate 5 days a week from 7:00 A.M. to 3:30 P.M. commencing on 3/31/96.

(Ex. 1)

The permit included a floor plan for the third floor snack shop which is entitled “Dry Vending Stand” and a hand drawn floor plan for the lobby coffee cart entitled “proposed cart/espresso”. (Ex. 1 at Attachment B) The permit also sets forth the approved items for sale. The only items that the permit provides may be prepared on site are “Coffee – complete Espresso service on lobby carts” and “Beverages, other – Iced Coffee/Espresso and Smoothie”. (Ex. 1 at Attachment C.) All other food items were classified as “PREPACKAGED ITEMS (not prepared on premises)”. (Id.)

The lobby coffee cart as it existed in November 2001, when DOR issued the Vending Facility Announcement, was in a different location and configuration as depicted in the permit. Furthermore, Fields continued to operate the lobby coffee cart in that location and configuration from the time he was awarded the contract by DOR in February 2002 through September 2009. There was no evidence presented to the panel as to what transpired in 1996 after the permit was granted to DOR and how the lobby coffee cart configuration, including the table and chairs, ended up in the configuration prior to Fields being awarded the contract for the vending facility in February 2002. DOR Program Manager, Deb Meyer, testified that it appeared that nobody complied with the permit when she began working for DOR in 2008. (Tr. at 152.) During the site visit during the arbitration, it was evident that the lobby did not have planters or escalators as shown in the coffee cart layout in the permit, but it is not clear to the panel if the planter and escalators ever existed or if they were recently removed as part of the current renovations.

GSA first raised the issue of the location and configuration of the lobby coffee cart with DOR during a quarterly meeting on July 28, 2009. (Ex. 27.) Then a month later, on September 1, 2009, Rebecca O’Dell, GSA’s Director of Facilities Management and Services Division, informed Debra Meyer, DOR’s Program Manager, of the issues involved with the lobby coffee cart size and location. Ms. O’Dell informed DOR that the lobby coffee cart issues involved recent “unsatisfactory health ratings” by the Federal Occupational Health inspector, impact to the emergency egress of the lobby due to the lobby coffee cart size and location, and damage to the historic mural. (Id.) Ms. O’Dell informed DOR that,

GSA plans to address the root cause of these problems by requiring the downsizing of Mr. Fields’ coffee cart to a maximum overall length of six feet, with no tables, display cases or other peripheral equipment. The cart will be relocated to another location in the lobby, and its offerings will be strictly limited to coffee and prepacked pastries.

GSA gave DOR until September 8, 2009, to implement the changes in its September 1, 2009 correspondence. (Id.) Apparently, a September 15, 2009, conference call between GSA and DOR was held to discuss the relocation of the lobby coffee cart, but the GSA was intent on relocating the lobby coffee cart as it informed DOR that "...we hope the BEP will appropriately modify and relocate the coffee cart to the new location before the close of business on September 21, 2009. Otherwise GSA is prepared to remove and store all excess furniture and equipment on-site for a 30-day period." (Ex. 29) when DOR sought a short extension due to furlough days, GSA intent was clear when GSA informed DOR that,

Just wanted to be clear that the two day extension was only for the deadline to relocate the Coffee Cart from September 21, 2009 to September 23, 2009 and not for additional time to present new alternatives to consider.

(Ex. 30.)

The lobby coffee cart was relocated to its current location and configuration on September 23, 2009, over DOR's objections. Even though the lobby coffee cart had been downsized and relocated, GSA and DOR continued to discuss the issue. Discussions and proposals ensued between John Tate, GSA's Deputy Regional Commissioner, and Anthony Candela, DOR's Deputy Director of Specialized Services Division, over the next five months through February 2010. (Ex. 35, 36, 37, 38A, 40, and 41.)

