

UNITED STATES DEPARTMENT OF EDUCATION
REHABILITATION SERVICES ADMINISTRATION

CALIFORNIA VENDORS POLICY
COMMITTEE, on behalf of all California
vendors, Petitioner,

vs.

STATE OF CALIFORNIA,
DEPARTMENT OF REHABILITATION,
Respondent.

Case No. R-S/10-9

ARBITRATION PANEL'S
FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND AWARD

I. BACKGROUND AND INTRODUCTION

The Randolph-Sheppard Act's, (R-S Act) purpose is:

providing blind persons with remunerative employment, enlarging the economic opportunities of the blind, and stimulating the blind to greater efforts in striving to make themselves self-supporting[.]

20 U.S.C.A. § 107.

The State of California, Department of Rehabilitation (DOR) operates a program, the Business Enterprise Program (BEP) pursuant to the R-S Act, which is a federal-state cooperative program designed to train, license, and supervise blind individuals so that they can obtain and maintain remunerative employment. 20 U.S.C. § 107. DOR is the State Licensing Agency¹ (SLA) appointed by the United States Department of Education, Rehabilitation Services Administration (RSA) for the State of California. The California BEP program is governed by the R-S Act, its implementing regulations, 34

¹ The State Licensing Agency is the agency in each state charged with training, licensing, and supervision of blind licensees. 20 U.S.C. § 107b. In addition the SLA administers the program, including "adopting accounting procedures and mandating financial records so as to enable evaluation of the SLA's performance." 20 U.S.C. §§ 107b-1(1) and (3).

C.F.R. §§ 395.1 through 395.38, Calif. Welf. & Inst. Code §§ 19625 through 19641 and Title 9, California Code of Regulations (CCR).

Pursuant to the R-S Act, a committee of blind vendors is voted upon by all licensed vendors in a state. 20 U.S.C. § 107b-1(2). In California, it is termed the California Vendors Policy Committee (CVPC). *Inter alia*, the CVPC's responsibilities require it to:

- (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;

34 C.F.R. § 395.14(b)

A. Standard of Review

This Panel is directed to, in accordance with the provisions of subchapter II of chapter 5 of Title 5, give notice, conduct a hearing, and render its decision[.]” 20 U.S.C. § 107d-2(a). Further, 5 U.S.C. § 556(d) provides that the proponent of an order has the burden of proof, and an order may issue “in accordance with the reliable, probative, and substantial evidence.” *Id.* Accordingly, Petitioner has the burden of proof to prove by substantial evidence that Respondent violated the R-S Act. “This is something more than a mere scintilla but something less than the weight of the evidence.” Pennaco Energy v. U.S. Dep’t of Interior, 377 F.3d 2247, 1156 (10th Cir. 2004).

B. Background of Vending Machine Income-Sharing Requirement

In 1974, the R-S Act was extensively revised. One of the main purposes of the revision was to protect the prior right of the blind to operate vending facilities on Federal property. The legislative history of the 1974 amendment makes it clear that, while the blind program was a success, “that success is as much a credit to the tenacity of the

vendors themselves as it is to the administrators of the program[.]” Sen. Rep. 93-937, p.

10. The report noted “serious problems” encountered by the blind vendors. Id. The report noted:

- Competition from automatic vending machines has increasingly threatened to suffocate the blind vendor program.
- Federal employee welfare and recreation groups refuse to part with any of the income from such machines, even though the use of such income by such groups is of questionable legality.

Accordingly, the R-S Act includes a provision whereby vending machines on federal property not operated by blind vendors are subject to income sharing. 20 U.S.C. § 107d-3. The purpose of income-sharing is to “achieve and protect” the R-S Act’s priority right for blind individuals to operate vending facilities on Federal and other property. 20 U.S.C. § 107(b)(1). The legislative history explains the importance of the change in the law to blind vendors:

Subsection (c) of section 7 [now 20 U.S.C. § 107(b)(1)] requires that vending machine income accruing to State agencies under subsection (a) is to be used for the benefits described under section 3(3)(E) of the Act. Currently, with the exception of tentative experiments in a few States, there is no provision of so-called “fringe” benefits for blind vendors which most working people take for granted. A blind vendor, as much as anyone else, has the right to expect the protection of income and health security. The Committee is of the opinion that there are few workers who are more deserving of pensions, health insurance, and sick leave and vacation time, than are blind vendors. Blind vendors often are assessed a percentage of their gross or net incomes by State licensing agencies for the purpose of providing set-aside funds for equipment, management services, and assuring a fair minimum return for all vendors. To a low income blind licensee such assessment creates a real hardship. It is the Committee’s hope that such assessments can be reduced through the accrual of vending machine income by State agencies.

Sen. Rep. 93-937, p. 23.

C. Procedural History

In 2007 DOR began to explore the possibility of entering into a statewide agreement with the United States Postal Service (USPS). The result was the draft USPS statewide

vending contract that is contained in Petitioner's Exhibit 3. In August of 2010, Joe Xavier, then Deputy Director of the DOR Specialized Services Division, Blind & Visually Impaired and Deaf & Hard of Hearing, the Division that contains BEP, decided that DOR would not enter into an agreement with the USPS based on the terms of the draft USPS statewide vending contract.

On August 19, 2010, the CVPC voted to request a full state-level evidentiary hearing pursuant to 20 U.S.C. section 107d-1 to review DOR's decision not to enter into the statewide agreement with the USPS. (Petitioner's Exhibit 5.) The hearing was conducted before Administrative Law Judge Karen Brandt of the California Office of Administrative Hearings (OAH) on October 21, 2010, February 17, 2011, and March 10, 2011.

On June 13, 2011, Judge Brandt issued a Proposed Decision in favor of DOR. DOR Director, Anthony P. Sauer, adopted the Proposed Decision on June 21, 2011. (*CVPC v. Department*, OAH Case No. 2010081085 (Department of Rehabilitation, June 21, 2011) (Administrative Record).

On July 1, 2011, CVPC filed the instant Complaint with RSA, pursuant to 20 U.S.C. section 107d-1, requesting that the matter be submitted to arbitration as provided for in 20 U.S.C. section 107d-2. (Petitioner's Exhibit 36.) On January 6, 2016, RSA accepted the complaint and agreed to convene an arbitration panel. (Petitioner's Exhibit 37.)

The Panel members were Gary A. Anderson, Arbitrator and Panel Chairperson; Ralph Black, SLA Appointee; and Susan Gashel, CVPC Appointee. The Panel held a pre-hearing conference on January 5, 2017, briefs were filed by the parties on February 15, 2017, and the hearing was held February 22-23, 2017, in Sacramento California.

Post hearing briefs were filed by the parties on April 14, 2017. The parties then engaged in lengthy settlement discussions, but when this effort was unsuccessful, final reply briefs were filed September 22, 2017.

D. Statement of Issue

Whether the SLA'S failure to collect unassigned vending machine income for the benefit of blind vendors violated the Randolph-Sheppard Act, implementing regulations, and state rules and regulations. Petitioner's Exhibit 37.

E. Applicable Law

1. Vending Machine Income on Federal Property

The R-S Act requires that vending machine income² on Federal property accrue to, or for the benefit of, blind licensees. It is important to note that the term "vending machine income" refers to net income. 34 C.F.R. § 395.1(z). Vending machine income accrues to the SLAs and individual blind vendors through the following mechanisms:

- a. The Federal agency is responsible to collect and account for vending machine income under its control. 34 C.F.R. § 395.32(a). Disbursement shall occur on at least a quarterly basis. 34 C.F.R. § 395.32(g)
- b. 100% of the income from vending machines in direct competition with a blind vendor accrues to the blind vendor. 34 C.F.R. § 395.32(b). A ceiling may be

² Vending machine income is defined as "receipts (other than those of a blind vendor) from vending machine operations on Federal property, after deducting the cost of goods sold (including reasonable service and maintenance costs in accordance with customary business practices of commercial vending concerns) where the machines are operated, serviced, or maintained by, or with the approval of, a department, agency, or instrumentality of the United States, or commissions paid (other than to a blind vendor) by a commercial vending concern which operates, services, and maintains vending machines on Federal property for, or with the approval of, a department, agency, or instrumentality of the United States." 34 C.F.R. § 395.1(z).

placed on such income, with any amount over the ceiling disbursed as provided in section 2 below. Id.

