

United States Department of Education
Office of Special Education & Rehabilitation Services

OPINION AND AWARD

IN ARBITRATION PROCEEDINGS PURSUANT TO AGREEMENT BETWEEN THE PARTIES

Case no. R-S/10-11

In the Matter of the Arbitration Between

Sharon Bragg

and

Tennessee Department of Human Services Division of Rehabilitation Services

ISSUE: Randolph-Sheppard Implementation at Shelby County Correctional Center

Pre-Conference Hearing: September 20, 2013

Hearing: September 30/October 1, 2013

Briefs Received: January 26, 2014

Reply Briefs Received: Award: February 3, 2014

Award: March 21, 2014

David Alexander
Arbitrator and Panel Chair

Barbara Badger
Arbitrator Agency Appointee

Clearthur Morris
Arbitrator Complainant Appointee

APPEARANCES:

FOR THE COMPLAINANT: Michael G. Floyd, ESQ., Sharon Bragg

FOR THE AGENCY: Telesa Taylor, ESQ, Michael Rebich

INTRODUCTION

The Randolph-Sheppard Act, 20 U.S.C. 107 *et seq.*, establishes a cooperative federal-state program to provide blind persons with opportunities to operate vending facilities on federal and other properties. 20 U.S.C. 107(a) and (b). The Secretary of Education has overall responsibility to administer the Act, as well as authority to promulgate regulations to carry out the Act's purposes. 20 U.S.C. 107(b), 107a(a); see 34 C.F.R. Pt. 395.

As part of his responsibilities, the Secretary designates state licensing agencies (SLAs) to implement the program. 20 U.S.C. 107a(a)(5). A State's participation in the program is voluntary, and a state agency wishing to be designated as an SLA must apply to the Secretary and agree to specified conditions. 20 U.S.C. 107b. For example, the Act requires SLAs to negotiate with federal agencies for the operation of vending facilities on federal sites, 20 U.S.C. 107a(c), and to equip the facilities, 20 U.S.C. 107b(2). The Act also imposes obligations on federal agencies to make vending facilities available to blind persons. 20 U.S.C. 107a.

A blind vendor who is dissatisfied with the action of an SLA must first seek relief from the SLA. 20

U.S.C. 107b(6), 107d-l(a). If the vendor is dissatisfied with the SLA's resolution of the matter, the vendor may "file a complaint with the Secretary who shall convene a panel to arbitrate the dispute." 20 U.S.C. 107d-l(a). Whenever an SLA determines that a federal agency is failing to comply with the Act, it may file a complaint with the Secretary, who will then convene an arbitration panel to address the dispute. 20 U.S.C. 107d-l(b), 107d-2(b)(2). The tri-partite panel includes arbitrators selected by each respective party. Those arbitrators then select a neutral panel chair.

Arbitration panels must give notice and conduct a hearing in accordance with the provisions of the Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.* See 20 U.S.C. 107d-2(a). The ruling of such a panel constitutes "final agency action" for purposes of judicial review under the APA, even though the Secretary has no authority to review or modify the arbitral decision. *Ibid.* Apart from such judicial review, the arbitral decision is "final and binding on the parties." 20 U.S.C. 107d-l(a).

Background

This case is before this arbitration panel pursuant to an appeal of a final administrative order from the Tennessee Department of Human Services (hereinafter "DRS" or "the Department" or "the SLA" or "the Agency") made in connection with a state administrative hearing on a grievance filed by Sharon Bragg (hereinafter "Appellant" or "Complainant") related to the administration of the Department's Tennessee Blind Enterprises (hereinafter "TBE") program. Following a full contested evidentiary hearing on January 28, 2011, the administrative hearing officer issued an order upholding

the Department's actions and finding that TBE (DRS) had acted appropriately and within all applicable federal and state regulations and state policies.

Complainant subsequently filed a complaint with the Secretary of the US Department of Education pursuant to 20 USC 107d-l(a) and 34 CFR 39.513, appealing the administrative decision and requesting an arbitration panel be convened. Pursuant to that complaint, the Deputy Commissioner issued a letter on or about February 2012, convening an arbitration panel to hear evidence on Ms. Bragg's dispute.

Complainant alleged that the Tennessee Department of Human Services state licensing agency failed to comply with the contract in regards to the facility at Shelby County Correctional Center, thus violating the Randolph-Sheppard Act, implementing regulations and/or State rules and regulations. The allegation pertains to the Complainant's transition as a new commissary vendor for the Shelby County Correctional Center, Memphis, Tennessee beginning in May, 2009.

Complainant alleged that the Agency did not properly support her transition into the facility, resulting in an uncalled for "bumpy" start leading to County and inmate dissatisfaction and loss of income for her business. More specifically, she alleged the ACTFAS accounting system was flawed, causing ordering and transaction-recording problems from the outset, while the state of the art technology specified in the bid announcement and contract with the County was unreasonably delayed.

Complainant also alleged that she received gender discrimination when she was required to pay a 6% commission to the County when a male blind vendor at a jail facility in the same County was not required to pay a commission.

Complainant requested reimbursement for loss of income and increased costs occurring because The Agency did not properly support her transition into the facility. She also asked for reimbursement of the 6% commission she had wrongly been required to pay the County. She also asked for payment of attorney fees.

The Agency denied that contracts or implementing regulations were violated. The Agency also denied the gender discrimination allegation.

A preconference hearing, required by the Act, was completed via conference call on September 20, 2013. The hearing was held on September 30 and October 1, 2013 at the Tennessee Department of Human Services office, Memphis TN. At the hearing, the witnesses were sworn-in, the parties were afforded the opportunity to examine and cross-examine the witnesses and to introduce relevant exhibits. A court reporter was utilized with transcript received electronically October 23, 2013, followed by hard copies. Panel Chair recorded the hearing for personal use, to be destroyed after the award is made. Both parties chose to render brief closing statements at the hearing, followed by

written briefs. An optional reply brief was authorized, with a deadline of 5pm February 3, after which the record was closed. One reply brief was received, that from the Agency.

The framing of the issue was broadly defined during the pre-conference call, at the suggestion of the panel chair, as follows:

Did the State treat Sharon Bragg unfairly in her transition to and operation of the Shelby County Correctional Center?

The issue was made more specific at the hearing after the introduction of the arbitration convening letter from the U.S. Department of Education of February 23, 2012 (J-1), adapted as follows:

Did the Tennessee Department of Human Services state licensing agency (SLA) fail to comply with the contract in regards to the facility at Shelby County Correctional Center, thus violating the Randolph-Sheppard Act, implementing regulations and/or State rules and regulations? If so, what shall be the remedy?

The issues were further specified into sub-issues by the Panel and the parties at the hearing, as follows:

I Hardware and Software (ACTFAS)

- a. Did the Agency provide to the blind vendor and County Management for their use all necessary hardware and an inmate accounting software program that will track all transactions? (J-2.7b)
- b. Did the Agency provide continuing support for the software and the hardware, including correcting program and system problems plus enhancements to the software? (J-2.7d)
- c. Did the Agency provide pod kiosks and related software which can be used by inmates to electronically place orders, view account balances, view his/her transaction history, file grievances and request sick call? (J-2.3a)

If not, what was the impact on the complainant and what shall be the remedy?

II Touch Pay

- a. Did the Agency provide deposit kiosks and any other related telephone/internet options for individuals to make deposits to inmate accounts? (J-2.3c),

If not, what was the impact on the complainant and what shall be the remedy?

III Discrimination

- a. Did the SLA exercise gender discrimination when the complainant was required to pay a 6% sales commission to Shelby County.

If so, what was the impact on the complainant and what shall be the remedy?

PERTINENT PROVISIONS

In the opinion of the Arbitrators, the following provisions related to the Randolph-Sheppard Act and its implementation are relevant in determining the issues in dispute:

THE RANDOLPH-SHEPPARD ACT - as amended and as codified at Ch.6A of Title 20 of the U.S. Code (J-5)

20 U.S.C. 107. Operation of Vending Facilities

(a) Authorization. For the purposes 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 the provisions of this chapter shall be authorized to operate vending facilities on any Federal property.

PERMIT AGREEMENT FOR OCCUPANCY AND USE OF PREMISES FOR BLIND OPERATED VENDING FACILITIES (J-2)

This is an Agreement, effective upon full execution, between the DEPARTMENT OF HUMAN SERVICES (hereinafter called "Agency") and Shelby County, Tennessee (hereinafter called "Management"), which manages and operates the Shelby County Correctional Center in Memphis, Tennessee. IN CONSIDERATION of the mutual agreements hereinafter contained, the parties agree as follows:

3.b. Agency shall provide pod kiosks and related software which can be used by inmates to electronically place orders, view account balances, view his/her transaction history, file grievances and request sick call. Paper order forms shall be used as a back-up to the pod kiosks.

3.c. Additionally, Agency, through a third party vendor approved by Management, shall provide deposit kiosks and any other related telephone/internet options for individuals to make deposits to inmate accounts and the third party shall guarantee good funds to the County's inmate trust fund for all such deposits.

3.d. All network wiring for kiosks shall be performed by the County's approved vendor at Agency's expense. All maintenance and replacement of inoperable kiosks and equipment shall be Agency's responsibility.

6.a. The use of the above-described premises shall be without cost to Agency or its licensed vendor and management shall bear the cost of all utilities; provided, however, that the licensed vendor shall on a weekly basis remit to Management six percent (6%) of net sales for that week.

6.b. "Net sales" for this purpose are defined at gross sales minus any applicable sales tax and any sales of stamped items. Additionally, the licensed blind vendor shall provide indigent packs to the inmates in accordance with Section 11 of this agreement. ·

7.a. The Agency, through its licensed vendor, will maintain records of all charges against an inmate's account.

7.b. Agency shall provide to the blind vendor and Management for their use all necessary hardware and an inmate accounting software program that will track all transactions. This accounting system shall generate reports showing transactions as necessary and appropriate to monitor the program.

7.d. Agency shall provide continuing support for the software and the hardware throughout the length of the contract. Support to include correcting program and system problems plus enhancements to the software as offered by Vendor, or determined necessary by Management or Agency, at no additional cost to the County. See Exhibit A for Inmate Commissary Services Computer Specifications...

11.e. The first thirty thousand (30,000) indigent packages per year will be provided by the licensed blind vendor at no cost to Management. Additional indigent packs may be purchased by Management from the licensed blind vendor at the vendor's actual wholesale cost...

EXHIBIT A: INMATE COMMISSARY SERVICES COMPUTER SYSTEM

I. Computer Hardware and Software System

5. Account for and provided payment to County for the following charges

c. Commissary charges

8. System must properly account for charges for indigent packages

INSTRUMENT OF FACILITY ASSIGNMENT-FACILITY (IOFA) #549- 5/1/09- TENNESSEE BUSINESS ENTERPRISES PROGRAM (J-3)

I. GENERAL

The intent of this instrument between the Department of Human Services (SLA), hereinafter referred to as the Agency, and the Licensee, hereinafter referred.to as the Manager, is to outline the

obligations, duties and responsibilities of each party. This is to insure that each is aware of all requirements so that the assigned facility is operated in compliance with all laws, regulations and program policies which have been established under 20 U.S.C. 107 Et. Seq. And T.C.A. 71-4-501 Et. Seq. for the administration of the Randolph-Sheppard Program in Tennessee.