The problem that this panel faces in this case is that neither party presented any evidence on the negotiation of the permit in 1996, and how the lobby coffee cart ended up in the location and configuration that GSA ultimately objected to on July 28, 2009. The permit had been in place for 13 years, and Fields had operated the lobby coffee cart in that location and configuration for a period of more than seven years. Fields testified that during those seven years, he added tow storage cabinets, as well as a nacho machine and chili, all without any objection by GSA. (Tr. 33 – 38.) Further, there was no evidence as to what changed or what transpired in July 2009 that caused GSA to object to the lobby coffee cart location and configuration. What is clear to the panel is that the lobby coffee cart location and configuration in the permit is not what was in existence at the time Fields viewed the vending facility in late 2001 and when he began operating the vending facility in early 2002. There is no evidence as to what changes were made and when to the vending facility from 1996 to 2002, or if the parties even agreed to those changes. The panel is unsure if the lobby coffee cart described in the permit existed in that configuration, because the permit describes the layout as "proposed". With that in mind, the panel is not in a position to guess what happened between 1992 and 2002.

1. Size of Vending Facility

The permit does describes the vending facility as a third floor wet stand and a lobby coffee cart, both of which encompass 935 square feet. (Ex. 1.) The permit, however, makes no mention of storage space or office space. The parties stipulated that the current third floor snack shop was 513 square feet in size and that the current lobby coffee cart location was 165 square feet in size, for a total of 689 square feet. GSA argues that the sub-basement office/storage area² and the basement storage area³ total and

² The parties stipulated that the sub-basement office/storage area was 345 square feet.

another 670 square feet which must be considered so that GSA has provided a significant amount of space beyond the 935 square feet contemplated in the permit.

Unfortunately, the permit does not contemplate storage space or an office, but contemplates that the lobby coffee cart and the third floor snack shop would be 935 square feet. GSA argues that the definition of a “satisfactory site” means that there is a minimum of 250 square feet available for the vending and storage of articles necessary for the operation of a vending facility so the storage areas being used by DOR should be included in the calculation. (See, 34 C.F.R. §395.1(q)(1).) In order to establish a vending facility the implementing regulations state that,

...the State Licensing agency shall submit an application for a permit setting forth the location, the amount of space necessary for the operation of the vending facility; the type of facility and equipment, the number, location and type of vending machines and other terms and conditions desired to be included in the permit.

(34 C.F.R. § 395.16.)

Under the implementing regulations, KOR was to set forth the amount of space necessary for the operation of the vending facility at the 300 North Los Angeles Street federal building. Here, the permit states that the facility size is 935 square feet and references the two floor plans at Attachment B to the permit which is the lobby coffee cart and the third floor snack shop. The permit makes no mention of storage space and/or office space. Therefore, the only conclusion that can be reached is that the 935 square feet refers only to the size of the lobby coffee cart and the third floor snack shop. Since the parties have stipulated that the current configuration of the lobby coffee cart and the third floor snack shop total 689 square feet, the panel finds that GSA violated The Act and its implementing regulations by not providing a total of 935 square feet for the lobby coffee cart and the third floor snack shop.

2. Lobby Coffee Cart Location

The permit includes a “proposed cart/espresso” showing the location of the lobby coffee cart in front of the lobby planters under the escalators facing the lobby mural. (Ex 1 at Attachment B.) At the time that Fields took over the operation of the vending facility, including the lobby coffee cart, the location of the coffee cart was now in front of the lobby mural facing the opposite direction from the “proposed” location depicted in the permit with a different configuration. Fields testified that he added two storage cabinets, but essentially the configuration of the lobby coffee cart remained unchanged from November 2001 through September 2009. Again, there was no evidence presented as to how the lobby coffee cart ended up in that configuration or when the table and chairs were added.

DOR contends that any limitations on the placement or the operation of the vending facilities based on a finding that the placement or operation would adversely affect the interests of the United States must be justified in writing to the Secretary of Education who shall determine if such limitation is justified and publish the decision in the Federal Register. DOR argues that since the Secretary of Education never

³ The parties stipulated that the basement storage area was 325 square feet.

made such a determination, that GSA could not implement those limitations. (See 20 U.S.C. § 107(b)) Furthermore, the implementing regulations provide that the installation, modification, relocation, removal, and renovation of vending facilities shall be subject to prior approval of the on-site official for the federal agency responsible for managing the property and the state licensing agency. (See 34 C.F.R. §395.35.)