- c. 50% of the income from vending machines not in direct competition with a blind vendor accrues to the blind vendor, subject to the ceiling described in the preceding paragraph. 34 C.F.R. § 395.32(c). Where there is no blind vendor, the 50% accrues to the SLA, and is disbursed as provided in section 2 below. Id.
- d. 30% of the income from vending machines not in direct competition with a blind vendor accrues to the blind vendor, where 50% of the hours worked are during a period other than normal working hours, subject to the ceiling described above. 34 C.F.R. § 395.32(d). Where there is no blind vendor, the 50% accrues to the SLA, and is disbursed as provided in section 2 below. Id.
- e. These requirements do not apply to income from vending machines at individual locations, installations or facilities³ which does not exceed \$3,000 annually and where machines do not directly compete with a blind vendor. 34 C.F.R. § 395.32(i). Here, income is gross income as the regulation does not use the defined term “vending machine income.”
- f. These requirements do not preclude arrangements that provide for a greater percentage of vending machine income or for the receipt of income from individual locations, installations or facilities which does not exceed \$3,000 annually. 34 C.F.R. § 395.32(j).

³ The term “individual location, installation or facility” is defined as “a single building or a self-contained group of buildings. In order for two or more buildings to be considered to be a self-contained group of buildings, such buildings must be located in close proximity to each other, and a majority of the Federal employees housed in any such building must regularly move from one building to another in the course of official business during normal working days.” 34 C.F.R. § 395.1(h).

2. Permitted Uses of Unassigned Vending Machine Income

Vending machine income obtained from the operation of vending machines on Federal property, where there is no blind licensee operating a vending facility on such property, accrues to the SLA for specific uses. 20 U.S.C. § 107d-3(a). Those specific uses are:

- a. to establish retirement or pension plans, for health insurance contributions, and for provision of paid sick leave and vacation time for blind licensees in such State, subject to a vote of blind licensees. 20 U.S.C. § 107d-3(c).
- b. any vending machine income remaining after the uses set forth in paragraph a. above may be used for the purchase of vending facility equipment, the maintenance and replacement of such equipment, management services,⁴ and assuring a fair minimum return to operators of vending facilities. Id., 20 U.S.C. § 107b(3).
- c. Reduction in the assessment, or set aside⁵ paid by blind vendors to the SLA, based on the vendors' net proceeds.⁶ 20 U.S.C. § 107d-3(c). Set-aside is

⁴ "Management services" is defined as "supervision, inspection, quality control, consultation, accounting, regulating, in-service training, and other related services provided on a systematic basis to support and improve vending facilities operated by blind vendors. "Management services" does not include those services or costs which pertain to the on-going operation of an individual facility after the initial establishment period." 34 C.F.R. § 395.1(j).

⁵ "Set aside" is defined as "funds which accrue to a State licensing agency from an assessment against the net proceeds of each vending facility in the State's vending facility program and any income from vending machines on Federal property which accrues to the State licensing agency." 34 C.F.R. § 395.1(s).

⁶ "Net proceeds" is defined as "the amount remaining from the sale of articles or services of vending facilities, and any vending machine or other income accruing to blind vendors after deducting the cost of such sale and other expenses (excluding set-aside charges required to be paid by such blind vendors). 34 C.F.R. § 395.1(k).

required to “be reduced pro rata in an amount equal to the total of such remaining vending machine income.” Id.

3. SLA’s Responsibilities Regarding Vending Machine Income and Set-Aside Assessments

The SLA is required to:

- a. Disburse vending machine income from machines in competition with blind licensees to the appropriate blind licensees on at least a quarterly basis. 34 C.F.R. § 395.8(b)
- b. Ensure that vending machine income is used for the purposes set forth in paragraph D.2., including to lower the set-aside paid by blind vendors to the SLA.
- c. Establish the amount of set-aside funds with the active participation of the CVPC, in a manner “designed to prevent, so far as is practicable, a greater charge for any purpose than is reasonably required for that purpose.” 34 C.F.R. § 395.9(c).
- d. Maintain adequate records to support the reasonableness of set-aside charges. Id.
- e. “Actively participate” with the CVPC in “major administrative decisions and policy and program development decisions affecting the overall administration of the State's vending facility program.” 34 C.F.R. § 395.14(b)(1).

4. SLA’s General Responsibilities

The SLA shall “cooperate with the Secretary in carrying out the purpose” of the R-S Act. 20 U.S.C. § 107b(1). Those purposes are “providing blind persons with remunerative employment, enlarging the economic opportunities of the blind, and stimulating the blind to greater efforts in striving to make themselves self-supporting[.]” 20 U.S.C. § 107. If

set-aside assessment is imposed, it will be only to the extent necessary. 20 U.S.C. § 107b(3). The SLA is directed to prevent, as far as practicable, any greater set-aside charge than is reasonably required. 34 C.F.R. § 395.9(c). The SLA is to ensure that set-aside assessments are reduced pro rata by unassigned vending machine income. 20 U.S.C. § 107d-3(c). The SLA is required to ensure that CVPC's responsibilities include active participation in major administrative decisions and program and policy development. 20 U.S.C. § 107b-1(3).

II. FINDINGS OF FACT

1. In the opinion of the SLA, with respect to vending machine income, its "role is just simply collect the money, to receive the fees, and then deposit that into the vendors' retirement fund." Transcript of Hearing, R-S/10-9, February 22 and 23, 2017 (TR), Page (@) 38. Testimony of Elena Gomez, Deputy Director for the Specialized Service Division for the Blind or Visually Impaired, Deaf and Hard of Hearing, with the Department of Rehabilitation, who testified that her "role is to provide executive oversight and leadership of the five programs including the Business Enterprises Program." TR @ I-29.
2. Last year, DOR received approximately \$195,000 in unassigned vending machine income from vending machines on Federal property. TR @ I-42.
3. The current practice of DOR is to seek a permit from the USPS and consider placing a blind vendor at locations identified by the USPS or which come to the attention of BEP by other means. A Location Development Officer will determine whether any such potential location can be expected to provide a viable income for the vendor. If the site is deemed inadequate to support a blind vendor, it is

referred to the Vending Machine Unit which will release an RFP [request for proposal] seeking a private vending company to service vending machines at the location. (Administrative Record, Transcript, March 10, 2011 (ART), Debra Meyer, at pp. 30-32, TR @ 41).

4. DOR, in 2010, had blind vendors assigned to serve 28 of the largest Post Office locations in California and had contracts in place with private vending companies to service 17 other locations. ART @ 40. One of the reasons DOR entered into such agreements was that some Post Office locations had not been forthcoming in providing unassigned vending machine income. (ART at 26.) Currently, DOR receives vending machine income from 28 postal locations through contracts with private entities. TR @ I-74. Those private entities retain a profit. TR @ I-95. DOR receives 6%, give or take, of the gross income from those contracts. TR @ I-114. TR @ I-115. DOR is also receiving vending machine revenue directly from one additional Post Office location. TR @ 1-73. It is not clear how much revenue DOR receives from these arrangements.
5. CVPC believed that DOR was not receiving all unassigned vending machine income to which it was entitled. TR @ 59. So, when they became aware that DOR was considering entering into a statewide agreement with USPS, CVPC passed motions on at least three occasions over a period of several years asking DOR to execute a proposed agreement. TR @ 202-203.
6. During the period from October 2007 to August 2010, DOR considered developing a statewide agreement with USPS.