The Agency has entered into an agreement known as (Occupancy Permit) for the operation of Facility #549 which...is attached to and made a part of this document...

II. AGENCY'S RESPONSIBILITIES

A. All necessary equipment, including vending machines, fixtures and any other items deemed appropriate, for the successful operation of the facility will be provided by the Agency for the use and benefit of the Manager... All facility equipment will be maintained in good repair pursuant to procedures set forth in the Operations Manual...

C. The TBE Consultant having responsibility for Facility #549 shall be available to assist in resolving problems and assuring that otherwise all appropriate and necessary services are provided for the efficient and effective operation of the facility.

IV. MUTUAL UNDERSTANDINGS

A. It is agreed and mutually understood that this instrument is not in the nature of a contract but rather serves as a basis for the general principles upon which the facility is to be operated.

B. It is further agreed to and mutually understood that the failure of the Agency to discharge its responsibilities may result in the Manager's bringing action through the grievance process to correct a violation. Similarly, the failure of the Manager to discharge his/her responsibilities may result in the Agency's initiating disciplinary action...

C. ... each party acknowledges and recognizes the significance of the obligations which are imposed as well as the consequences for failure to discharge one or more of them.

TENNESSEE BUSINESS ENTERPRISES ANNOUNCEMENT-VENDING FACILITY 549- 2008 (J-4)

This is to announce that Vending Facility No. 549 is available for assignment... Applications must be postmarked by Thursday, August 14, 2008.

CHARACTERISTICS OF FACILITY

3200 INMATES

Projected Counter Sales: \$1,500,000

SPECIAL NOTES:

Negotiations regarding this facility are ongoing and have not been finalized. This bid is being issued with the assumption that all remaining details can be agreed to and that the facility will come on line October 1, 2008, as tentatively planned. The manager will be expected to pay a yet to be determined commission to the County as well as provide all or a portion of the indigent packs... The indigent packs and commissions could account for as much as 25% of the manager's net proceeds... TBE will provide the necessary hardware and software through Aramark Correctional Services as well as necessary training. This facility will include pod kiosks which will allow inmates to place orders and a lobby kiosk provided by Touch Pay that will allow family members to put money on an inmate's account. The manager will make no money off the Touch Pay lobby kiosk. The Aramark system is state of the art and requires a high level of computer skills by the manager or key employee. SCCC has indicated that it wishes to have a representative serve on the three member interview panel and TBE has agreed to allow this. By bidding on this facility and accepting an award, the manager agrees to pay any commissions or other financial obligations as specified in the permit and agrees to work cooperatively with SCCC officials as well as Aramark and Touch Pay representatives.

FACTS

SUMMARY OF RELEVANT TESTIMONY and EVIDENCE

This summary of facts, derived from testimony at the hearing and exhibits of the parties, is presented to illustrate as simply as possible, linked to the three key issues of the complaint, as follows:

- I. Hardware and Software (ACTFAS)
- II. Touch Pay
- III. Discrimination

ACTFAS

ACTFAS is a computer software system that links to the jail management system (JMS) and assists with management of the prison, including inmate records finances. For the commissary, ACTFAS provides means for inmates to place orders and payment, manages inventory, and provides total sales information. Inmate orders may be done using paper scantrons or if available, a kiosk with an order touch screen. State of the art facilities use the kiosk method.

Pertinent language from the Permit Agreement between the Department of Human Services and the County (J-2), the bid announcement (J-4), and the IOFA between the SLA and the Licensee (J-3) is shown below:

Permit Agreement between the Department of Human Services and the County (J-2)

3.b. Agency shall provide pod kiosks and related software which can be used by inmates to electronically place orders, view account balances, view his/her transaction history, file grievances and request sick call. Paper order forms shall be used as a back-up to the pod kiosks.

3.d All network wiring for kiosks shall be performed by the County's approved vendor at Agency's expense. All maintenance and replacement of inoperable kiosks and equipment shall be Agency's responsibility

6.b. "Net sales" for this purpose are defined at gross sales minus any applicable sales tax and any sales of stamped items. Additionally, the licensed blind vendor shall provide indigent packs to the inmates in accordance with Section 11 of this agreement.

The Agency, through its licensed vendor, will maintain records of all charges against an inmate's account.

7.a. Agency shall provide to the blind vendor and Management for their use all necessary hardware and an inmate accounting software program that will track all transactions. This accounting system shall generate reports showing transactions as necessary and appropriate to monitor the program.

7.d. Agency shall provide continuing support for the software and the hardware throughout the length of the contract. Support to include correcting program and system problems plus enhancements to the software as offered by Vendor, or determined necessary by Management or Agency, at no additional cost to the County. See Exhibit A for Inmate Commissary Services Computer Specifications...

11.e. The first thirty thousand (30,000) indigent packages per year will be provided by the licensed blind vendor at no cost to Management. Additional indigent packs may be purchased by Management from the licensed blind vendor at the vendor's actual wholesale cost...

Bid Announcement

Negotiations regarding this facility are ongoing and have not been finalized. This bid is being issued with the assumption that all remaining details can be agreed to and that the facility will come on line October 1, 2008, as tentatively planned. The manager will be expected to pay a yet to be determined commission to the County as well as provide all or a portion of the indigent packs... The indigent packs and commissions could account for as much as 25% of the manager's net proceeds... TBE will provide the necessary hardware and software through Aramark Correctional Services as well as necessary training. This facility will include pod kiosks which will allow inmates to place orders and. ... The Aramark system is state of the art and requires a high level of computer skills by the manager or key

employee... By bidding on this facility and accepting an award, the manager agrees to pay any commissions or other financial obligations as specified in the permit and agrees to work cooperatively with SCCC officials as well as Aramark and Touch Pay representatives.

IOFA

II. AGENCY'S RESPONSIBILITIES

A. All necessary equipment, including vending machines, fixtures and any other items deemed appropriate, for the successful operation of the facility will be provided by the Agency for the use and benefit of the Manager... All facility equipment will be maintained in good repair pursuant to procedures set forth in the Operations Manual ...

C. The TBE Consultant having responsibility for Facility #549 shall be available to assist in resolving problems and assuring that otherwise all appropriate and necessary services are provided for the efficient and effective operation of the facility.

The Complainant testified that she was expecting more from ACTFAS than she found upon her startup, based on the IOFA (J-3), the Permit Agreement between the Department of Human Services and the County (J-2) and the bid announcement (J-4). Key testimony from her direct and cross examination follows:

- The basic ACTFAS was there, but there were major issues, especially the first month
- Work space was not initially provided at the jail, and when it was they had to share a computer/printer with a County office. They finally got a work space and linked to the JMS
- ACTFAS was using scantrons for inmate orders, a much more problematic method than kiosks. There were problems getting the scantron system to work-inmates were used to pens and pencils and ACTFAS required pencils only. The coding was not matching up with the new menus, causing delivery problems and inmate dissatisfaction and grievances.
- Work space and scantron problems caused the Commissary to incur a bad start with the inmates and costs to the business. Labor costs were high with 14-20 workers working from 6am-midnight, some with overtime. The scantrons cost \$280 a month for the 16 months used awaiting kiosks. Kiosks were provided in September, 2010.
- ACTFAS did not take out sales tax on orders for the first month. Ms. Bragg paid the \$7155 tax, asked Mr. Smith for reimbursement, was not reimbursed and did not file a grievance.

- ACTFAS did not function properly to account for and control issuance of indigent packages, resulting in delivery of 30, 117 packs in the first 8 months of operation. Contract required delivery of 30,000 per year at no cost to County. TBE chose to pay for packs for next 4 months. ACTFAS also was not able to deduct money automatically for packs for indigent inmates with some money in their account, requiring a manual process which Ms. Bragg chose not to do, even though the permit agreement allowed it.
- Issues were immediately brought up to the TBE consultant, including e-mail copies to other TBE managers. They did talk to the AFTAS company and got programming issues ultimately fixed after a month or two
- Difficult to document sales lost due to these problems. Can document labor/overtime costs directly related to ACTFAS

Testimony from the State was done by Terry Smith, former State employee and Director of Services for the Blind and Visually Impaired at the time of the grievance. and Mike Rebich, TBE supervisor, currently and at the time of the grievance. Key testimony from Mr. Smith's direct and cross examination follows:

- Aramark software ACTFAS complied with requirements of Exhibit A of Permit Agreement (J-2) Doesn't remember being made aware of inmates not being able to order using ACTFAS
- Bragg was not happy with ACTFAS. We offered to bring back Swanson system, but she refused saying she wanted Aramark to "do it the way she wanted it done rather than going to a system we knew would fix it" Ms. Bragg utilized the ACTFAS system in her previous assignment and was well aware of its capabilities
- It was not intended that kiosks go in when facility opened... Aramark goes in with "paper scan forms first... and then go in a few months later and start installing kiosks, and that was the plan all along." It was explained to Bragg that they would be phased in.
- Bumpy start. Can't recall specifics. Bragg made me aware of issues... some operational... ACTFAS... kiosks. Had discussions, multiple meetings with County, spent time in Memphis, referred computer side to Aramark, "we bird-dogged them pretty good to make sure they were following up on issues as appropriate." Eventually Aramark assigned a full-time support person to work with ACTFAS issues.
- Indigent packs... questioned the 30,000 in 7-8 mos, not accurate count. "I told Sharon that, you will be delivering indigent packs next week, and if you do not deliver indigent packs next week, you'll be removed from the facility. So she agreed that she'd deliver the indigent

packs... we couldn't justify the County to pay for the indigent packs, so we paid... covered the cost of those for her." She suffered no economic loss from that.

- Regarding inmates with some money in account using that money for indigent packs, contract allowed it be used. ACTFAS was not capable of automating it. Gave Bragg choice of going back to Swanson or taking money out manually, and she chose not to do either. Indigent inmates had a total of \$1900 that could have been retrieved manually

TOUCH PAY Lobby Kiosk

ISSUE: Did the Agency provide deposit kiosks and any other related telephone/internet options for individuals to make deposits to inmate accounts? If not, what was the impact on the complainant and what shall be the remedy?

Touch Pay is a system that allows inmate families, relatives, friends, or anyone to put money directly onto the inmate's account without going through the finance office of the facility. They can do that process by coming to a lobby kiosk at the facility using a credit card or cash or via phone or on-line with a credit card. The system is convenient and fast, allowing inmates to have access to money which can be used for the commissary and other payments at the facility.

Pertinent language from the Permit Agreement between the Department of Human Services and the County (J-2), the bid announcement (J-4), and the IOPA between the SLA and the Licensee (J-3) is shown below:

Permit Agreement: (J-2.3c) Additionally, Agency, through a third party vendor approved by Management, shall provide deposit kiosks and any other related telephone/internet options for individuals to make deposits to inmate accounts and the third party shall guarantee good funds to the County's inmate trust fund for all such deposits.

3.d. All network wiring for kiosks shall be performed by the County's approved vendor at Agency's expense. All maintenance and replacement of inoperable kiosks and equipment shall be Agency's responsibility.

