

**BEFORE THE
UNITED STATES DEPARTMENT OF EDUCATION
REHABILITATION SERVICES ADMINISTRATION
PANEL OF ARBITRATORS**

CASE NO. R-S/11-07

and

CASE NO. R-S/11-08

Consolidated

JOHN BURT, ET AL, Claimants

and

TERRY CAMARDELLE, ET AL, Claimants

vs

LOUISIANA WORKFORCE COMMISSION

Respondent

**FINDINGS OF FACT AND CONCLUSIONS OF LAW AND ANALYSIS
OF THE PANEL OF ARBITRATORS**

I. BACKGROUND

The arbitration hearing in this matter was held on April 24-26, 2017 before an ad hoc tripartite panel of arbitrators (“the Arbitration Panel”) impaneled by the United States Department of Education (“the Department”) under the provisions of the Randolph-Sheppard Act, 20 U.S.C. §107 et seq., (“the Act”), the REVISED INTERIM Policies and Procedures for Convening and Conducting an Arbitration Pursuant to Sections 5(a) and 6 of the Randolph-Sheppard Act as Amended, dated February 3, 1978 (“RSA Arbitration Rules”), and related state and federal regulations. The hearing was held at the Baton Rouge Regional Office, Louisiana Rehabilitation Services, in Baton Rouge, Louisiana. The hearing was conducted under the provisions of the Act, the RSA Arbitration Rules, Louisiana statutes and regulations, (*See, e.g.,* La. R.S. 23:3021 *et seq.*, and Louisiana Administrative Code (Title 67, Part VII.), the Program Manual for the Louisiana Business Enterprises Program.) The Parties were allowed to examine and cross-examine witnesses, and the Arbitration panel had the opportunity to make credibility determinations. The Parties submitted written post-hearing briefs.

The Act creates employment opportunities for blind persons by establishing a program under which the Department designates a State Licensing Agency (“SLA”) in each State. The SLA in each state may issue to blind persons licenses for the operation of vending facilities on federal property. Under the Act, priority is given to blind vendors licensed by the SLA in authorizing the operation of

vending facilities on Federal Property.¹ In the State of Louisiana, the Louisiana Workforce Commission (“LWC” or “Respondent”) operates as the SLA designated by the Department.²

II. THE COMPLAINTS FOR ARBITRATION

As agreed by the Parties, this arbitration proceeding consolidates two Complaints for Arbitration under the Act filed with the Department against the LWC, and the Parties to the Complaints are referred to collectively as (“the Claimants”).

The Complaint for Arbitration filed with the Department by John Burt III on August 30, 2012 on behalf of Terry Carmardelle, Chair of the Elected Committee of Blind Managers (“the Elected Committee”), and all members of the Elected Committee with the exception of Lee Frazier, Herbert Reado, Miles Kimball and Max Lege, contesting the process by which the Respondent selected the operator of the Folk Polk, Louisiana military base is referred to herein as “the Selection Complaint.”³

The Complaint for Arbitration filed with the Department on October 29, 2012 by Terry Camardelle, Chair of the Elected Committee, on behalf of himself, Philip Trahan, Patrick Babin, Shelly Le Jeune, Sam Hyde, Donald Arabie, Frank Gaffney and Herbert Reado, member of the Elected Committee, Elected Committee, the Elected Committee of Managers contesting the payment of legal fees through expenditure of funds from the Blind Vendors Trust Fund (“Trust Fund”) is referred to herein as “the Legal Fees Complaint.”⁴

A. The Selection Complaint

In the Selection Complaint dated August 16, 2012, Claimants demanded a full evidentiary hearing and asserted that the following actions of the Louisiana State Licensing Agency violated the Randolph-Sheppard Act, 20 U.S.C. §107b (6) and 34 C.F. R. §395.13(a); are arbitrary and capricious; and exceed its legal authority:⁵

On July 8, 2011, the State licensing agency requested applications from licensed blind vendors to operate a vending facility at Fort Polk, Louisiana. The closing date for submission of applications was July 22, 2011. Following submission of applications by nine licensed managers, the State licensing agency arbitrarily and capriciously and unilaterally determined that eight of the nine

¹ 20 U.S.C. §§ 107a (b),107(b).

² In their original Complaints for Arbitration, Claimants Terry Camardelle, et al and John Burt III, et al referred to the Respondent LWC as the SLA. During the arbitration proceeding, however, the Claimants contested the status of the LWC as the SLA for the State of Louisiana. In its January 26, 2017 ruling, the Arbitration Panel granted Respondent’s Motion in Limine with respect “Claims or assertions that Louisiana Workforce Commission (“LWC”) was not the State Licensing Agency (“SLA”) and any references that the LWC and/or its officials did not have authority to be involved in the selection process at issue and/or that Louisiana Rehabilitation Services (“LRS”) improperly delegated its responsibilities in the selection process to LWC.

³ Joint Exhibit 9.

⁴ Joint Exhibit 8.

⁵ Joint Exhibit 7.

applications contained insufficient or incomplete information on minimum qualifications, and the State licensing agency summarily threw out such applications and awarded the facility to the one remaining blind vendor whose application was deemed adequate, without competition and without participation by the selection committee. It is further alleged that the selected vendor did not complete all application requirements.