7. Despite these efforts, by August 2010 there remained unresolved questions. DOR did not investigate if it was entitled under the R-S Act to receive any unassigned vending machine income from the USPS beyond what it was receiving from 17 locations. ART @ 79. It did not investigate precisely how many additional Post Office locations would be covered by the proposed agreement or whether any of them would provide new employment opportunities for blind vendors. ART @106-108, TR @ 224-225, 254. It did not investigate how much, if any, additional revenue the BEP program would be likely to derive by entering into the proposed agreement. ART @ 60-61.
8. DOR acknowledged that pursuant to the proposed contract, if the RSA did not approve the payment to the Postal Service that DOR would not be required to pay it, but DOR maintains that the RSA does not have that authority. TR @ 2-181. In any case, DOR did not contact the RSA to determine whether the payment to the Post Office was permissible. TR @ 2-182.
9. Although DOR was aware of the concerns raised by CVPC and knew that there had been problems with collecting vending machine revenue from USPS locations, DOR did not undertake a comprehensive effort to ascertain whether or not it was receiving all of the revenue to which it was entitled from USPS in 2010. At the time of the hearing In February 2017 DOR still did not know whether it was receiving all of the revenue it was entitled to from USPS. TR @ 69.
10. At the hearing on February 22, 2017, Ms. Gomez was asked whether DOR had undertaken any investigation to determine whether the USPS was failing to provide DOR with all of the unassigned vending machine revenue to which it was

entitled under the Act. She responded, “According to my knowledge, I would say no.”⁷ (TR @ 81.)

11. Ms. Gomez also testified that DOR’s reasons for not entering into the proposed state-wide agreement with the United States Postal Service are: (a) the “burden of collecting, accounting for, and disbursing the unassigned vending machine income resides with the federal entity and not with the BEP program.” TR @ I-43; (b) “doesn’t generate employment opportunities for the blind.” TR @ I-44; (c) it “would require the BEP to contract out with private contractors to collect the commissions and give them to the BEP to deposit into the vendors’ retirement fund.” TR @ I-44; (d) “don’t have the current staffing to do the work.” TR @ I-44; (e) “the statewide contract also requires the BEP to give a percentage of the commissions that are collected to the United States Postal Service, which is not an authorized use of the commission funds.” TR @ I-46.
12. At the 2011 full evidentiary hearing, Ms. Mayer testified that there was a hiring freeze, that the “hiring of individuals is difficult if there isn’t a need – something that the State would gain from it. Instead, it would just be putting money into the retirement fund for the blind vendors.” ART @ 49. Ms. Mayer’s view with respect to the limitations imposed by Government Code 19130 is that if there is “staff currently doing the job, I sure can’t contract out that same job” ART @ 73.

⁷ In accordance with the ruling of Panel Chair Anderson on February 19, 2017, documents or testimony concerning events or conduct occurring subsequent to the state administrative hearing, which concluded on March 10, 2011, are admitted for the limited purpose of establishing an appropriate remedy.

13. The proposed USPS agreement does not preclude DOR from developing standalone locations for individual blind vendors on postal properties. TR @ I-48, TR @ I-49.
14. DOR has no mechanism currently in place to ascertain if the Post Office is not sending revenue from unassigned vending machines. TR @ I-80. TR @ I-81. DOR does not actively seek to increase unassigned vending machine income. TR @ I-90. DOR has not approached vendors with respect to generating more benefits by changing the focus to be not entirely retirement, but increasing the amount of unassigned vending machine income to build the program.⁸ TR @ I-92. DOR does consider that fringe benefits, such as retirement, health insurance, sick leave, and vacation pay contribute to enlarging economic opportunities. TR @ I-111.
15. According to DOR, there are 1600 to 2000 post office locations in the State of California. TR @ I-105.
16. According to the Affidavit of Michael W. Hooks, Director of the Business Enterprise Program in Texas, and the exhibits attached thereto (Petitioner's Exhibit 19), revenues received from Texas' state wide contract with USPS have never been less than \$300,000 per year.
17. The USPS has a contract with a company called National Vending to service unassigned vending machines, collect revenue from such machines, and pay to SLAs which do not have separate statewide agreements the amounts to which

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they are entitled under 34 C.F.R., part 395.32. TR @ 58. DOR staff testified that DOR is not currently receiving any distributions of vending machine income from National Vending. TR @ 58, 228.

18. 12 to 14 states have entered into state-wide agreements. TR @ I-133. Pursuant to these agreements, a two percent fee goes to the Post Office and 1.5% fee goes to the employee welfare funds. TR @ I-134. These fees are based on the gross received [by the SLA from National Vending and/or the Post Office]. TR @ I-135. Money is received from every postal location, even from those where vending machine income does not exceed \$3,000 annually. TR @ I-136.

19. The SLA believes it would be required to add seven to eight staff if it entered into a state-wide agreement. TR @ I-246, I. 5-7. This belief is not based on consultation with other states with state-wide agreements, but on DOR's existing staff patterns. TR @ I-250. The SLA did not investigate the difference between the Post Office retaining 30-50% of unassigned vending machine income versus payment of the 3.5% commission back to the Post Office. TR @ 1-264. The SLA did not consult with R-S Act experts, the RSA or ask the Post Office for a list of locations where vending machines are located in the State of California. TR @ I-264.

20. CVPC has attempted to bring to the attention of DOR the availability of private companies to collect vending machine income. TR @ I-286, TR @ I-287. One of the companies which would service vending machines and submit income to DOR was the Wilkinson Group; DOR rejected CVPC's proposal to retain the Wilkinson Group. TR @ I-306.

21. A long-time BEP vendor, Mr. Roy Harmon, testified about the potential benefits of entering into the proposed statewide agreement and suggested how it might be managed. Monies coming in from postal commissions would be a great asset to vendors because most vendors don't have the ability to accumulate savings. TR 2-10. Vendors leave the program because it offers no future, because the BEP program does not support vendors. TR @ 2-11. TR @ 2-101-2-202. DOR is not making an honest good faith effort to make the BEP program grow, to assist vendors in their facilities, and to help them in upward mobility. TR @ 2-106. After 20 years of participating in the present retirement program, licensed vendor Mr. Harmon has only accumulated enough for three years of living expenses. TR @ 2-14. DOR's estimates regarding additional program staff are unwarranted because technology allows for monitoring of vending machines. TR @ 2-17, 2-18. DOR has been presented with this information and that such technology should be required on vending machines. TR @ 2-19. Texas has one employee to handle the state's entire program. TR @ 2-21. Funds from a state-wide contract could be used to pay all of vendors' health insurance. TR @ 2-31. Remedies sought by CVPC include a state-wide agreement, monies to reconcile lost monies to vendors, and a lowering of set aside. TR @ 2-37 through 2-39.

22. Currently Mr. Harmon pays 49% of his net sales to DOR as a set aside fee. TR @ 2-91. Set-aside is calculated by either 6% of gross sales or on a sliding sale as a percentage of net income. TR@ 2-93. DOR testified that it has not reached out to the Texas BEP regarding staffing needs, paying the fees as set forth in the contract, whether to add new locations or receive unassigned vending machine

income. TR @ 2-156, 2-157. DOR testified it has no knowledge as to whether the RSA ever told a state that entering into a state-wide contract would violate the R-S Act. TR @ 2-164.

23. DOR has not discussed the state-wide contract or items related to it with CVPC during Ms. Gomez's administration as deputy director.⁹ TR @ 2-171. DOR acknowledged that California Government Code Section 19130 would not preclude DOR from entering into a state-wide agreement with USPS. TR @ 2-174. With respect to Petitioner's Exhibit 3, DOR testified that the Post Office could demand to add machines where machines would not be profitable. TR 178. Yet, Petitioner's Exhibit 3 provides that the California BEP would provide all vending machines services determined achievable by BEP and desired by UPS, yet DOR did not investigate what that term meant. TR @ 2-179.

24. DOR testified that the Postal Service indicated, within the last year or so, that it did not want to enter into a state-wide contract, and that it referenced National Vending.¹⁰ TR @ 2-217. Yet, DOR did not direct staff or undertake to make contact with National Vending. TR @ 2-217, 2-218.