Bid Announcement (J-4): Negotiations regarding this facility are ongoing and have not been finalized. This bid is being issued with the assumption that all remaining details can be agreed to and that the facility will come on line October 1, 2008, as tentatively planned... TBE will provide the necessary hardware and software through Aramark Correctional Services as well as necessary training. This facility will include pod kiosks which will allow inmates to place orders and a lobby kiosk provided by Touch Pay that will allow family members to put money on an inmate's account. The manager will

make no money off the Touch Pay lobby kiosk. The Aramark system is state of the art and requires a high level of computer skills by the manager or key employee.

The Complainant testified that she understood that Touch pay would not be available at start-up, but she did not expect it would take three years. Key testimony from her direct and cross examination follows:

- Touch Pay increased sales more than 10% here in Shelby County once it came on in May 2012. May 2009 sales=\$106653 and May 2012 sales= \$129, 080. Used Exhibit A-3, Touch Pay Sales, to arrive at a figure of \$414, 678.50 as sales lost due to Touch Pay not being operable from May 2009 until May 2012.
- Regarding efforts to get Touch Pay installed: Numerous contacts with TBE estimated at 10- 20 meetings, 50-100 e-mails. Filed grievance in January, 2011 for breach of understanding that Touch Pay would be used. "Yes was informed by Terry Smith about his continuing discussions with County... and I asked on many occasions for him to pursue it more vigorously. He chose not to." Basing lack of vigor on "because it took over three and a half years for it to get installed."
- Regarding language in the Permit Agreement that "Agency, through a third party vendor approved by Management, shall provide" Touch Pay: "Approval from the County? Yes, I do understand that. Nowhere in my imagination would I have thought that it would have taken over three years for that to happen, and the negotiations for this contract had gone on for a full year if not nine months prior to even coming in, so for having... to not have everything in place and well organized in the beginning of this contract is just incredible."
- Response to questions about the validity of the financials: Monthly fluctuations in sales due to "population decrease, inventory removal, holidays, policies that go into effect that affect sales... " sales environment not uniform... can have sales vary \$10,000 in one week. Used averages ... more truthful than one month compared to the next.. .is why I compared year to year.

Testimony from the State was done by Terry Smith, former State employee and Director of Services for the Blind and Visually Impaired at the time of the grievance and Mike Rebich, TBE supervisor, currently and at the time of the grievance. Key testimony from Mr. Smith's direct and cross examination follows:

- Regarding bid announcement and length of time to get kiosks and touch pay: "She was aware that it had to be approved by the County. It was never discussed-she knew it was not going to be there when she went in" ... There was never a time frame discussed. ACTFAS had to be working day 1. No time frame for kiosks and touch pay.

- Regarding TBE vigor: "And the thing I emphasize is that it did not go in because of a lack of effort on our part. It was the County's position, and they said we've got to approve it, and we're not approving it, so what could we do? The contract allowed for that."
- Answering why it took so long: "Well, there was a lot going on, and to be perfectly frank, you know, they had issues with Ms. Bragg, and there were some meetings that were held that where some things were said and done that really irritated the County, and we were doing damage control... They never said because we're mad at Ms. Bragg we're not going to let you do this, but they certainly made it clear that ... their spirit of cooperation was not what it would otherwise be... they said all along that they weren't going to put Touch Pay in until the kiosks were in... let's do this one step at a time... let's get ACTFAS in and start delivering, using the scan forms. Then we'll get all the kiosks in, and then we will move to Touch Pay. And that's the process we followed. When we got to the Touch Pay issue, then they started throwing up roadblocks on why they had problems with Touch Pay. The fundamental issue was that when you put money on a credit card, it is a couple of days before you actually see it in your bank, so there's like a float for two days"... before the County gets its money. They were concerned about fraudulent credit cards... "So we had to work through those issues... we had an agreement in principle to move forward. Then they had County elections and everything stopped ... So we got Touch Pay to eventually put up a bond... to protect the County... then ... the administrator leaves so everything dies again... a new director of the correctional institute who wasn't in favor of us coming in in the first place... and had to start from scratch."
- Regarding complainant's involvement in the Touch Pay process: She was involved in many of the meetings where we discussed Touch Pay with the County ... she was aware of everything that was happening
- Regarding blame for delay: It wasn't our fault. It wasn't Ms. Bragg's fault... We are blaming it on the County."
- Touch Pay impact on sales: "... We wanted Touch Pay in because it would get money on the accounts and it would increase sales. That's a given. And it was also a good service to the family members." The inmate population at the Correctional Center began to fluctuate shortly after Ms. Bragg assumed operation of the commissary and declined by 20% (600 inmate
- Regarding the operation: "An operation this sophisticated, you're not going to find outside the state of Tennessee... we're on the cutting edge of this... the only state that really does jail commissaries"

III. Discrimination

Issue: a. Did the SLA exercise gender discrimination when the complainant was required to pay a 6% sales commission to Shelby County. If so, what was the impact on the complainant and what shall be the remedy?

Pertinent language from the Permit Agreement between the Department of Human Services and the County (J-2), the bid announcement (J-4), and the IOFA between the SLA and the Licensee (J-3) is shown below:

Permit Agreement

6.a. The use of the above-described premises shall be without cost to Agency or its licensed vendor and management shall bear the cost of all utilities; provided, however, that the licensed vendor shall on a weekly basis remit to Management six percent (6%) of net sales for that week.

6.b. "Net sales" for this purpose are defined at gross sales minus any applicable sales tax and any sales of stamped items. Additionally, the licensed blind vendor shall provide indigent packs to the inmates in accordance with Section 11 of this agreement.

Bid Announcement

The manager will be expected to pay a yet to be determined commission to the County as well as provide all or a portion of the indigent packs... The indigent packs and commissions could account for as much as 25% of the manager's net proceeds... By bidding on this facility and accepting an award, the manager agrees to pay any commissions or other financial obligations as specified in the permit and agrees to work cooperatively with SCCC officials as well as Aramark and Touch Pay representatives.

The Complainant testified that she was discriminated against because a male blind licensee was at a Shelby County jail facility was not paying a commission while she was required to pay 6% of sales as a commission in a facility operated by the same county. Key testimony from her direct and cross examination follows:

- Paying commission from May 2009 through the first nine months of 2013... Commission paid out= \$452,710, using monthly averages
- Disadvantage of 6% commission: " I have less capital in my business to buy merchandise and to possibly expand my business if possible... less ability to pay bills... less profit to little profit after bills and inventory, operating expenses have been paid. And Mr. Shaw does not have that kind of restraint."

- Aware of commission when signed agreement. Of opinion that she would not be awarded contract unless signed. Believed ongoing services would be available, and they were not, making the commission more of a burden than it would have been otherwise. Would not have bid knowing kiosks would not be there.
- Did not feel discriminated against during process because other women and men were bidding.
- Difficult to pass costs on via pricing because County and inmates pressure for lower prices

Testimony from the State was done by Terry Smith, former State employee and Director of Services for the Blind and Visually Impaired at the time of the grievance. and Mike Rebich, TBE supervisor, currently and at the time of the grievance. Key testimony from Mr. Smith's direct and cross examination follows:

- Flexibility allowed in negotiations with individual facilities based on the needs/requirements of facility
- Negotiations with Shelby - Tried to get in facility for 10 year before we did..." ... five or six years prior to going into this location, we had really gotten very aggressive in going after commissaries and had had a lot of success... we had the sheriffs association and the legislature on two different occasions trying to get exempt from our priority, because they did not want... to have to give these locations to blind vendors. We had defeated that effort in both years they tried to get it passed, but at the same time we were reaching out to the sheriff's association and trying to find some middle ground to where we could peacefully coexist. So all that's going on at the same time I start negotiating with Shelby County." Shelby had a private vendor but wanted to bid ii out but knew we would exercise blind vendor priority and come in... started dialogue in 2007 and "they said if you can get us fairly close to what we are getting now financially, we will drop our resistance and work with you to get a blind vendor in here... back and forth with every possible scenario...proposals and counterproposals... we were offering flat fees...transaction fee...small commission, and ended up with the agreement that is here now." Having received a 15% commission from previous vendor, Shelby was taking the position that the taxpayers of Shelby County should not be forced... to pay for that blind vendor priority... If we couldn't get close, "they were going to challenge us in court and keep us out of there, which was not a test case that we wanted."
- 90% of negotiations took place prior to bid announcement... had conference call with bidders to bring them up to date-looked like a 6% commission plus indigent packs... Ms. Bragg was on conference call... followed up in writing after the call
- Ms. Bragg did not indicate at any time prior to filing of grievance that she believed she was required to pay the 6% commission because she was female

- Regarding the Shelby County Jail with the male blind licensee Shaw who pays no commission: had been at facility since 1974... jail had requested a commission many times... felt unfair to go in after the fact and require commission... "Committee of Blind Vendors authorized paying commissions in commissaries provided we didn't go back and impose a commission on any existing managers retroactively ... " Committee of Blind Vendors- body of eleven members elected by vendors at large to represent them in working with the Agency on major administrative decisions
- Regarding contract with Mr. Shaw: Contract was changed and renegotiated...permit changed but IOFA with Shaw without commissions was many years old and remained the same
- Regarding the different permits in same county being discriminatory: "We wouldn't engage in a discriminatory practice. When we negotiated that commission, we had no idea that a female was going to be going into that location, had no idea."

POSITIONS OF THE PARTIES

APPELLANT'S POSITION

The Appellant contends the Tennessee Department of Human Services (SLA), has violated the Randolph-Sheppard Act and any rules and regulations as it relates to its actions or inactions by the following:

Requiring the use of the accounting software called ACTFAS to manage the Shelby County Correctional Facility ("Appellant's Facility"). ACTFAS did not track, as required, the indigent kits Appellant provided, resulting in the Appellant handing out 117 more than required, costing her labor costs. ACTFAS also malfunctioned the first month by not taking out sales taxes with purchases, resulting in the Appellant having to pay the \$7155 in sales tax, for which she was not reimbursed.

Not having the TouchPay system and kiosks installed in Appellant's facility at the start up of the facility, which in turn caused a loss in Appellant's sales, when the SLA was contractually bound to have TouchPay and the kiosks in place. The kiosk order system were not operational until 16 months after opening. The TouchPay system allowing monetary deposits to inmates accounts was not operational until three years after opening. TouchPay believes it results in an 10% increase in sales, meaning Appellant lost at least \$414,678 in sales during the period TouchPay was not installed.

Exercising gender discrimination when the SLA required Appellant to pay a 6% commission because she was a female vendor when other male vendors did not have to pay a commission. The city jail is also a TBE facility. Its operator is Barry Shaw. Mr. Shaw is a male vendor. Mr. Shaw

does not pay any commissions. Furthermore, Mr. Shaw is not required to provide free indigent kits. Appellant's understanding was that TBE would not let a blind vendor take over Appellant's facility unless a commission was paid. Swanson's Corporation, who was not a blind vendor, was the operator of Appellant's facility, before Appellant took charge. For the past four-and-a-half years, Appellant has paid \$452,710 in commissions to Shelby County, which comes off Appellant's bottom line. Swanson's Corporation did have to pay a commission, but they are a multi-million dollar corporation. It can be reasonably inferred that Swanson's Corporation is more able to pay a commission than Appellant

Appellant requests the arbitration panel to find that the Tennessee Department of Human Services did in fact violate the Randolph-Sheppard Act and award damages and attorney's fees to Appellant. The Third Circuit has held that arbitration panels have authority to award monetary damages. *Delaware Dep't of Health & Social Servs. v. United States Dep't of Educ.*, 772 F.2d 1123, 1137 (3d Cir. 1985). Because the Act gives a vendor the right to submit any dispute with an SLA to arbitration, and arbitrators in other contexts have typically had authority to award damages, those courts have concluded that Congress intended to condition a State's participation in the program on the State's consent to the possibility that an arbitration panel would award damages against the SLA for violations of the Act. *Ibid.*

Appellant requests attorney's fees of \$35,000.00 for four (4) years labor. Counsel was retained in 2010, at a rate of \$350.00 per hour, with a total of one hundred (100) hours. This rate is based on two (2) hearings, preparation for hearings, review of the legal files, legal research for both the hearings and brief, and consultation with Appellant.