GSA argues that it did not place any limitations on the vending facility, but had the right to relocate the lobby coffee cart for the following reasons: (1) the lobby coffee cart interfered with the potential emergency egress of the building, (2) the lobby coffee cart damaged the historical mural, (3) the lobby coffee cart failed to comply with GSA mandates for design excellence, and (4) and the lobby coffee cart received two unsatisfactory health ratings. While each of the reasons set forth by GSA may be valid reasons for requesting that DOR agree to relocate the lobby coffee cart, GSA's argument ignores the requirements of The Act and its implementing regulations which require that any installation, modification, relocation, removal, and renovation of vending facilities shall be subject to prior approval of the on-site official for the federal agency responsible for managing the property and the state licensing agency. (34 C.F.R § 395.35.) GSA argues that DOR agreed to the relocation, but DOR adamantly denies that it ever agreed to the relocation. This is supported by the fact that DOR continued discussions with GSA regarding the relocation, size, and configuration of the lobby coffee cart months after GSA relocated the lobby coffee cart. (Ex. 35.) Even though, DOR offered a compromise proposal, GSA rejected DOR's proposal stating that the size, location, and offerings of the lobby coffee cart had to be based on health and safety concerns, impact on the ability to evacuate the building, and satisfaction of the tenants that the reconfigured location addressed those needs. (Ex. 37.) Unfortunately, GSA was required to get DOR's agreement prior to any relocation of the vending facilities and as it related to the lobby coffee cart and GSA simply failed to get DOR's approval for the relocation of the lobby coffee cart. Accordingly, the panel finds that GSA violated The Act and its implementing regulation when it relocated the lobby coffee cart in September 2009 to its current location.

3. Lobby Coffee Cart Offerings

DOR also complains that GSA has limited the lobby coffee cart offerings in violation of The Act and its implementing regulations. GSA argues that all of the items identified in the permit are offered for sale in either the lobby coffee cart or the third floor snack shop so GSA has not limited anything in any manner. On September 1, 2009, GSA informed DOR, among other things, that the lobby coffee cart will be limited to coffee and pre-packaged pastries. (Ex. 27.)

The permit provides that "[t]he types of articles to be sold and services to be offered are enumerated in Attachment C." (Ex. 1.) With regard to food and drinks, the permit lists two categories, "PREPACKED ITEMS (not prepared on premises)" and "PREPARED ITEMS (prepared on premises)" that can be sold at the vending facility. (Ex. 1 at Ex. C.) The permit does not designate what items can or cannot be sold at the lobby coffee cart and what items can or cannot be sold at third floor snack shop. While it appears that the dispute over certain offerings at the lobby coffee cart (i.e. nachos, hot dogs, chili, popcorn) were considered items that were prepared on the premises and therefore not allowed under the permit, GSA's September 1, 2009, correspondence has gone too far in limiting the offerings to only coffee and

pre-packaged pastries. (Ex. 27.) In addition to violating The Act and its implementing regulations when the lobby coffee cart was relocated, the panel also finds that GSA violated The Act and its implementing regulations by limiting the offerings at the lobby coffee to coffee and pre-packaged pastries in its September 1, 2009, correspondence.

C. RELOCATION OF THE THIRD FLOOR STORAGE/OFFICE IN APRIL 2011

In July 2009, GSA informed DOR that because of the downsizing of the lobby coffee cart and tenant critical space needs on the third floor, the third floor storage/office space being used by Fields would need to be relocated to the sub-basement area. (Ex. 27.) DOR and Fields objected to the moving of the third floor storage/office space stating that it would be too difficult for Fields to manage and operate the lobby coffee cart and the third floor snack shop from the sub-basement area because of the distance to both the lobby and the third floor, and the lack of adequate communications (i.e. phone lines). Additionally, DOR and Fields stated that the proposed sub-basement area was inadequate in size.