25. Mr. Terry Smith, Director of the Entrepreneurs Initiative for the National Federation of the Blind, testified that the template for the statewide agreements with USPS, on which the draft California agreement was based, is not designed

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solely to collect revenue to which an SLA is legally entitled under 34 C.F.R. part 395.32. Rather it is designed to allow an SLA to collect unassigned vending machine revenue from all Post Office locations, regardless of whether or not that location generates the \$3,000 annual minimum established by 20 U.S.C. section 107d-3(d). Thus, any potential revenue to be derived from executing a statewide agreement with the USPS would consist of a combination of money which DOR is legally entitled to collect and revenue from locations falling below the \$3,000 threshold. 34 CFR 395.32(j) permits arrangements under which the SLA or blind vendors may receive vending machine income from locations where such vending machine income does not exceed \$3,000 annually.

26. Mr. Smith also testified that only larger Post Office locations would be expected to provide to the USPS revenue in excess of the \$3,000 threshold. "I would be surprised if there are any locations that meet the threshold. Because like I said, they have to earn \$3,000 a year, which means, if they're only getting three-and-a-half percent, that means the location would have to generate \$150,000 in sales to meet the — the threshold for the — for them to have to pay a commission back to the SLA. So there aren't going to be many of them out there right now that meet that threshold." TR @ 148.

Furthermore, Mr. Smith indicated that the fact that California is not currently receiving any revenue from National Vending could be because there are no other locations that generate revenue for the USPS in excess of the \$3,000 threshold. TR @ 186.

III. CONCLUSIONS OF LAW

A. DOR claims that the “statute places the burden on the federal agency to ensure that the appropriate amount of commissions from unassigned vending machines “accrues to the State licensing agency,” citing to 20 U.S.C. § 107d-3. DOR’s Reply Brief, page 4. Further, DOR argued, in effect, that it may simply sit back and wait for the revenue promised by the R-S Act to be distributed by the Federal agencies and accept whatever they provide. While the statute does require the Federal agency to disburse vending machine income to the State licensing agency, we cannot accept this interpretation of the statute which would absolve DOR of any responsibility.

The Act does not provide blind vendors, or the statewide committee which represents them, with the ability to seek arbitration directly against a federal agency. Only a state licensing agency can make such a request under 20 U.S.C. § 107d-1(b). Ga. Dep’t of Human Serv. v. Nash, 915 F.2d 1482 (11th Cir. 1990) Nor may a blind vendor seek enforcement of the R-S Act against a federal agency by means of a § 1983 action. See Jones v. DeNotaris, 80 F. Supp. 3d 588 (E.D. Penn. 2015)

Since blind vendors cannot hold Federal agencies accountable for disbursing unassigned vending machine revenue to the states, DOR’s position would permit a Federal agency to violate the law with impunity and render the statutory scheme regarding collection of vending machine income essentially unenforceable.

We reject this “literal interpretation” of the R-S Act because it leads to an absurd result and “thwarts the purposes of the statute.” Kentucky v. U.S., 62 Fed. Cl. 445, 447 (2004), aff’d sub nom., Kentucky, Educ. Cabinet, Dep’t for the Blind v. U.S., 424 F.3d 1222 (Fed. Cir. 2005), Accordingly:

literal interpretation must be jettisoned in favor of a rational inquiry based on the context and purpose of the statute. Without taking heed of the latter wisdom,

sometimes the danger arises that “wooden literalism” could make a statute, and especially its component remedial parts, unworkable. Such is the case here.

Id. The Panel concludes that DOR’s interpretation of its duties involving the collection of unassigned vending machine income thwarts the purpose of the statute, and results in a blind vending program that, while perhaps not unworkable, certainly is less effective and offers fewer opportunities to blind licensees than envisioned by Congress in enacting and amending the R-S Act.

B. The Petitioner’s argument is that DOR is not receiving all the unassigned vending machine revenue to which it is entitled from the USPS and it must, therefore, take some action to remedy this situation. (Petitioner’s Opening Brief at p.2) This argument is closer to the Panel’s view of the law discussed below.

Underlying this argument is Petitioner’s assertion that DOR is not receiving all of the vending machine revenue from USPS facilities to which it is entitled under the Act. Petitioner bases this conclusion on a comparison with Texas which, as noted in finding of Fact 16, has derived no less than \$300,000 annually from the statewide agreement it has with the USPS. However, even if we assume that California could derive similar sums from entering into an agreement with the USPS, this still tells us nothing about how much, if any revenue DOR was entitled to from the USPS pursuant to (1) 34 C.F.R. §§ 395.32(b), (c) and (d) (mandated revenue) that it was not receiving, and how much income DOR could have received pursuant to 34 C.F.R. § 395.32(j), authorizing arrangements under which blind vendors or SLAs may receive income from locations where vending machine income does not exceed \$3,000 annually (discretionary revenue).

In effect, the income to be derived from the proposed statewide agreement would consist of two components—(1) the mandated revenue, and (2) the discretionary revenue. Unfortunately, we do not know how much of each source of potential revenue California might expect to derive from a statewide agreement.

Thus, the evidence about the experience of Texas gives rise to an inference that California could bring in more money than it is currently receiving, but without more evidence directly bearing on whether DOR was receiving all the mandated income to which it was entitled in 2010, we cannot conclude that the decision not to enter into the proposed statewide agreement was per se a violation of the Act.

C. This discussion does, however, raise another issue which the parties did not address. Does the R-S Act impose on an SLA an obligation to make efforts to determine whether it is receiving all the unassigned vending machine revenue to which it is entitled under the R-S Act?

The Respondent would, presumably, say “no.” it maintains that its responsibility is to merely accept and properly utilize whatever funds it receives from federal entities. It is true that there is nothing in the Act or its implementing regulations which expressly requires an SLA to confirm that it is receiving all vending machine income to which it is entitled, but where a statute’s “language is not dispositive, we look to the congressional intent revealed in the history and the purposes of the statutory scheme.” U.S. Aviation Underwriters Inc. v. Nabtesco Corp., 697 F.3d 1092, 1098 (9th Cir. 2012) (citation omitted). For the reasons discussed below, we think that a careful reading of the law strongly suggests that Congress intended states to undertake such inquiries.

First, subdivision (b)(2) of section 107d-3 clearly states that, “The head of each department, agency, and instrumentality of the United States shall insure compliance with this section with respect to buildings, installations, and facilities under his control, and shall be responsible for collection of, and accounting for, such vending machine income.” As we have previously noted, one of the major reasons for the 1974 amendments to the Act was to deal with the fact that many Federal agencies, particularly the USPS, were not cooperating in the collection of vending machine income to support the blind vending program. It seems obvious that Congress required Federal agencies to “account for” vending machine income because they anticipated that there might be future questions about whether a particular agency is or is not collecting and disbursing to the states the appropriate amount of vending machine income. If Congress had expected states to stand passively by and never inquire about the amount of vending machine revenue they received, there would be no reason to require such accounting by the Federal agencies.

Second, subdivision (a) of 34 C.F.R. part 395.37 provides that “Whenever any State licensing agency determines that any department, agency, or instrumentality of the United States which has control of the maintenance, operation, and protection of Federal property is failing to comply with the provisions of the Act or of this part and all informal attempts to resolve the issues have been unsuccessful, such licensing agency may file a complaint with the Secretary.” One way in which a federal agency might fail to comply with the provisions of the Act would be to neglect to distribute to an SLA all the unassigned vending machine revenue to which it is entitled. We recognize that, in Sauer v. U.S. Dep't of Educ., 668 F.3d 644 (9th Cir. 2012) the Ninth Circuit held that

states are not required to pursue arbitration against federal agencies. However, unless an SLA knows how much revenue it is entitled to, it would never be able to determine whether a federal agency is complying with those provisions relating to unassigned vending machine revenue and would never be in a position to pursue arbitration should the circumstances warrant such action.

Finally, the right to receipt of vending machine income is clear. See 20 U.S.C. § 197d-3, 34 C.F.R. § 395.8, 34 C.F.R. § 395.32, Calif. Code of Reg., Title 9, § 7225(a).

Unassigned vending machine income is necessary to provide benefits to licensed blind vendors and to reduce vendors' set-aside assessments. See 34 C.F.R. § 395.9(c).

DOR has voluntarily entered into a contract to administer the R-S Act as the SLA.