AGENCY POSITION- INITIAL BRIEF

The Department submits that at all times relevant to this action, TBE has acted in accordance with the Randolph Sheppard Act, its implementing regulations and all state rules and regulations. The Department contends that the implementation of the ACTFAS software system and TouchPay system met the specifications and requirements of the Pem1it Agreement for Occupancy and Use of Premises for Blind Vending Facilities executed between TBE and the Shelby County Government. The Department contends that the Appellant's gender discrimination claim without merit as she fails to establish that she was required to pay the commission because of her gender or that she was treated differently than a similarly situated male counterpart because of her gender. The Department further contends that Appellant has failed to establish that she has suffered actual damages as result of the actions alleged.

I. ACTFAS Software Meets the Requirements of the Permit Agreement.

The Department contends the specific system requirements outlined in the Permit Agreement relating to the operation of the ACTFAS software were met at the time the Appellant began operating in the facility. Absent the software working, Appellant would not have been able to secure orders from the inmates at the facility. However, by Appellant's own testimony, she was able to secure and fill orders using the software provided through the ACTFAS.

The Department further contends that the Appellant's argument centers on additional requirements for the software that she believed that it could or should accomplish related to the capture of certain funds related to indigent kits through an automated process. However, the specifications sought by Appellant were not included in the requirements of the ACTFAS software pursuant to the Permit Agreement. During cross-examination, Appellant could not identify any specific provisions in the software requirements nor the body of the Permit Agreement that such process be automated. Thus, this issue is without merit.

II. TBE Installed the TouchPay System in Accordance with the Express Terms of the Permit Agreement as the Installation of TouchPay System Was Contingent Upon Approval of the TouchPay System and Vendor by Shelby County. Upon Receiving Approval for the System from the County, TouchPay was Installed.

The Department contends there was undisputed testimony that Appellant was aware that the installation of the TouchPay system was contingent upon the approval of the County, and Appellant was aware that efforts were being made by the Department to secure approval from the County. Further, Terry Smith, who was TBE Director at the times relevant to this complaint and who was instrumental in negotiating the agreement with Shelby County, testified in detail regarding the Permit Agreement, including that there was no timeframe specified for County approval. The Department points out that upon receiving approval for the system from the County, the TouchPay system was installed and is currently operational. The Department contends the Appellant has failed to establish that TBE failed to install the TouchPay system pursuant to the terms of the Permit Agreement and that the Appellant cannot prevail on this issue.

III. TBE Did Not Discriminate Against Appellant Based on Her Gender By Requiring Appellant to Pay 6% Commission Based on Successful Bid Because Payment of Commission Was Requirement for Successful Bid on Facility.

The Department contends that by her own admission, Appellant was aware at the time that she bid on the facility, was interviewed, and selected for placement at the facility, that the manager who accepted the facility would be required to pay a commission. She further admitted that she was informed that the amount of the commission would be 6% prior to her acceptance of the facility.

Appellant further admits that both males and females participated in the bid and interview process with regard to this facility, and that both males and females understood that a payment of a commission was a requirement for the successful candidate. The evidence presented at the hearing indicates that at no time during the bid, interview, or selection process did Appellant indicate that she was being asked to pay a commission at this facility because she was female.

Appellant's entire argument regarding her alleged gender discrimination claim rests on her contention that a male operator, Barry Shaw, at another TBE facility in Shelby County does not have to pay a commission. However, in order to establish a prima facie case of discrimination, Appellant must show that the male operator who is not being required to pay commission is similarly situated. However, by Appellant's own testimony, neither Mr. Shaw nor his facility is similarly situated to hers. Appellant testified that the facility operated by Mr. Shaw is a jail as opposed to the prison commissary she operates at the Shelby County Correctional Center. Appellant further testified that the requirements and process for operating and administering the prison commissary differs from the jail vending services Mr. Shaw operates. She also testified that the administration to whom the jail reports to differs from prison at which she operates the commissary. Moreover, Appellant admitted that permit agreements governing the entities differ and are specific to the facility.

The Department points out that each permit agreement is negotiated separately based on the needs of that particular facility prior to the selection of the individual blind vendor who will be placed in the facility. Terry Smith gave lengthy testimony regarding the requirement for a commission at the Appellant's facility in light of the fact that the long-time private vendor being replaced had paid a commission and the County was requiring one for placement. In contrast, Mr. Shaw continues to operate under a long-time permit with the jail that was negotiated with that facility and its administration over forty (40) years ago.

The Department contends the Appellant fails to establish that she has been treated differently than a similarly situated male operator, thus her claim is without merit and should be denied.

AGENCY REPLY TO APPELLANT BRIEF

The Agency contends the Appellant is unable to prove actual losses or compensable damages as a result of using the ACTFAS software or as a result of the delay in the installation of the TouchPay system. The Agency expresses concern about lack and/or quality of financial evidence presented at the hearing in support of the Appellant's claims. The Agency also expresses concerns about the validity of financial projections and assumptions used to arrive at Appellant's estimates of the financial impact on her operation.

Regarding the sales tax issue, the Agency makes the argument that the issue should not be before the Panel because at no time prior to the arbitration hearing did the Appellant dispute the handling of

the issue by TBE or indicate that she disagreed with TBE's resolution of the matter, or file a grievance. The Department contends the Appellant cannot now recover on appeal under a theory or dispute that she never grieved prior to arbitration.

The Agency contends the Appellant failed to present evidence that the ACTFAS software failed to properly track the 30,000 indigent kits under the permit agreement. The Agency suggests the Appellant was compensated for and suffered no damage for providing indigent kits above 30,000.

The Agency contends the Appellant failed to establish that alleged damages caused by the delay with TouchPay are the result of a breach by TBE.

OPINION

PRELIMINARY MATTERS

As might be expected, the collective bargaining process has led to a body of language and widely recognized and followed precepts, derived from the process itself, scholarly research and writings, arbitration awards, court appeals and consensus views of appropriate perspectives and practices. Some of those relevant to this case, including some provided by the parties, are presented below:

The Respondent claims that Czubak agreed to the revisions of the bid announcement and the operating agreement made pursuant thereto and therefore should be held to the bargain he made. Perhaps, if this were a simple claim made under Illinois contract law that could be true. But such reliance on contract theory alone would negate the oversight and requirements of both the Federal and State statutory enactments under which this agreement was made. The goal of both legislative efforts was to encourage and assist economic success not entrap a small business person in a questionable contract that he was not in a position to renegotiate. As an intended direct beneficiary of the legislation, Mr. Czubak had a right to rely on the SLA's acumen in making sure that the contractual provisions it sanctioned were at least equitable and would not harm him, as intended by the law... *D.Czubak v. Illinois Department of Human Services*, Case No. R-S/08-5, Anne L. Draznin, Arbitrator/Chair. March 31, 2010, p.24

Regarding what effect the federal courts' jurisprudence on state sovereign immunity to award money damages and/or other relief a majority of the Panel finds the wisest course for us to take is to assume, without deciding, that we have plenary authority to award whatever relief we find appropriate based on the facts presented at arbitration. In taking that course, we are mindful that the United States Supreme Court's decisions on state sovereign immunity have severely circumscribed a plaintiff's ability to obtain relief, whether legal or equitable, retroactive or prospective, against a state entity. However, the Court has not specifically addressed the authority of a Randolph-Sheppard arbitration panel to award money damages and/or other relief. And there is a split in the federal

judicial circuits on that issue... In the opinion of a majority of this Panel, we have been selected by the parties to resolve the disputes submitted to the best of our abilities, and to provide remedies for proven breaches of contract and/or violations of statute...it would be a strong disincentive for any blind vendor wishing to vindicate his rights through the state court evidentiary and/or a federal arbitration proceeding if the best he/she could hope for was some sort of declaratory judgment. *John Bell v. New Jersey Commission for the Blind and Visually Impaired*, Case No. R-S/07-14, Stephen F. O'Beirne, Arbitrator/Chair, May, 2011.

Based on the foregoing history of the interaction between attorneys' fees and the Eleventh Amendment, it appears that a court may award attorneys' fees only if it already has jurisdiction over some other part of the award. Therefore, attorneys' fees might be awarded against the state if the plaintiff prevailed on a request for prospective relief, but not if the defendant was immune from damages. Since we already have determined that the state in this case was immune from the enforcement of the damage award by federal courts, the state is also immune from enforcement of the attorneys' fee award. This is not to say Hinton cannot enforce the attorneys' fee award through some other method, but he may not utilize the federal courts in order to collect the fees. *Tennessee Dept. of Human Services*, 979 F.2d 1162 at para. 43 (6th Cir. 1992). Hinton could collect the award if the state agency agrees to pay it or if the federal government enforces it on his behalf (assuming such federal enforcement was authorized by the statute, which we do not decide today)... A suit on the judgment in state court also is a possibility, although such a suit brings into play state doctrines of immunity (Footnote 4 of the Decision).

I conclude that Randolph-Sheppard arbitration panels cannot subject the states to damage awards. However, the arbitration panel must have the authority to grant some relief to blind licensees in order to give meaning to the arbitration provisions. When a sovereign waives immunity to some form of relief, but not to damage awards, it is appropriate to uphold declaratory or prospective injunctive relief. *State of Wisconsin Dept. of Workforce Development v. U.S. Dept of Education*, 3:09-cv- 00011-bbc (U.S. Dist. Ct, 2009)

THE MERITS

At issue in this case is whether Bragg was treated unfairly in her transition to and operation of the Shelby County Correctional Center?

More specifically:

Did the Tennessee Department of Human Services state licensing agency (SLA) fail to comply with the contract in regards to the facility at Shelby County Correctional Center, thus violating the Randolph-Sheppard Act, implementing regulations and/or State rules and regulations? If so, what shall be the remedy?

Even more specific sub-issues were developed to assist in arriving at reasoned conclusions:

I. Hardware and Software (ACTFAS)

- a. Did the Agency provide to the blind vendor and County Management for their use all necessary hardware and an inmate accounting software program that will track all transactions? (J-2.7b)
- b. Did the Agency provide continuing support for the software and the hardware, including correcting program and system problems plus enhancements to the software? (J-2.7d)
- c. Did the Agency provide pod kiosks and related software which can be used by inmates to electronically place orders, view account balances, view his/her transaction history, file grievances and request sick call? (J-2.3a)

If not, what was the impact on the complainant and what shall be the remedy?