Discussion regarding the relocation of the third floor storage/office space continued for a period of more than two years. When it became apparent to GSA that DOR and Fields would not agree to move, GSA informed DOR that it had movers ready to move Fields' supplies and possessions on April 25, 2011, because the renovation of the third floor space for the tenants was about to begin. It is unclear to the panel if DOR is authorized to occupy anything other than the third floor snack shop or the lobby coffee cart because the permit is silent as to any storage/office space on the third floor, basement, sub-basement or any other portion of the building. All the permit describes is 935 square feet for the lobby coffee cart and the third floor snack shop without any mention of the storage/office space. Section 395.35 of the regulations provides that "[e]very permit shall describe the location of the vending facility." Neither party provided any evidence as to whether the custom and practice in negotiating the permits included the listing of storage/office space that a State Licensing Agency would occupy as part of the vending facility.

GSA argues that section 395.1(q) of the regulations specifically defines a "satisfactory site" as one that includes a minimum of 250 square feet available for the vending and storage of articles necessary for the operation of the vending facility. Therefore, the inclusion of the 670 square feet of storage/office space must be considered when making a determination of whether GSA violated The Act when the lobby coffee cart was relocated. DOR, on the other hand, argues that the 935 square feet identified in the permit applies only to the lobby coffee cart and third floor snack shop, but DOR's argument fails to address the storage/office space that was occupied by Mr. Fields. DOR has the burden of proving the GSA violated The Act and its implementing regulations when it relocated the third floor storage/office space in April 2011 to the sub-basement area. While it appears that GSA allowed DOR to occupy the third floor storage/office space for a long period of time, the parties have asked this panel to determine if the April 2011 relocation of the third floor storage/office space was in violation of The Act and its implementation regulations. The permit states that the location is a "satisfactory site", meets all of the criteria identified in Section 395.1(q), and no exceptions to the site were listed in the permit. (Ex. 1.) Since the permit is silent as to the usage of the third floor storage/office space, the panel cannot find that GSA violated The Act or its implementing regulations when the third floor storage/office space was

relocated to the sub-basement in April 2001 because the permit is the authority in which DOR is allowed to occupy the space in a federally owned space. There was no evidence presented that the terms of the March 1996 permit were ever modified or changed by the parties.

During discussions regarding the relocation of the lobby coffee cart and the third floor storage/office space, GSA and DOR each prepared new permits reflecting the size and location of the vending facility that each party would presumably agree with. (See, Exs. 34, 35, 42.) While neither of the new permits were agreed upon or executed, it is interesting to note that in each of the new permits, each party expressly included the location and size of the storage space in the new permit that it offered to the other party. (*Id.*) The parties obviously knew that the permit is what defines the locations and size of the areas that DOR is entitled to occupy, including storage space. The panel finds that GSA did not violate The Act or its implementing regulation when the third floor storage/office space was relocated to the sub-basement are because there is no evidence that DOR was ever entitled to occupy the third floor storage/office space in the first place.

V. Conclusion

For the reasons state above, the panel finds that GSA violated The Act and its implementing regulations, by relocating the lobby coffee cart and failing to provide a total of 935 square feet for the lobby coffee cart and the third floor snack shop as the current configuration only encompasses 678 square feet. DOR is entitled to another 257 square feet; by relocating the lobby coffee cart in September 2009, without first getting DOR's approval. The panel also finds that GSA violated The Act and its implementing regulations by limiting the offerings at the lobby coffee cart to coffee and pre-packaged pastries.

The panel finds that GSA did not violate The Act and its implementing regulations when the third floor storage/office space was relocated in April 2001 because the permit does not include an area for storage/office space.

Dated 5/15/ 2013

Joseph Gentile, Panel Chairman

Dated 5/13/2013

Jeff Thom, Panel Member

Dated 5/13/2013

Martin Hom, Panel Member