Accordingly, it is required to do so pursuant to the purposes of the R-S Act. The collection of vending machine income to ensure that vendors do not have to pay more set-aside than is reasonably required is mandated by 34 C.F.R. § 395.9(c), and cannot be disregarded by DOR. It is hard to see how an SLA could ensure that such set aside charges are not higher than reasonably necessary if it does not know how much revenue it is entitled to receive from federal sources or whether it is actually receiving the required amounts.

For these reasons, we believe the CVPC's construction of the statute, to require DOR to make reasonable efforts to pursue unassigned vending machine income is preferable to DOR's view that it can administer the program by merely accepting unassigned vending machine income, without making adequate efforts to determine whether Federal agencies are in compliance with the law. Moreover, the obligation to minimize set-aside charges leads us to conclude that the duty to investigate extends to the exploration of

opportunities made available to an SLA for obtaining vending machine income from Federal agencies in excess of that minimally required by the Act.

Accordingly, the Panel unanimously concludes that the R-S Act imposes a duty on an SLA to determine whether or not it is receiving mandatory vending machine revenue to which it is entitled under the Act and to investigate opportunities to obtain discretionary unassigned vending machine income from Federal agencies.

D. We do not mean to suggest that an SLA must routinely demand a full accounting of vending machine revenue from every Federal agency or pressure all Federal agencies to enter into agreements like the one proposed by the USPS. Such an interpretation might impose an undue burden on the states, especially in a state like California which no doubt has hundreds of Federal agencies with thousands of individual installations where vending machines may be located. However, in light of the foregoing analysis, we think that in cases such as this, where an SLA has some indication that it might not necessarily be receiving all the revenue to which it is entitled, and where the committee of blind vendors has been steadfast in its recommendation that the SLA act to obtain such revenue, the Act does contemplate that it must make reasonable efforts to investigate that question and insist that the Federal agency account for the revenue generated by vending machines on property under its control. And, when a Federal agency indicates its willingness to enter into an agreement which has the potential to provide substantial discretionary revenue beyond that to which the SLA is entitled under the law (mandated revenue), the SLA shall make reasonable efforts to fully explore the feasibility of such an arrangement.

E. In the present case, there was a history of noncompliance by USPS with the provisions of the Act related to collection of vending machine income. In fact, DOR had entered into contracts with private firms to collect vending machine income at various Post Office locations precisely because, in the past, it had not been receiving all the income to which it was entitled under the Act. (Finding of Fact 4.) Yet, when the Petitioner alleged that DOR still was not collecting all revenue to which it was entitled, DOR made no concerted effort to determine whether this was actually the case.

It is true that DOR did take some tentative steps in this direction. At the time of the state-level hearing, DOR staff testified about plans to contact local Post Office officials, inquire about collection of unassigned vending machine revenue, and press them to comply with the R-S Act. (ART at 28.) We do not know if this plan was ever implemented, but we can say that it did not amount to an effective effort to determine whether Respondent was receiving all of the income to which it is entitled under the R-S Act. Indeed, at the time of the arbitration hearing in February 2017, Elena Gomez acknowledged that DOR had not undertaken any investigation of this basic question. (See Finding of Fact 10).

Furthermore, in 2007 the USPS offered to enter into an agreement with DOR which would have ensured that DOR would receive all of the mandated vending machine revenue and, in addition, might well have yielded significant discretionary vending machine revenue. DOR considered this proposal but never pursued it far enough to resolve the many questions it had about the arrangement. For example, as indicated in Finding of Fact 8, DOR did not even ask RSA if it believed the payment of commissions

to the USPS would be permissible under the R-S Act. See also Findings of Fact 7, 14 and 19.

Therefore, the Panel unanimously concludes that the Petitioner has demonstrated, based on substantial evidence, that the Respondent did not fulfill its obligations under the R-S Act because it failed to make reasonable efforts to determine whether it was receiving all of the income from the USPS to which it was entitled by law.

In addition, we hold that DOR failed to take sufficient action to determine the feasibility of the USPS statewide agreement.

IV. DECISION and AWARD

1. DOR shall actively participate with the CVPC to pursue collection of unassigned vending machine income from the USPS. Within 30 days of the receipt of this Decision, DOR shall either undertake efforts pursuant to Section 2 of this Decision to ensure that it is receiving all of the vending machine income to which it is entitled under 34 C.F.R. 395.32 from the USPS, or in the alternative, undertake efforts to enter into a statewide agreement with the USPS or National Vending pursuant to Section 3 of this Decision.

2. A. Within 10 days from the receipt of this Decision (or immediately upon termination of efforts pursuant to Section 3), DOR shall send a request for information to USPS pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. section 552. This request for information will seek the following:

1. The current contract between USPS and National Vending applicable to vending in California;
2. A list of post offices in California, staffed with one or more USPS employees;

3. The number of employees in each post office location in California;
4. The locations of post offices with vending machines in California;
5. The number of vending machines at locations of post offices with vending machines in California;
6. The income USPS received from vending machines in California for the most recent federal fiscal year for which data is available ;
7. All other financial information USPS possesses on the individual locations such as gross receipts, cost of goods, contract fees, and other financial information;
8. The point of contact for each post office location to find out information about the location.

B. Within 10 days from the date of receipt of this Decision (or immediately upon termination of efforts pursuant to Section 3), DOR shall send an email to Debra Cote, USPS Purchasing and Supply Management Specialist, Program Services CMT and Facility Services CMC, (or her successor with respect to obtaining such information) requesting the information listed in paragraph A. above.

C. After the DOR receives all of the requested information from USPS, or USPS provides its final response to the FOIA request, but no later than six months from the date of the FOIA request described above, DOR will meet with CVPC at the next scheduled CVPC meeting for which there is sufficient time to properly notice the subject on the agenda pursuant to the Bagley-Keene Open Meeting Act (California Government Code section 11120 et seq.), in order to evaluate the information received and determine, with CVPC's active participation, whether an additional FOIA request should

be made or to take such action as may be necessary. Throughout the process, DOR shall promptly provide the CVPC with copies of responses received by it to the USPS FOIA requests when same are received by DOR.

D. Over a period not to exceed three months from the date DOR receives all of the requested information from USPS, or USPS provides its final response to the FOIA request outlined in paragraph A, but no later than nine months from the date of said FOIA request, DOR will, to verify the information received through the FOIA request, whether or not information is received, provide to CVPC detailed logs of its attempts to reach, via email or telephone, at least twenty-five percent of the USPS offices in metropolitan locations and at least twenty-five percent of the USPS offices in rural locations in California, from the list of locations obtained through the FOIA request, or from a list of locations available to the public via internet searches. An assigned CVPC delegate may assist with calling these locations. The calls will be made with the goal of targeting locations receiving \$3,000 or more annually in vending machine income. The responses received from the USPS offices will be documented.

E. DOR shall then estimate, with the active participation of CVPC, the amount of vending machine income for each USPS office in California that currently has vending machines as reported through the FOIA response received from USPS. The estimate will distinguish between determining which locations are generating \$3,000 or more annually in vending machine income and those which are not. This estimate shall be provided in writing, without delay, to the CVPC.

F. Over a period of three months from the receipt of this Decision, DOR will have at least one telephonic meeting individually with a responsible official from the SLA in five

states, including Texas, which have statewide vending contracts with USPS. An assigned CVPC delegate will participate in these meetings. In these meetings, DOR will ask questions regarding staff resources, income, and liabilities involved in these statewide contracts. A written report shall be provided in writing, without delay, to the CVPC.

G. After DOR has conducted the research outlined in paragraphs A. through F., DOR will actively participate with CVPC to evaluate which one of three options DOR will pursue. These options are the following:

1. Within six months of gathering all relevant data, DOR will seek agreement of USPS for DOR to enter into 6-8 additional contracts with outside entities based on geographic service areas to service vending machines and collect unassigned vending machine income for additional USPS locations in major metropolitan areas, and work with USPS to enter into these agreements as soon as reasonable and continue this process in future years to capture all possible locations;
2. DOR will present to USPS a statewide vending agreement with USPS and work with USPS to enter into this agreement as soon as reasonable; or
3. DOR will work with USPS to receive vending machine commissions from USPS as soon as reasonable, such as by providing contract language regarding obligations under the R-S Act, including the obligation to make payments payable to the BEP on a quarterly basis, for USPS to incorporate into its Requests for Proposals and contracts with outside vendors servicing the vending machines.