II. Touch Pay

- a. Did the Agency provide deposit kiosks and any other related telephone/internet options for individuals to make deposits to inmate accounts? (J-2.3c)

If not, what was the impact on the complainant and what shall be the remedy?

III. Discrimination

- a. Did the SLA exercise gender discrimination when the complainant was required to pay a 6% sales commission to Shelby County.

If so, what was the impact on the complainant and what shall be the remedy?

THE PANEL'S FINDINGS AND CONCLUSIONS ON THESE ISSUES

CONCLUSION- ACTFAS

Terry Smith testified that ACTFAS was to be operational on day 1. It was in fact operational, but there were flaws with the manual scantron system and flaws in tracking transactions, evidenced by the system not taking out sales tax and not properly accounting for indigent packs. It is clear from the evidence that there was a "bumpy" start in getting the transition from a private vendor to a blind vendor up and running. It is clear from the testimony that bumpy starts are not unusual and in fact expected in similar situations. But it is also clear that the Complainant suffered inconvenience that

resulted in lessened revenues and higher costs because of the initial system flaws and the time it took to implement the technology specified in the bid announcement. For example, transitioning from the use of manual scantrons to kiosks with touch pad ordering capability took some 16 months, with the main explanation being that the vendor always started with scantrons and phased in kiosks, and that the timelines were not specified anywhere and the Complainant knew there was a phase in period. Given undisputed testimony indicating inmate grievances and some County displeasure with the Complainant, it is reasonable to conclude these flaws and time delays were contributing factors to a bumpy start, putting the Complainant at a disadvantage serving her new clients, along with probable lower revenue and higher costs. The bumpiness is especially disconcerting given the testimony of the years and negotiations it took to get a blind vendor the opportunity to serve the facility, only to have a poor start largely outside the control of the Complainant. Her testimony was especially telling, in essence noting that she realized it would be bumpy but she expected it would be smoother.

AWARD-ACTFAS

Complainant was treated unfairly and harmed by matters largely outside her control by ACTFAS flaws and untimely compliance with the bid announcement, the TBE permit agreement with the County, and the IOFA between the TBE and Complainant

Concurring in the Award

Clearthur Morris- Complainant Appointee

Dissenting in the Award

Barbara Badger-Agency Appointee

REMEDY-ACTFAS

The Complainant testified that she was required to pay sales tax of \$7155 because the ACTFAS system failed to take out sales tax on inmate purchases. To initiate the reimbursement process, Complainant will be required to provide verifiable proof that she paid the sales tax. Additionally, she will need to show that ACTFAS provided her no means for knowing prior to the end of the month that sales tax was or was not being taken out. Additionally, Complainant will be required to provide e-mail confirmation of her efforts to be reimbursed for this ACTFAS oversight.

The Complainant testified that Scantrons were used for 16 months at \$280 per month, or \$4,480. The Complainant is required to provide the Agency verifiable data supporting this claim. The parties are to agree to a monthly cost and agree to a reasonable time period less than the 16 months, given that there was understanding that the kiosks would be phased in.

Complainant testified that she gave out 30,117 indigent packs at her cost during the first 8 months of operation when her required maximum per year was 30,000. To initiate reimbursement for the extra 117 packs, Complainant must provide verifiable evidence that 30,017 were given out. She also must provide her material and labor costs for the overage packs.

Concurring in the Remedy

Clearthur Morris- Complainant Appointee

Dissenting in the Remedy

Barbara Badger-Agency Appointee

CONCLUSIONS-TOUCH PAY

Implementing the convenient means for inmates' family and friends to place money in an inmate's account, as indicated in the bid announcement, took over three years. The Agency explains this delay by language in the permit agreement with the County that stated "... Agency, through a third party vendor approved by Management, shall provide deposit kiosks..." Testimony was abundant that the Agency could not act until the County approved a vendor, and that the County was reluctant to act. Mr. Smith testified that the reasons for the delay were varied, ranging from politics to concerns about the Complainant and concerns about financial security such as cash float and credit card fraud. There was no testimony about approving or disapproving a vendor, perhaps because the bid announcement had already identified Aramark Correctional Services and the Touch Pay kiosk. The County delay over vendor approval is even more puzzling considering that the Agency was paying for all the hardware, software, and wiring. The Complainant testified that while there was understanding that Touch Pay would not be available on opening but would be phased in, she had no idea it would take over three years. Mr. Smith testified that the fault for the delay did not belong to the Agency or Ms. Bragg, but to the County. The majority of the Panel believes it is in no position to pinpoint fault, but also believes there is little excuse for a three year delay for a technology that was highlighted in the bid announcement.

AWARD-TOUCH PAY

The Complainant was treated unfairly and harmed by matters largely outside her control by extended delay in complying with the bid announcement, the TBE permit agreement with the County, and the IOFA between the TBE and Complainant. The Agency, as representative of the Complainant, bears the overall responsibility for this poor performance in not delivering what was expected for the Complainant as well as inmates and their families and friends.

Concurring in the Award

Clearthur Morris- Complainant Appointee

Dissenting in the Award

Barbara Badger-Agency Appointee

REMEDY-TOUCH PAY

It was undisputed that Touch Pay would increase revenues for the Complainant. The tough question is how much. The Complainant suggested revenues would increase by 10% and furnished data to arrive at a figure of \$414,678.50 as sales lost due to Touch Pay not being operable from May 2009 until May 2012. Unfortunately, that data provides only a start to arriving at a fair monetary loss caused by the delay in implementing Touch Pay. The Agency rightfully questioned, at the hearing and in its briefs, the inadequacy of financial evidence. However, at the hearing the Panel Chair stated "Let's just say that for the record, there is some question as to the... correctness of these numbers, and where they came from, and that this should become something in the remedy part of the case..." TR-353. And here we are. The panel was not privy to the financial details of the Complainant's operation, although it is our understanding that such information is available to both parties.

The task of the parties during the remedy portion of this process is to reach agreement on a monetary loss. The parties must first agree on a reasonable time delay before Touch Pay was to be operational, because it was understood it would be phased in. That start time until the time Touch Pay became operational can be the lost revenue period.

The next task is to arrive at some estimate of revenues, arrived at as scientifically and analytically as practical. Hopefully the parties will agree on a range of revenues, and then a number, even if using differing methods of analysis. The focus then should be on the effect on the Complainant's net profits (essentially revenues less cost goods sold and expenses, including labor). One commonly used method is to determine the Complainant's actual net profits as a percentage of revenues, perhaps annually, then use that percentage to ascertain net profits on the assumed lost revenues. That estimated net profit is one way to arrive at reasonable monetary damages.

Concurring in the Remedy

Clearthur Morris- Complainant Appointee

Dissenting in the Remedy

Barbara Badger-Agency Appointee

CONCLUSION - III. DISCRIMINATION

The majority of the Panel believes it is clear from the evidence that the Complainant was not discriminated against because of her gender. She testified that the selection process was not discriminatory. She also testified that she knew when she made her bid that there would be a percentage of revenues paid to the County. The Complainant believed she was discriminated against for gender because a jail in the same county has a male blind vendor not paying a percentage of revenue as a commission. Mr. Smith provided credible testimony that facilities can have differing permit agreements negotiated, that a facility operated in the same county may differ in needs and permit agreements. Mr. Smith also explained how the male vendor had been in that facility since 1974, suggesting it would be unreasonable and unfair to him to suddenly require a commission. Mr. Smith also described the years the TBE had been trying to get a blind vendor in the facility where the Complainant became the first, explaining that the previous vendor, a major corporation, had paid a 15% commission while TBE was able to negotiate 6%. The majority of the Panel believes the Complainant has not met the burden to show gender discrimination.

AWARD-DISCRIMINATION

The charge of gender discrimination is denied.

Dissenting in the Award

Clearthur Morris - Complainant Appointee

Concurring/ in the Award

Barbara Badger-Agency Appointee

CONCLUSION - LOOKING FORWARD

Arbitrators recognize that parties have ongoing relationships long after the arbitrators leave. It is important that once an award is delivered, the parties not allow the grievance process and award to interfere with their responsibilities and obligations to work together for the overall good, for those they are working to serve, such as Shelby County, Blind Vendors, and the State of Tennessee and its taxpayers for example.

The Panel was fortunate to have witness Terry Smith, a consultant and trainer regarding the Randolph-Sheppard Act, respond to Panel questions. Two enlightenments related to this case have to do with arbitration awards and blind vendor opportunities for work.

First about awards. Mr. Smith confirmed the Panel's own experience and research that it is very difficult to have awards calling for retroactive pay be paid, especially in the Sixth Circuit, where a

federal ruling upheld state sovereign immunity. Award orders for prospective relief can be carried out. The remedy section of this conclusion will address this concern from a retroactive and prospective viewpoint. The second area Mr. Smith addressed was the problems he has encountered getting blind vendors accepted as vendors, the case at hand being one that took several years of work to get blind vendors a foot in the door. Because a part of this case addresses the bumpy start once a blind vendor was selected, the remedy section will also address the importance that TBE and blind vendors, individually and collectively, develop and enhance their reputation as providers of quality products, service, and value.

While the Panel commends TBE for its leadership in creating state of the art opportunities for blind vendors and their clients, Panel members noted the testimony that seemed to rely on an attitude that says "we didn't do anything wrong contractually" and "bumpiness just happens." Granted, arbitration is a quasi-legal process that TBE was placed in, but a Panel majority believes that if such an attitude existed it would have exacerbated the bumpy situation the Complainant faced, opening the door to bumpy relationships and a possible County conclusion that "I knew we shouldn't have let these blind vendors in here." The Panel majority concludes that, prospectively, TBE owes the Complainant an apology at minimum and relief where possible. The Panel majority further concludes that, prospectively, TBE should take action to increase the probability that blind vendors and their customers will experience increasingly improved starts with increasingly improved opportunities for relationship building and image building.

Concurring in the Conclusion

Clearthur Morris- Complainant Appointee

Dissenting in the Conclusion

Barbara Badger-Agency Appointee

REMEDY-LOOKING FORWARD

The parties are directed to use this case and Award as a stepping stone for improvement by developing lessons learned and using them to prevent future "bumpy" situations. The focus should be on blind vendor ability to provide quality products, service, and value to their customers. Target outcomes might be customer satisfaction, blind vendor image of excellence compared to competitive vendors, and increased demand for blind vendors. Operational outcomes might be vendor cost efficiencies, revenue increases, and profit increases. Identifying and improving key processes is at the heart of this directive. Some thoughts and questions from the Panel might serve as a starting point:

- How could the bid announcement and selection process have been improved?

- How could the pre-opening/opening process have been improved to minimize bumpiness? Why weren't the scantrons pre-tested against menu prior to opening? Why was it accepted that Aramark insisted on starting with scantrons prior to using kiosks? Where was Aramark? Why did Aramark "eventually" put a rep there full time? Why did it take 16 months to "phase in" kiosks? Why did ACTFAS not add sales tax to purchases, or properly account for indigent packs?
- How could the permit agreement be improved? Why did it take so long to approve a vendor for Touch Pay? Why was vendor approval allowed to stop the process when the County had already agreed that there would be a lobby kiosk? What contract language in the future can prevent these technology delays?
- How could the IOFA be improved? Why is it specified as not being a contract? Isn't it a contract?
- What is the process for identifying issues and resolving them informally? Is the process effective? Is it expected that a formal grievance be filed for routine operational issues not being met? How effective is the formal grievance process for resolving grievances at the lowest level?