H. DOR's decision shall be made within one year from the date of this Decision, and shall be provided, in writing, without delay, to the CVPC.

I. Should DOR and CVPC jointly and reasonably determine that USPS has failed to cooperate with the Respondent or that USPS likely owes the Respondent vending machine commissions, based on failure to respond to inquiries addressed herein or failure to provide commissions to DOR, DOR shall promptly decide, with the active participation of CVPC, whether or not to seek the convening of an arbitration panel pursuant to 20 U.S.C. section 107d-1(b). CVPC will make its best efforts to enlist organizations advocating for the blind to join in the effort to assure that the arbitration panel has the opportunity to fully evaluate the law and the facts of the case.

3. If DOR elects to pursue an immediate statewide agreement, it shall, within 30 days of the receipt of this Decision, contact USPS and National Vending to determine whether either or both of these organizations is willing to enter into a statewide agreement with DOR. If neither USPS or National Vending is willing to enter into such an agreement, DOR shall immediately proceed to take the steps outlined in Section 2 of this Decision. Otherwise, DOR shall initiate negotiations with either USPS or National Vending aimed at executing a statewide agreement within 90 days from the receipt of this Decision which will provide DOR income from all vending machines at USPS locations in California. If such negotiations are unsuccessful, DOR shall immediately proceed to take steps outlined in Section 2 of this Decision.

4. CVPC shall be awarded its attorneys' fees and costs in this matter. The parties have 30 days from the date of this order to come to an agreement on the amount of reasonable attorneys' fees, failing such an agreement, the Panel retains jurisdiction to

order attorneys' fees based on submissions from the parties. Petitioner is to make such submission within 45 days of this Panel's order, and Respondent is to reply within 60 days of this Panel's order.

Dated February 20, 2018.

Gary A. Anderson, Panel Chair

Ralph Black, DOR Appointed Panel Member

Susan Rockwood Gashel, CVPC Appointed Panel Member

UNITED STATES DEPARTMENT OF EDUCATION
REHABILITATION SERVICES ADMINISTRATION

CALIFORNIA VENDORS POLICY
COMMITTEE, on behalf of all California
vendors, Petitioner,

vs.

STATE OF CALIFORNIA,
DEPARTMENT OF REHABILITATION,
Respondent.

Case No. R-S/10-9

ARBITRATION PANEL'S
AWARD OF ATTORNEYS' FEES AND
COSTS

I. BACKGROUND

On February 22 and 23, 2017, the Arbitration Panel convened to hear the above-referenced case. On February 20, 2018, the Panel concluded as follows with respect to the claims of the California Vendors Policy Committee (CVPC) against the State of California, Department of Rehabilitation (DOR):

DOR's interpretation of its duties involving the collection of unassigned vending machine revenue, that its role is just simply to collect the money and deposit it into the vendors' retirement fund, thwarts the purpose of the Randolph-Sheppard Act, 20 U.S.C. §§ 107 through 107e (R-S Act), and results in a blind vending program that, while perhaps not unworkable, certainly is less effective and offers fewer opportunities to blind licensees than envisioned by Congress in enacting and amending the R-S Act.

Accordingly, the Panel unanimously concluded that CVPC demonstrated, based on substantial evidence, that DOR:

- Did not fulfill its obligations under the R-S Act because it failed to make reasonable efforts to determine whether it was receiving all of the vending

machine income from the United States Postal Service (USPS) to which it was entitled by law.

- Failed to take sufficient action to determine the feasibility of a proposed statewide agreement for the collection of vending machine income from the USPS.

The Panel's unanimous decision required DOR to actively participate with CVPC to pursue collection of unassigned vending machine income from the USPS, and set forth a number of specific actions for DOR to take to ensure that it complies with its duties pursuant to the R-S Act with respect to the collection of unassigned vending machine income. CVPC was awarded its attorneys' fees and costs incurred in this matter, with the Panel retaining jurisdiction to make an award, after the parties were afforded the opportunity to brief their respective positions.

II. AWARD OF ATTORNEYS' FEES AND COSTS

A. Awards of Attorneys' Fees and Costs are Authorized in R-S Act Cases

In the Ninth Circuit, attorneys' fees are authorized in R-S Act cases. Premo v. Martin, 119 F.3d 764, 771 (9th Cir. 1997), *cert denied*, 118 S.Ct. 1163 (1998):

[t]he overwhelming implication of the statute is that by agreeing to participate in the Randolph-Sheppard program, states have waived their sovereign immunity to enforcement of such awards in federal court.

The Eleventh Amendment does not apply to Randolph-Sheppard arbitration panels, and thus does not preclude them from awarding compensatory relief.

Id. at 771.

DOR argues that attorneys' fees were not directly at issue in Premo v. Martin.

However, after concluding that compensatory damages are available under the R-S Act, the Ninth Circuit upheld a district court decision affirming an arbitration panel decision

that awarded Ms. Martin, the blind licensee, \$379,025.05 in lost income and \$70,898.65 in attorney's fees and costs. *Id.* at 767.

The Panel, having duly considered Respondent Department of Rehabilitation's Motion for Reconsideration of Award of Attorneys' Fees, denies same on the basis that Premo v. Martin remains the dispositive law in the Ninth Circuit. See Bird v. United States Dep't of Educ., No. 3:14-CV-00843-YY, 2017 WL 2365110, at 5 (D. Or. May 31, 2017) disagreeing with the State of Oregon's contention that "subsequent holdings by the United States Supreme Court in Federal Maritime Commission v. South Carolina State Ports Authority (FMC), 535 U.S. 743 (2002), and Sossamon v. Texas, 563 U.S. 277 (2011), abrogate Premo." In Bird, the District Court concluded that the Federal Maritime case was not applicable in the R-S Act context because that case "does not discuss waiver of sovereign immunity when a state opts into a federal statutory scheme, which was the central issue in Premo. Bird at 6. With respect to Sossamon, the District Court noted that:

the clear language of the RSA that the state agrees to "submit grievances of any blind licensee ... to arbitration" as authorized in the RSA is explicit consent to such a process that will be final and binding on the parties. 20 U.S.C. § 107d-1. *See also Premo*, 119 F.3d at 769. The *Premo* court also noted it was "widely recognized that this language permits arbitration panels to award compensatory relief."

Id. The Panel concurs with the District Court's reasoning in Bird.

Thus, the Panel concludes that Premo v. Martin governs its decision authorizing it to award attorneys' fees and costs in this matter.

E. CVPC is Entitled to the Fees and Costs Incurred at the State Level Hearing

CVPC is entitled to all attorneys' fees reasonably incurred to obtain a favorable decision. DOR claims that a state regulation at Cal. Code Regs. (CCR), tit. 9, section

7227(d) absolves it of its responsibility to pay those attorneys' fees and costs incurred at the state level hearing. That regulation states:

- A. licensee or vendor shall be responsible for the costs of his or her own expenses related to disputing or settling issues which may include, but not limited to, travel or private counsel.

According to DOR, this means that the CVPC cannot be reimbursed for its attorneys' fees and costs associated with the state administrative hearing, in the amount of \$38,565.74.

DOR's interpretation of this provision would effectively absolve it of its responsibility pursuant to Premo v. Martin, 119 F.3d 764 (9th Cir. 1997), which clearly establishes a vendor's right to damages, injunctive relief, and attorney's fees. DOR's position is unwarranted.

As an initial matter, the Panel's view is that DOR misinterprets this regulation. It is more logical to construe the provision to merely prevent DOR from being required to pay state level hearing fees absent an award that is favorable to a blind vendor. The plain meaning of section 7227(d) is simply to clarify that DOR's responsibility to provide the basic infrastructure for a full evidentiary hearing does not extend to covering a vendor's expenses, including costs for private counsel. The regulation says nothing whatsoever about whether an administrative law judge presiding over the state level hearing or an arbitration panel may or may not order DOR to subsequently reimburse the vendor for reasonable attorneys' fees if the vendor is determined to be the prevailing party.

Moreover, this particular regulation is preempted by the R-S Act's arbitration provision. California may pass regulations; but to the extent that a regulation directly conflicts with

the requirements of federal law, the Supremacy Clause requires that they be given no effect. U.S. Const. art. VI., Cl. 2. While DOR claims this regulation is valid because the United States Department of Education approved it, that approval has no merit whatsoever in terms of a legal decision as to whether the regulation with respect to “expenses related to disputing or settling issues” prohibits a panel from awarding attorneys’ fees and costs for pre-arbitration proceedings. After all a vendor cannot assert the right to arbitration until after a fair hearing at the state level. 20 U.S.C. § 107d-1(a). When the blind licensee remains dissatisfied with “any action taken or decision rendered as a result of such hearing,” a complaint to the Secretary of Education is authorized. Id. The Secretary of Education then convenes a panel to arbitrate the dispute. Id. The hearing is conducted pursuant to chapter 5 of Title 5, U.S.C. The decision of the panel is final and binding except that it is “subject to appeal and review as a final agency action for purposes of chapter 7 of such Title 5” (the Administrative Procedure Act). 20 U.S.C. §§ 107d-1(a), 107d-2(a). This is the “federal adjudication path.” Tamashiro v. Dep’t of Human Serv., 146 P.3d 103, 108 (Hawaii 2006).

If a vendor knows that it will be his or her responsibility to cover the expenses of the fair hearing without the chance of being awarded those fees should the vendor prevail, it only serves to undermine the arbitration right accorded to the vendor by Congress.

Under the Supremacy Clause of the United States Constitution, state laws that ‘*interfere with, or are contrary to the laws of Congress*’ are *preempted* and are therefore *invalid*.” *Fireman’s Fund*, 302 F.3d at 941 (emphasis added) (quoting *Gibbons v. Ogden*, 22 U.S. (9 Wheat) 1, 211, 6 L.Ed. 23 (1824)). Whether federal law preempts state law is governed by congressional intent. *Fireman’s Fund*, 302 F.3d at 941....

Preemption is compelled where Congress intends and “Congress’ command is explicitly stated in the statute’s language or implicitly contained in its structure and purpose.”

Fireman’s Fund Ins. Co. v. City of Lodi, Cal., 296 F. Supp. 2d 1197, 1213 (E.D. Cal. 2003). In the R-S Act context, a state statute conflicted with 23 U.S.C. § 111, which authorizes R-S Act vending facilities in state owned safety roadside rest areas. New Hampshire v. Ramsey, 366 F.3d 1, 30 (1st Cir. 2004). There the law in question authorized an open bidding system, whereas § 111(b) only permitted other bidders after the SLA waived its priority. The Court found that the state statute was preempted. Here, CCR, tit. 9, section 7227(d) is preempted by Congress’ decision that blind licensees are entitled to arbitration, as recognized in Premo v. Martin: “the evidence that Congress conditioned state participation in the Randolph–Sheppard program on consent to federal judicial enforcement of compensatory awards is overwhelming.” Premo v. Martin, 119 F.3d 764, 770 (9th Cir. 1997).

A state-imposed limit on the right to attorney’s fees does not accord with Congress’ stated purpose in enacting the arbitration provisions of the R-S Act, to provide for the “final and satisfactory” resolution of disputes, given that the 1974 legislative history provides that, “under current circumstances the machinery for prompt and satisfactory disposition of blind licensee and State agency complaints does not exist except where individual States have provided, on their own, some grievance procedure.” S Rep 937, p. 20.

The R-S Act’s arbitration provision does not state that states can prevent blind vendors from obtaining attorneys’ fees awards for any portion of the federal adjudication path –

full evidentiary hearing, followed by arbitration, followed by appeal to Federal courts. 20 U.S.C. §§ 107d-1(a), 107d-2.

The following summaries of decisions published in the Federal Register (FR) reflect awards of attorney’s fees:

FR Citation	Case Name	Ruling
FR 01-13468	Bedikian v. California	DOR made no demonstrable effort to assist Mr. Bedikian; the R-S Act places an affirmative obligation to overcome problems cited by Federal agency. Panel awarded compensatory damages for loss of net profits plus attorneys’ fees and costs
FR 95-1579	McMullin v. Washington	Entitled to attorney’s fees because of his reliance on the SLA’s longstanding support of his position.
FR 2012-7994	Morris v. Kentucky	Sovereign immunity waived; Ms. Morris reimbursed her attorney’s fees in defending subcontract required by the SLA

See, also, recent decisions of arbitration panels awarding attorney’s fees at <https://rsa.ed.gov/display.cfm?pageid=595>, Taylor v. Wisconsin, Hooks v. North Carolina, Homan v. Maryland, Cyrus v. Ohio.

The specific question of pre-arbitration attorneys’ fees under the R-S Act has been addressed by the federal courts in Delaware Dep’t. of Health & Soc. Servs., v. U.S. Dep’t. of Educ., 772 F.2d 1123 (3d Cir. 1985), the Third Circuit held that the R-S Act authorizes an award of attorneys’ fees to a prevailing party. Most significantly for our purposes, the fees at issue in that case were not incurred during arbitration or during appellate review, but were, in fact, attributable to the state-level evidentiary hearing.

Thus, we find it compelling that the Court held, in a virtually identical situation, that:

Although the statute does not deal specifically with pre-arbitration legal expenses, the overall scheme strongly suggests that the states must undertake to make blind vendors whole for breaches of the contractual obligations imposed on them by virtue of participation in the Federal Blind Vendor Program. . . . We conclude on balance that the undertaking of the states participating in the Randolph-Sheppard program is to make blind vendors whole for state breaches

of contract, and that an award of attorneys' fees as contract damages is, in this unique circumstance, an appropriate means to that end.

(Id. at p. 1139.)

While Delaware does stand for the proposition that attorney's fees are a proper remedy under the R-S Act, it did not involve a situation like the present case where a state licensing agency adopted a regulation which it interprets to bar attorney's fees incurred by a prevailing party at the state-level hearing. The rule regarding federal preemption of a state law or regulation requires that we find that the state law provision is "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."

(California Fed. Sav. and Loan Ass'n. v. Guerra, 479 U.S. 272, 28 (1987). (citation omitted)

DOR's interpretation of section 7227(d) would bar an award of attorneys' fees for a state-level administrative hearing. The Court in Delaware found that such an award is necessary, in an appropriate case, to make blind vendors whole for a state's failure to comply with its obligations under the R-S Act. Thus, section 7227(d), as interpreted by DOR, is preempted because it would interfere with carrying out the intent of Congress when it adopted the 1974 amendments to the R-S Act. See, also, McGaw Prop. Mgmt., Inc., 133 B.R. 227, 229-30 (Bankr. C.D. Cal. 1991), preempting state law that limited attorney's fees for over-secured creditors, based on legislative history of bankruptcy law.

It is black letter law that "[a]dministrative regulations that alter or amend the statute or enlarge or impair its scope are void and courts not only may, but it is their obligation to strike down such regulations." California Assn. of Psychology Providers v. Rank, 51 Cal. 3d 1, 11, 793 P.2d 2, 7 (1990), as modified on denial of reh'g (Sept. 20, 1990).

Here it is obvious that the regulation at issue is at cross-purposes with both Federal and California law. California law has the same purposes as the Federal law, and affirmatively requires that Federal regulation serve as minimum standards for the operation of the blind vending program:

For the purpose of providing blind persons with remunerative employment, enlarging the economic opportunities of the blind, and stimulating the blind to greater efforts in striving to make themselves self-supporting, blind persons licensed under this article shall be authorized to operate vending facilities on any property within this state as provided in this article. In order to administer this article, the director shall establish and promote the Business Enterprises Program for the Blind.