The parties are directed to work in good faith during the retained jurisdiction period to settle any retroactive monetary awards, even if relying on prospective relief. Realizing the complications of cash payments, the Panel expects that the Agency do everything within its power to meet, legally and ethically, the requirements of this award and its remedies. The Panel expects both parties to seek creative alternative ways to meet the requirements of the remedies, preferably with cash but also with other legal and ethical ways that are agreeable to the Complainant. For example, don't Aramark and the County have some financial responsibility here? Would negotiating with the County to lower its commission until a portion of the Touch Pay losses are made up be a possibility? Could TBE grant preferential assignment for the Complainant to another facility? While the expectation of the Panel majority is that the parties use the lessons learned from this case for improvement of specific processes, the Panel Chair encourages the parties, with TBE leadership, to think long term and to think big in search of excellence. "Big" might include setting of BHAGs, or big hairy audacious goals (see Jim Collins, Good to Great, 2001). "Long term" might be to work for and receive the prestigious Baldrige Award for Performance Excellence. (<http://www.nist.gov/baldrige/>).

Concurring in the Remedy

Clearthur Morris- Complainant Appointee

Dissenting in the Remedy

Barbara Badger-Agency Appointee

CONCLUSION-ATTORNEY FEES

The Complainant's brief asks that attorney fees be awarded in the amount of \$35,000 (100 hours @ \$350 per hour) for four years of labor that include preparation for two hearings, review of the legal files, legal research for both the hearings and brief, and consultation. Support for this claim is provided in the brief where a 1985 U.S. Court of Appeals upheld retrospective damages, including \$1254 in legal expenses, awarded by a Randolph-Sheppard arbitration panel (*Delaware Dep't of Health & Social Servs. v. United States Dep't of Educ.*, 772 F.2d 1123, 1137 (3d Cir. 1985)).

While the Panel majority saw the need for the Complainant to have legal support in this hearing, the Panel understands there has been much water under the attorney fee bridge since that 1985 decision. From testimony at the hearing and further research in the matter, it appears that in Tennessee the Complainant is responsible for her own legal expenses. Without further evidence provided the Panel of a statutory basis for payment of legal expenses in Tennessee, as well as evidence and Agency input on the reasonableness of the fees, the Panel majority must deny payment of attorney fees. If evidence is forthcoming, it must be provided during the retained jurisdiction period.

Dissenting in the Conclusion

Clearthur Morris- Complainant Appointee

Concurring in the Conclusion

Barbara Badger-Agency Appointee

also be used. It is remedy portion is an important process. It is important that the parties and the panel are focused and on the same page.

David Alexander

Neutral Panel Chair

Dated 3-21-14

Clearthur Morris

Complainant Appointee

Concurring and Dissenting Writing Dissenting Opinion

Dated March 8, 2014

Barbara Badger

Agency Appointee

Concurring and Dissenting

Writing Dissenting Opinion

Dated 3/14/14

OPINION DISSENTING IN PART AND CONCURRING IN PART

Barbara J. Badger, Panelist

This Panelist concurs in part with the majority with respect to the finding that Ms. Bragg was not discriminated against due to her gender and the denial of attorney's fees. The Panel is correct to deny both claims. However, this Panelist dissents on all other conclusions, awards, and remedies. They are not supported by the facts presented and to a certain extent go beyond the scope of this arbitration panel.

ACTFAS

The parties agreed at the hearing that the issue to be resolved was:

Did the Tennessee Department of Human Services state licensing agency (SLA) fail to comply with the contract in regards to the facility at Shelby County Correctional Center, thus violating the Randolph-Sheppard Act, implementing regulations and/or State rules and regulations? If so, what shall be the remedy?

The issue was further broken down but the Panel had to first answer the above question. If the answer to this question was no, then the other issues are not relevant. There was no evidence presented at the hearing that the ACTFAS system failed to meet the specifications of the contract. In fact, testimony from Terry Smith who negotiated the contract testified that the ACTFAS system did meet the contract requirements and there was no evidence introduced that the County felt the system did not comply with the contract and it is an important distinction that the contract is between the State and the County. It is important to note that according to testimony at the hearing Ms. Bragg utilized the ACTFAS system in her previous assignment at Davidson County and was well aware of its capabilities. Testimony did establish the fact that the system did not do what Ms. Bragg wanted it to do. She wanted ACTFAS to automatically track all indigent packs and charge the inmate if he/she had any money left on their account. According to testimony, ACTFAS would track the indigent packs but would not automatically deduct the money if there was any left on an inmate's account. This panelist can find no reason to suggest the State was under any contractual obligation to provide a system that would do this automatically as Ms. Bragg desired. ACTFAS would track the indigent kits distributed but Ms. Bragg had to enter the data manually. According to testimony, she refused. But even if the ACTFAS system did not meet contract specifications, this Panelist would conclude that any claim Ms. Bragg may have had was negated by her apparent decision to not change to another system. Mr. Smith testified that he offered Ms. Bragg the opportunity to change to another system that was known to perform the functions she desired but she refused. It was her choice and her choice alone to continue to use ACTFAS.

Ms. Bragg claims she was forced to pay sales tax when the ACTFAS system did not calculate the taxes properly. Although there is no reason to doubt Ms. Bragg's testimony, there was no evidence entered to support this claim and without such evidence the Panel cannot conclude wrongdoing on the part of the State...The Panel in its majority does not base its finding on whether or not the State violated the contract with Shelby County as it was required to do. Instead, it bases its finding on what it refers to as a "bumpy" start. The witness for the State did not deny that there was a bumpy start but a bumpy start does not warrant an award of damages. Ms. Bragg is an independent entrepreneur and, as is the case with any entrepreneur, must assume risks. This Panelist interprets the Randolph-Sheppard Act simply as a vehicle that affords licensed blind vendors such as Ms. Bragg to be entrepreneurs. Once that opportunity is extended, the blind entrepreneur assumes risks like any other entrepreneur. This Panelist acknowledges that the ACTFAS system did not function as designed if it failed to calculate sales taxes on the early sales. And there is no denying that Ms. Bragg may have absorbed those taxes. However, a one-time computer glitch does not indicate that ACTFAS did not meet the requirements of the contract nor does it suggest that the State is somehow liable for the computer glitch. The award of the majority in this case suggests that the State is liable anytime there is a hardware or software failure and that it must compensate the blind vendor for lost revenues. This logic suggests that if a vending machine breaks, the State must compensate the blind vendor for lost sales until the machine can be fixed even though the State had nothing to do with the machine malfunctioning. If a grill breaks in a cafe, the State should compensate the blind vendor for lost sales until the grill is repaired. If a computer gets a virus and crashes, the State must compensate the blind vendor. This is a total mischaracterization of how this Panelist believes the Randolph-Sheppard Program should function. The Panel in its majority would seem to view the Randolph-Sheppard Program as some type of sheltered employment as opposed to the entrepreneurial program it is.

With respect to the time it took to install the pod kiosks, testimony indicates that Ms. Bragg was told that the technology solutions would be phased in over a period of time. There was no evidence that any commitment was made in terms of time to install the pod kiosks. Yes, Ms. Bragg had to pay for paper products until the ordering process could be fully automated but this Panelist would conclude that is simply a cost of doing business and a cost Ms. Bragg knew she would incur.

The charge should be denied.

TOUCH PAY

The question before the Panel was:

Did the Agency provide deposit kiosks and any other related telephone/internet options for individuals to make deposits to inmate accounts? (J-2.3c)

The question was not did the Agency provide the deposit kiosks when Ms. Bragg wanted them or did the Agency provide the kiosks within a specified time period? Deposit kiosks were provided and done in compliance with the contract between the State and Shelby County.

It is an undeniable fact that the kiosks were not installed as quickly as Ms. Bragg and the State, for that matter, would have liked. Ms. Bragg wants to hold the State accountable. However, this Panelist must conclude that the State had no choice except to comply with the contract. That contract said that a system approved by the County would be installed and the County withheld that approval for reasons explained by Mr. Smith in his testimony. The reasons were many but one appears to be directly related to the County's dissatisfaction with Ms. Bragg. According to Mr. Smith, the County did not seem too enthused about assisting Ms. Bragg because of issues directly related to Ms. Bragg's performance. But still the State persisted in pushing for the installation of the TouchPay kiosks and ultimately was successful. It should also be stressed that Ms. Bragg knew when she accepted the assignment that the technology solutions would be phased in as is the case with all ARAMARK commissaries. There is nothing to suggest that any commitment of time was given to Ms. Bragg. Ms. Bragg alleges that she lost sales as the result of the TouchPay kiosks not being installed. Sales admittedly increased after Touch Pay was installed; however, she was not able to the satisfaction of this Panelist show any cause and effect. Mr. Smith's testimony suggested that there may have been other factors at play. The number one fact that impacts sales would logically be the number of inmates who are available to purchase from the commissary. Testimony substantiated the fact that the number of inmates fluctuated by as much as 20%. Ms. Bragg compares sales in May of one year with sales in May of the next year after TouchPay was installed as justification for her claim to damages but her claim ignores the potential impact that inmate population may have had on the difference in sales. In a jail environment, there are all kinds of things that can impact sales. Pointing out a single factor is hardly enough to support Ms. Bragg's calculations. The Panel in its majority rightfully questioned the legitimacy of the amount of Ms. Bragg's damage claim as does this Panelist. This Panelist finds that Ms. Bragg was afforded an opportunity to document to the satisfaction of the Panel that not having Touch Pay resulted in lost sales and she failed to do so. Therefore, this Panelist cannot concur with the decision of the majority.

The charge should be denied.

DISCRIMINATION

The Panel is correct in denying Ms. Bragg's claim that she was discriminated against due to gender.

LOOKING FORWARD

Issues related to the Program's bid announcement, IOFA, permits, and program improvements go far beyond the scope of this Panel. Likewise, even suggesting that the State take action to hold ARAMARK and/or the County accountable are inappropriate and go far beyond the scope of this arbitration. The purpose of this Panel is to determine if the State did anything wrong in regards to Ms. Bragg. ARAMARK and Shelby County are not parties to this action and it is unreasonable to suggest that the State should somehow try to hold the County accountable for simply exercising the authority it had under the contract. Although the Panel in its majority makes some good points with respect to lessons learned, the conclusions and award go beyond the scope of this arbitration and this Panelist does not concur.

ATTORNEY'S FEES

The Panel is correct in denying Ms. Bragg's claim to attorney's fees.

DISCUSSION OF DAMAGES

This Panelist believes that the Panel in its majority has set in motion a chain of events that may ultimately have to be adjudicated in the federal courts. The Panel in its majority concluded that Ms. Bragg was harmed by the actions of the State -- a conclusion not shared by this Panelist. However, by awarding monetary damages, the Panel in its majority has effectively given the State a "get out of jail free card" and has ensured that Ms. Bragg will most likely not be made whole. The question does not revolve around whether or not a panel can award damages. The issue is whether or not a state can be forced to pay damages and the U.S. Court of Appeals for the Sixth District has answered that for us. The answer is no.