It is the intent of the Legislature that the Randolph-Sheppard Act (20 U.S.C. Sec. 107 et. seq.),¹ and the federal regulations for its administration set forth in Part 395 (commencing with Section 395.1) of Title 34 of the Code of Federal Regulations, shall serve as minimum standards for the operation of the Business Enterprises Program for the Blind.

Cal. Welf. & Inst. Code § 19625. See also, 20 U.S.C. § 107.

There is nothing in the Federal or State law that would permit California to absolve itself of being financially responsible for failing to perform its duties as the State Licensing Agency. This Panel accordingly finds that the California regulation is preempted insofar as it prevents an arbitration panel from awarding attorneys' fees incurred in a required preliminary step before an arbitration panel can be convened.¹¹

C. LaBarre is Not Required to Hold a California License to Represent CVPC at Either the State Level Hearing or the Federal Arbitration Hearing

¹¹ We note that if DOR limits the application of the regulation to the narrower construction discussed above, it would not be pre-empted by the R-S Act. This is because, to become a state licensing agency, DOR was required by 34 C.F.R. §§ 395.4 and 395.13 to establishing regulations regarding the conduct of full evidentiary hearing. A regulation defining how costs associated with hearing are allocated would be within the scope of this authority.

DOR argues that CVPC should not be awarded attorneys' fees because its counsel is not licensed to practice law in California. This argument is without merit.

The Panel agrees with CVPC that DOR has waived this argument, first put forth in May 2018, well after the arbitration hearing in February 2017. DOR has known since 2010 that Mr. LaBarre holds a Colorado license. At the state evidentiary hearing level, the Office of Administrative Hearings failed to object to Mr. LaBarre's appearance.

Furthermore, a party in an administrative hearing need not be represented by a California licensed attorney. CCR, tit. 1, section 1015 clearly states that a party may be represented by legal counsel or by an "other representative." There is one exception not applicable here: special proceedings regarding arbitration of state contracts before an administrative tribunal, where pro hac vice is required. Indeed, DOR's own regulations related to hearings pursuant to the R-S Act refer to vendors being represented by an "authorized representative." (CCR, tit. 9, § 7227.2.)

DOR relies on Benninghoff v. Superior Court, 136 Cal.App. 4th 61 (2006) for the proposition that practice before an administrative body by an attorney licensed in a jurisdiction other than California is unlawful. DOR's reliance is misplaced. Benninghoff involved a California attorney that resigned from the California bar with disciplinary charges pending. Mr. LaBarre retains his law license.

It is clear that CVPC could have been represented by any individual at the state-level hearing and the fact that CVPC chose a representative who is an attorney not licensed to practice law in California is of no consequence for our purposes and does not bar CVPC from being compensated for its incurred attorney's fees.

Most importantly, the state full evidentiary hearing is a part of the Federal adjudication path, which DOR agreed to in its application to serve as state licensing agency for the R-S Act program. Accordingly, the Panel concludes that DOR's attempt to avoid its responsibility to pay CVPC's attorney on the basis that Mr. LaBarre is not licensed in California is meritless.

D. The Incurred Fees and Costs are Reasonable

The Panel calculated the attorneys' fees award based on lodestar figures for CVPC's counsel, Scott C. LaBarre. There is a "strong presumption that the lodestar represents a reasonable fee." Gates v. Deukmejian, 987 F.2d 1392, 1397 (9th Cir. 1992). The lodestar method provides that the court calculate the number of hours reasonably expended multiplied by the reasonable hourly rate." Morales v. City of San Rafael, 96 F.3d 359, 363 (9th Cir. 1996). The lodestar method for calculating reasonable attorneys' fees has been adopted by both Federal and California courts. Hensley v. Eckerhart, 461 U.S. 424, 433 (1983). Fee applications are accompanied by affidavits of petitioners to establish the reasonableness of the rate sought. Mendenhall v. Nat'l Transp. Safety Board, 213 F.3d 464, 471 (9th Cir. 2000). The Panel concludes that the fee affidavits submitted by CVPC conclusively establish the reasonableness of the hourly rate sought.

The factors to be used in determining the reasonableness of the lodestar are:

(1) the time and labor required, (2) the novelty and difficulty of the questions involved, (3) the skill requisite to perform the legal service properly, (4) the preclusion of other employment by the attorneys due to acceptance of the case, (5) the customary fee, (6) whether the fee is fixed or contingent, (7) time limitations imposed by the client or the circumstances, (8) the amount involved and the results obtained, (9), the experience, reputation, and ability of the attorneys, (10) the "undesirability" of the case, (11) the nature and length of the professional relationship with the client, and (12) awards in similar cases.

Kerr v. Screen Extras Guild, Inc., 526 F.2d 67, 70 (9th Cir. 1975).

The Panel agrees with CVPC that R-S Act cases are both novel and difficult, given the scarcity of legal precedent, particularly in this case concerning vending machine commissions, that Mr. LaBarre was prevented, due to his acceptance of this case, from pursuing other employment, and that Mr. LaBarre agreed to take this case on a reduced fee with a contingency of collecting a market fee later. It is evident that Mr. LaBarre is highly experienced in R-S Act cases, and highly regarded in the field.

The Panel concludes that CVPC is entitled to obtain reasonable fees at prevailing market rates even though it may have paid a discounted rate throughout the pendency of the action. See Hensley v. Eckerhart, 461 U.S. 424, 433 (1983), Chavez v. City of Los Angeles, 47 Cal. 4th 970, 985 (2010). The Panel finds DOR's contentions that certain time entries lacked specificity to be meritless, given that more specific time entries could potentially reveal attorney client privileged communication.

DOR's contentions that time spent reviewing the record, drafting briefs, and conferring with CVPC as to the scope of the arbitration decision are also without merit.

The Panel agrees with CVPC that the decision in this case is significant and substantial. The Panel's decision requiring DOR to pursue vending machine income and to actively participate with CVPC to do so is expected to result in significant monies becoming available to blind licensees for retirement and other benefits. Nevertheless, the Panel concludes that the fee award should be adjusted to reflect the extent to which CVPC was successful in achieving the objectives it sought.

In our decision of February 20, 2018, this Panel concluded that DOR's decision not to enter into the proposed statewide contract with the U.S. Postal Service (USPS) was not,

per se, a violation of the R-S Act. However, we did find that DOR violated the Act by failing to fully investigate the proposed statewide contract and failing to take action to ensure that it was receiving all the revenue to which it was entitled from the USPS. We ordered DOR to take steps to determine whether it is receiving all available revenue from the USPS and, if not, to take action to remedy that situation. .

In Hensley v. Eckerhart, 461 U.S. 424, 436-437 (1983), the Court emphasized that there is no precise rule for making an adjustment to a fee request and that the lower courts, or in this instance the arbitration panel, has discretion in such matters. (461 U.S. 424, 436-437 (1983).) This case involved a variety of complex issues which were intertwined so that it is not possible to specifically identify hours expended by CVPC's counsel which were solely attributable to the CVPC's unsuccessful claims. Moreover, the Panel concludes that it would be problematic to accurately and conclusively establish the vending machine revenue which DOR might or would have obtained if it had complied with its R-S Act responsibilities.

The Panel recognizes that CVPC did achieve an important clarification of the meaning of the R-S Act by virtue of our holding that an SLA has an obligation to determine whether a Federal agency is providing it with all appropriate vending machine income and take steps to remedy any identified deficiency. Nevertheless, for the foregoing reasons, we conclude that some modest adjustment of the requested fees is warranted.

III. CONCLUSION AND AWARD

Accordingly, CVPC's May 18, 2018 Motion for Attorneys' Fees and Costs is granted with the following adjustments. CVPC is awarded 90% of the requested attorneys' fees

(90% of \$94,860 equals \$85,374) plus \$4,818.83 in costs incurred (the \$4,854.20 originally requested less \$35.37 which CVPC concedes to have been charged in error), for a total award of \$90,192.83. DOR is directed to promptly pay this amount.

Dated September 26, 2018.

Gary A. Anderson, Panel Chair

Dated October 15, 2018.

Ralph Black, DOR Appointed Panel Member

Dated October 7, 2018.

Susan Rockwood Gashel, CVPC Appointed Panel Member