The Panel in its majority is naive to think that the State and Ms. Bragg can agree on (1) The number of indigent packs that Ms. Bragg delivered in the first nine months; (2) A reasonable amount of time that should have been allowed for Touch Pay to be operational when the contract had no time frame; (3) A reasonable amount of time that the order kiosks should have been installed; and (4) The amount of net profit Ms. Bragg lost in order to determine a monetary award. These matters will likely come back to the Panel for resolution so that an award of damages can be fixed. It is even more naive for this Panel to believe that the State will pay any

damages at all. Ms. Bragg will in all likelihood have to go to federal court to enforce this award. Since the Sixth Circuit Court of Appeals has already ruled, she stands very little chance of winning. Unless the U.S. Supreme Court decides to take up the case if it should get there in the next several years, the State will not be required to pay monetary damages and Ms. Bragg's legal fees will only mount.

Furthermore, this Panelist finds the directive of the Panel in its majority for the State to negotiate in good faith to determine an amount of a monetary award curious. Clearly, the State takes the position it is protected by the Eleventh Amendment of the U.S. Constitution and cannot be required to pay damages. It is assumed that the State will not agree to pay any monetary damages regardless of the amount. Therefore, to direct them to reach an agreement on the amount of monetary damages appears to be a futile exercise. To the knowledge of this Panelist, the State has not accepted any liability and by negotiating a damage award the State is essentially being asked to admit fault. If the Panel in its majority had directed the parties to assess the difference in sales and profits that are directly related to the Touch Pay system assessing blame so that this Panel could consider possible appropriate non-monetary awards, all parties would have been better served in the opinion of this Panelist.

This Panelist agrees with the Panel in its majority that the State and Ms. Bragg should work in good faith to resolve this matter. Finding a nonmonetary resolution is the only way this case will not have to go to federal court for resolution. This Panelist believes the parties would be better served to forego efforts to arrive at a damage figure unless the State is prepared to pay such damages. Instead, the parties should take advantage of this short window of opportunity to try to negotiate in good faith to reach an agreement that does not include financial compensation. As the Panel in its majority suggested, preferential treatment in assignment to another vending facility is an option. Without assigning blame to either party, in recognition that there were problems in the early stages of this business venture and in an effort to find some solution, this Panelist would have found that Ms. Bragg should be placed on demotion status for a period of two years as prescribed by the Tennessee Business Enterprises rules and regulations. This would have allowed Ms. Bragg to be assigned to any facility for which she is certified that may become vacant within that time period and which has less than 85% of the sales as compared to her current facility. In this case, that would be any vacant vending facility with sales of less than approximately \$1,275,000 annually. The award should be restricted to only vending facilities that do not utilize ARAMARK's ACTFAS. This would allow Ms. Bragg to move into a vending facility that generates less in sales but could be more profitable. If there are other nonmonetary prospective solutions that the parties can agree to, then the parties are encouraged to explore those as well. It is the sincere hope that within the period of time that this Panel retains jurisdiction, that the parties can achieve a nonmonetary agreement. If Ms. Bragg insists on monetary damages, this Panel should take that into consideration when making a final award.

Barbara J. Badger
Agency Appointee
DATED March 3, 2014

March 5, 2014

CleArthur Morris

Arbitrator

In the Matter of the Arbitration Between

Sharon Braggs

Complainant

Vs.

Tennessee Department Of Human Services Agency

Arbitration between Braggs v. TN Dept of Human Services

Dissenting Opinion - Discrimination

The complainant alleges that she was paid less wages than a similarly situated male. She was required to pay 6% of her net sales and provide indigent kits while a similarly situated male was not required to do so. The agency argued that the male was a long time employee, worked for a different employee, and were not similar situated as the complainant. All contracts were negotiated by the agency and therefore the agency was ultimately responsible for the contracts. Agency witness, Terry Smith, stated that the agency had been trying to get into the Shelby County Correctional Center (SCCC) for ten years and had not had a lot of success. The agency in its desire to get into the SCCC was willing to turn a blind eye to the discriminatory practices of requiring the complainant to pay a 6% commission on sales and provide indigent kits for inmates while not requiring a similarly situated male to do the same. The complainant has similar skills, efforts and responsibilities, therefore, is similarly situated. It is true that males and females were considered for the complainant's job and males and females were on the selection panel. That would be relevant information if this were a hiring issue, but it is not. The complainant was hired and, therefore, we are talking about discrimination in the general terms and condition of her employment with regard to wages. It is unlikely that a male would have been hired for the vendor job since the complainant was the most qualified and that is why she was hired. It is also true that the complainant was aware of the 6% commission she had to pay and that she would have to provide indigent kits but if she had rejected the agency's offer, she would not have been hired. The complainant could not complain about the male not being required to pay a 6% commission or not providing indigent kits until she was hired and learned that the male was not being treated the same as her. There is no evidence that the male was grandfathered-Into his

contract since the agency admits that his contract had been re-negotiated. The agency acquiesced in an illegal act by negotiating a contract with the complainant that required her to pay a 6% commission on sales and provide ' . indigent kits for inmates but did not require the male to do the same or not require the complainant to provide these services.

Remedy

Complainant is due \$452,710.00 for paying a 6% commission from May 2009 through September 2013.

CleArthur Morris

March 8, 2014

Arbitration between Bragg v. TN Dept of Human Services

Dissenting Opinion -Attorney Fees

The complainant, Sharon Bragg, filed her complaint through the assistance of her attorney, Michael Floyd, Esq. in 2010. The complaint has proceeded through the various steps up to and through arbitration, approximately four (4) years. Mr. Floyd has spent countless hours representing the complainant during this process. A split arbitration panel has found on behalf of the complainant at least in-part that she was treated unfairly under the Randolph-Sheppard Act and, therefore, she is entitled to some relief. The complainant would not have prevail, in-part, if it had not been for her attorney. Since the complainanf s attorney has successfully represented her, in-part, he is entitled to attorney fees.

In Case No. R-S/08-5 (Daniel Czuback, Complainant v. Department of Human Services, Division of Rehabilitation Services, Respondent, the arbitration panel awarded \$7,000.00 in partial recompense for attorney fees. In Case No. 979 F.2d 1162, 117 A.L.R. Fed. 839 (Tennessee Department of Human Services, Plaintiff-Appelle v. United States Department of Education, Defendant-Appelle, Wayne Hinton, Defendant-Appellant, No. 91- 5768. United State Court of Appeals, Sixth Circuit), the Sixth Circuit stated that it affirms the arbitration award is not affected by the Eleventh Amendment and the case was remanded to the district court for further proceeding. Thus, the arbitration panel may award attorney fees but the courts may not enforce this award. These are two separate acts and one does not necessarily depend on the other.

Remedy

Based on four years of labor at \$350.00 per hour with a total of 100 hours, the complainant's attorney is due \$35,.000.00 in attorney fees.

CleArthur Morris

March 8, 2014

David Alexander Arbitrator and Panel Chair

Barbara Badger Arbitrator

Agency Appointee

CleArthur Morris Arbitrator

Complainant Appointee

January 23, 2015

IN ARBITRATION PROCEEDINGS PURSUANT TO AGREEMENT BETWEEN THE PARTIES

ADDENDUM TO THE AWARD FINAL REMEDY

United States Department of Education Office of Special Education & Rehabilitation

Case no. R-S/10-11

In the Matter of the Arbitration Between

Sharon Bragg

and

Tennessee Department of Human Services Division of Rehabilitation Services

ISSUE: Randolph-Sheppard Implementation at Shelby County Correctional Center

Pre-Conference Hearing: Hearing: September 20, 2013

Hearing: September 30/October 1, 2013

Briefs Received: January 26, 2014

Reply Briefs Received: February 3, 2014

Award: March 21, 2014

Final Remedy Briefs Received: December 10, 2014

Addendum to the Award-Final Remedy: January 23, 2015

REPRESENTATION: FOR THE COMPLAINANT: Darrell J. O'Neal, ESQ

FOR THE AGENCY: Telesa Taylor, ESQ

INTRODUCTION

The Randolph-Sheppard Act, 20 U.S.C. 107 *et seq.*, establishes a cooperative federal-state program to provide blind persons with opportunities to operate vending facilities on federal and other properties. 20 U.S.C. 107(a) and (b). The Secretary of Education has overall responsibility to administer the Act, as well as authority to promulgate regulations to carry out the Act's purposes. 20 U.S.C. 107(b), 107a(a); see 34 C.F.R. Pt. 395.

The hearing was held on September 30 and October 1, 2013 at the Tennessee Department of Human Services office, Memphis TN. The Award was issued March 21, 2014. The Award called for a retained jurisdiction period, restated as follows:

This Panel will retain jurisdiction for 60 days from the date of the award. The parties will submit a progress report, collectively or individually, at the end of 30 days and a final report at the end of 60 days. Issues at impasse should be brought to the attention of the Panel Chair at the time of impasse to initiate a decision by the Panel. Telephone conferences including both parties may be initiated with the Panel through the Panel Chair. A conference call with the Panel and the Parties participating in the remedy portion of this Award is recommended at the beginning of the retained jurisdiction period and as required during the process. E-mails with copies to all may also be used. This remedy portion is an important process. It is important that the parties and the panel are focused and on the same page.

The remedy process was formally started with a conference call on June 12, 2014 that included the Panel and respective party representatives. Darrell O'Neal was added to represent Complainant Bragg in the absence of Mr. Floyd due to illness. Status reports and communications were conducted among the parties in June 2014 through January 2015.

The Arbitration Panel Members met September 24, 2014 via telephone conference call to discuss finalizing the Remedy for the findings of the Award. In addition to the Award itself, Panel members had access to emails, including the email packet with attachments emailed August 13, 2014 by Complainant attorney O'Neal and the email and letter submitted September 18 by Agency attorney Telesa Taylor. In an email received September 25, Mr. O'Neal indicated his August email provided the supporting documentation for the Remedy. He also asked to be contacted if other information is needed. Both parties indicated an effort at reaching agreement as to Remedy, but were unable to do so.

After considerable discussion, the panel majority determined that for the Panel to finalize Remedy, additional information was required. A September 26, 2014 document was issued to the parties setting forth the information needed. Complainant provided additional information

on October 9 as requested by the Panel. This information was reviewed by the panel and used to develop a document sent to the parties on November 18. Parties were given the opportunity to respond to this added discussion prior to formulation of the final remedy. The Panel was especially interested to hear concerns about accuracy and validity of information used to formulate remedy as well as methodologies used. Party responses were received on December 9 and 10.

The additional information provided, along with responses from both parties through December 10, was analyzed by the Panel in making its remedy decisions. These remedies are presented below.

Sales Tax

Complainant submitted a Tennessee Department of Revenue document showing the sales tax paid for the month of May 2009 was \$8,697. Complainant asked that \$8,697 be reimbursed, although at the hearing she had asked for \$7155. Emails between Ms. Bragg and Terry Smith on May 13, 2009 indicated that the sales tax was omitted from purchases for a two week period in May. Complainant was asked to provide evidence of the dollar amount of sales tax paid out of her pocket due to product sold having no tax added to purchases during that two week period of May. In Complainant's October 9, 2014 response, Attachment 6 shows sales tax paid as \$1947.92 for week 1 in May 2009 and \$2175.11 for week 2, for a total of \$4123.03, and is the Complainant's requested remedy. In its December 10 response, the Agency pointed out that the Complainant had not provided documentation evidencing out of pocket costs Complainant had incurred. Agency also provided an email (Exhibit A) dated May 7, 2009 from ARAMARK indicating the tax had been entered into the ACTFAS system.

FINAL REMEDY-Sales Tax. The Panel majority concludes that Complainant had out of pocket costs for uncollected sales tax through the first week of May and some or all of the second week of May. Given the inability to be precise as to the time, the Panel majority awards reimbursement of \$1,948 for week 1 and half of week 2, or \$1,088, for a total to be reimbursed of \$3,036.

Concur with Remedy and Methodology

Clearthur Morris

01/17/2015

Concur with Methodology, Dissent with Remedy Award.

Barbara Badger

1/28/15

Scantrons

Complainant testified at the hearing that Scantrons were used for 16 months at a cost of \$280 per month, or a total of \$4480. Required to provide verifiable data to support the claim, Complainant on August 13, 2014 provided a statement from Scantron of payments made, and asked to be reimbursed \$4565.25. Complainant indicated at that time that the parties did not indicate agreement, as suggested in Remedy, on a reasonable time for the kiosks to be phased in after start. In its October 9 response to the Panel's request for additional information, Complainant provided the same supporting document from Scantron but revised its reimbursement request to \$4566.34.

In the Panel's November 18, 2014 memorandum to the parties, the Agency was provided the opportunity to offer rationale as to why reimbursement for the entire 16 months should not be made, given the findings of the Award that the Complainant incurred harm due to a "bumpy" start of which the kiosk delay and Scantron issues were a key factor.

In its December 9 response the Agency reaffirmed its position of disputing the damages incurred by Complainant and additionally disputed the documentation provided to support the amount of damages alleged. Agency based its argument on Complainant's testimony at the hearing that she was aware prior to the start of operations that the pod kiosks would be phased in and Scantrons would be used until such time they were phased in. Agency provided supporting documentation of this awareness by providing a September 23, 2008 email from Terry Smith to Sharon Bragg et al. The Agency also suggested Complainant was able to process orders from the start using Scantrons, and Complainant provided no evidence of lost sales due to the pod kiosks not being installed. Agency also suggested that the operating permit specifically provides that paper forms were to be used as back up for the kiosks, indicating that Complainant would have been required to purchase Scantrons as back up anyway, which could be written off as a business expense.

The Panel majority reaffirms its findings in the Award that Complainant was harmed by a "bumpy" start that caused customer difficulties processing orders, resulting in grievances and complaints from the county that put the Complainant in an unfavorable light and caused her to have fewer sales and increased expenses. Complainant testified that she bid on moving to this facility with the thought that it would be a "state of the art" facility. After receiving and accepting the bid, it became apparent that the technology would be delayed, including the pod kiosks, but that she felt she had little choice but to accept it. At the hearing and subsequent written work, the Agency made much of the permit language allowing phase in, the County's authority to approve the contractors, and the County's hesitancy to grant approval.

The relevant language in the 2008 email provided by the Agency in its December 9, 2014 response, where TBE's Terry Smith reported on a conversation with the County, is excerpted below:

1. With respect to wiring the pod kiosks, he thought they were giving the building layouts to Aramark and they were marking the wiring but...
2. As for start date, he is fine with us starting before we complete wiring and starting with a paper process...

On the Aramark side, we need to see how long it will take for the interface and make sure the kiosks allow inmates to file grievances and request sick call. In the meantime, Cheryl and Sharon can work out the market basket analysis...

While it is evident that the Complainant (Sharon) was made aware in September 2008 that a paper process may be used on start up, the Panel majority notes the appearance of a degree of capitulation by TBE to a paper process some eight months prior to the actual start up, when apparently Aramark had already been approved by the County and had started work. The Panel majority also remembers the undisputed testimony of Ms. Bragg regarding the problems as operations began with the paper process. The Panel majority wonders why these problems were not pretested and ironed out before going on line, or better yet, why the kiosks were not ready for this important new client. The Panel majority understands that the cost of the Scantrons could be written off as a business expense, but the Complainant still suffered out of pocket costs.

FINAL REMEDY-Scantrons. The Panel majority directs that Complainant be reimbursed for Scantron purchases in the amount of\$ 4,566.

Concur with Methodology and Remedy

Clearthur Morris

01/17/2015

Concur with Methodology. Dissent with Remedy Award

Barbara Badger

1/2/15

Touch Pay

Complainant suggested at the hearing that revenues would increase by 10% with Touch Pay, furnishing supporting analysis that indicated lost sales of \$414,678.50 from the period May, 2009 until Touch Pay was installed in 2012. It was noted at the hearing and in the Award that the analysis using only lost sales was a start, but insufficient to determine lost profits. The task of the parties during the retained jurisdiction period was to arrive at a reasonable time delay before Touch Pay was to be operational, thus providing the lost revenue period. The parties were then instructed to arrive at revenue estimates and the effect on Complainant's net profits. The attorney for the Complainant advised via email on August 13, 2014 that the Parties had been unable to resolve the Touch Pay issue and submitted the same request for remedy of \$414,678.50, along with further support for a 10% Touch Pay effect on sales. No new analysis was provided regarding impact on Complainant's profits. Panel Chair asked via email August 14, 2014 that Complainant arrive at a reasonable dollar amount for the Touch Pay delay, based on her income statements, for presentation to the Agency as a beginning step to a fair resolution. No new analysis was received by the September 18 deadline.

In its September 24, 2014 teleconference the Panel met via teleconference and decided that the Panel would formulate the Remedy but would require additional information to do so. Accordingly the Panel asked that the Complainant provide financial statements for the periods used in the analysis of sales previously submitted. Statements were to be monthly for 2009, 2012 and 2014, and monthly or annually for 2010, 2011, and 2013. Population statistics for those periods were also to be provided.

Complainant provided additional information on October 9 that related to Touch Pay as follows:

Attch 1 Cover letter asking for an award of \$300,325.39

Attch 9 Touch Pay Corporation justification for 10% increase in sales

Attch 10-15 Monthly financial statements from May, 2009 through August, 2014

Attch 2 Statement suggesting justification for a 9.28% increase in sales based on analysis of a 28 month period before Touchpay to a 28 month period after Touch Pay. Applying that 9.28% to actual sales during the lost revenue period of January 2010 through April 2012 indicates a loss of sales of \$300,326.

Arbitrator analysis of the updated information yielded the following considerations:

- While it is reasonable to expect that Touch Pay would result in increased sales, it is inappropriate to use top-line sales as the remedy without considering the out of pocket

costs paid for the products sold as well as labor and other expenses. Bottom-line Net Profit (Sales minus costs of sales) is a more appropriate reflection of the personal loss to the Complainant.

- It is suggested that a profit percentage (profit divided by sales) of 8.34% be used for the remedy calculation. This percentage was determined by adding the annual profits of years 2010 through August, 2014 (\$564, 838) and dividing by sales over that same 4.67 year period (\$6,772,717).
- It is suggested that lost revenue period be designated as 2010, 2011, and 4 months of 2012, thus allowing 8 months of 2009 as a reasonable time delay for Touch Pay to be operational. Applying that 8.34 % to the \$300,326 lost sales during that 28 month period yields a lost profits dollar amount of \$25,047.
- It is necessary to make assumptions to arrive at a fair and reasonable remedy. However, making assumptions necessarily suggests that the numbers may be close but not perfect. In addition to assumptions made to arrive at the calculations above, the following assumptions were also made:
 - Any impact of facility population changes will likely be smoothed out over the 4.67year analysis period.
 - Any impact of inflation resulting in higher sales will likely be offset by increased costs of product, labor, and expenses.
 - Acceptance of goods purchased as cost of goods sold, without considering ending and beginning inventories, somewhat distorts the true profits, although this distortion is likely smoothed out over time.
 - It is assumed that expenses and labor costs are largely variable over time. In other words, labor costs and other expenses tend to increase as sales increase.

Parties were given the opportunity on November 18, 2014 to respond to the following:

- a lost revenue period designation of 2010, 2011, and 4 months of 2012, thus allowing 8 months of 2009 as a reasonable time delay for Touch Pay to be operational
- the validity of actual net sales for that period of \$3,236,264
- the use of the Complainant-provided financial statements and related information as a basis for formulating Remedy.

- arbitrator analysis arrived at after receipt of the October 9, 2014 information
- a remedy award of \$ 25,047.

FINAL REMEDY-Touch Pay. The Panel majority awards Complainant \$25,047 in damages for lost profits incurred due to a 2.33 year excessive delay in implementing Touchpay.

Concur with Award of damages, Dissent with the methodology

Clearthur Morris

01/17/2015

Dissent with the Award of damages, Concur with the methodology

Barbara Badger

1/28/15

Looking Forward

Parties were instructed to work in good faith during the retained jurisdiction period to settle any retroactive monetary awards, even if relying on prospective relief. The parties were also directed to use this case and Award as a stepping stone for improvement to prevent future "bumpy" situations in the event Complainant moved to another facility.

In its December 9, 2014 response, the Agency reported on improvements made to prevent "bumpiness" should the Complainant be awarded a bid for a facility being served for the first time by a blind vendor.

Agency was to report on how retroactive monetary relief can be met legally and ethically, or in the alternative, how prospective relief might be offered as a substitute. The Agency's response was as follows:

...It is the Department's position that Complainant has not proven any damages in this matter. However, even if such damages were proven, the State (and therefore the Department) is protected by the Eleventh Amendment of the U.S. Constitution and cannot be required to pay damages... awarded by the panel... See Tennessee Department of Human Services v. United States Department of Education and Wayne Hinton, 979 F.2d 1162(6th Cir.1992; see also Tenn. Code Ann.71-4-508(c)...

The Panel majority notes the Agency response and recognizes the difficulties Agency may have in paying damages. Nevertheless, the Panel majority insists that the Arbitrator Panel's responsibility, as

dictated by the Randolph Sheppard Act, is to make the call as it sees it, regardless of legal constraints that might follow.

The Panel majority also suggests that failing to fulfill remedy requirements subverts the spirit of the Act and is not in the best interest of any of the parties to the Act, especially the Blind Vendors but also the State SLAs and the clients served by the Blind Vendors and the State SLAs. In the Panel majority's opinion, failure to fulfill remedy requirements begets arbitration awards rendered feckless that begets hesitancy of Blind Vendors to arbitrate unresolved grievances that begets administrative mediocrity and unaccountability that begets poor service to client organizations that begets loss of opportunities for Blind Vendors.

FINAL REMEDY - Looking Forward.

The Agency is directed to fulfill the retroactive payments called for in this Remedy. The Agency must negotiate and substitute appropriate and equivalent prospective relief acceptable to the Complainant for those areas where retroactive payments are not made.

Concur with Final Remedy-Looking Forward

Clearthur Morris

01/17/2015

Dissent with Final Remedy-Looking Forward

Barbara Badger

1/28/15

FINAL REMEDY COMPLETED FOR SUBMISSION TO THE PARTIES

David Alexander, Panel Chair

1/23/2015