The undersigned Elected Committee of Managers and individual signatories to this grievance are dissatisfied specifically as follows:

(1) The State licensing agency improperly administered the provisions of transfer and promotion policy by failing to provide interviews of all applicants.

(2) The State licensing agency improperly administered the provisions of transfer and promotion policy by failing to allow the Elected Committee of Managers to make recommendations on the selection of candidates for the Fort Polk facility.

(3) The State licensing agency violated the Randolph-Sheppard Act and its regulations by prohibiting active participation by the Elected Committee of Managers in decisions regarding policy, program, and management of the vending facility program, specifically in the administration of the transfer and promotion policy of the Louisiana blind vending facility program.

(4) The State licensing agency improperly eliminated any and all competition for the vacancy at Fort Polk, and thereby discriminated against eight of the nine applicants for that position.

(5) The State licensing agency violated its own Technical Assistance and Guidance Manual by not providing necessary policy documents and information to applicants for the Fort Polk facility.

After a full Grievance Hearing, Administrative Hearing Officer Shelly Dick denied the grievance on May 1, 2012. On August 30, 2012, John Burt III filed the Selection Complaint with the Department requesting an arbitration hearing under the Act⁶, and alleging the following:

The Elected Committee of Managers was not permitted to actively participate in the formulation of the program's Training and Guidance Manual, nor in the construct of the selection criteria for vendor assignments, including Fort Polk. The selection committee's functions were usurped unlawfully by the Respondent State licensing agency when the agency unilaterally made the selection of Lee Frazier after declaring that no other vendor applicant had submitted a valid application. Frazier's qualifications were woefully inadequate on the face of his

⁶ Joint Exhibit 9.

application, and the selection committee would not have selected him to fill the vacancy.⁷

B. The Legal Fees Complaint

The Elected Committee filed a grievance alleging that the payment of legal fees by LWC from the Trust Fund violates the Act, federal regulations and related Louisiana Program Rules; and that the expenditure of such funds was without the active participation of the Elected Committee or the Trust Fund and therefore in violation of the Act and related federal regulations, Louisiana law, Louisiana Administrative Code (“LAC”) provisions. The Respondent submitted a motion for summary judgment on February 27, 2012, which was granted by Administrative Hearing Officer Shelley Dick on May 24, 2012 after a full Grievance Hearing. On October 29, 2012, Terry Camardelle, Chair of the Elected Committee filed with the Department a request for an arbitration hearing under the Act⁸, alleging the following:

Complainants assert that payment of the Respondent's legal expenses out of Randolph-Sheppard program funds in the Blind Vendors Trust Fund violates the Randolph-Sheppard Act, 20 U. S. C. §107d-3(c); Federal regulations, 34 C. F. R. §§395.8 and 395.9; and Louisiana program rules, 67 LAC VII:519.F.5.

Complainants assert that the decision and policy to pay for legal services from Randolph-Sheppard program funds without active participation by the Complainant Elected Committee of Managers violates the Randolph-Sheppard Act, 20 U. S. C. §§107b(3) and 107b-1; Federal regulations, 34 C. F. R. §395.14(b)(1); and Louisiana program rules, 67 LAC VII:527.C.1.

Complainants assert that the decision and policy to pay for legal services from the Blind Vendors Trust Fund without review or approval by the Blind Vendors Trust Fund Advisory Board, violates Louisiana law, R. S. 23:3041-3045, and program rules, 67 LAC VII :2101-2003.

Complainants assert that payment of legal expenses from Randolph-Sheppard program funds in the Blind Vendors Trust Fund, which moneys are intended and specified to operate the blind vending facility program and support blind vendors, for the purpose of defending against grievances properly and lawfully brought by blind vendors against their State licensing agency in order to

⁷ The Complaint for Arbitration filed by John Burt III demanded the following relief:

- (1) That the selection and the process of selection undertaken for the Fort Polk vending facility be declared null and void, and the selection of the sole applicant for the facility be withdrawn; and
- (2) That the State licensing agency be required to adhere to the transfer and promotion policy and establish a new selection process for the Fort Polk facility, which process includes the acceptance of all applicants who are licensed blind managers, and to carry out the remainder of the selection process as set forth in State policy and Federal law.

⁸ Joint Exhibit 9.

protect their rights under law, is offensive to public policy and must not be tolerated.⁹

It is not disputed that the burden of proving the above allegations rests with the Claimants in this matter. Like the Administrative Hearing Officer, we find Claimants have failed to carry that burden in each of the filed Complaints.

III. JOINT STIPULATED FACTS

1. On July 8, 2011, LWC, through LRS (hereinafter "the SLA"), submitted a vacancy announcement to all licensed managers regarding an anticipated opening for management of the Fort Polk vending facility, VF# 7214 (hereinafter "Fort Polk vacancy announcement").
2. A Screening Committee meeting was scheduled for August 5, 2011 in which Mr. Frazier was to be interviewed; however, the only member of the Screening Committee in attendance at the interview on August 5, 2011 was the Randolph-Sheppard Program Manager.
3. All of the Screening Committee members were invited to attend the August 5, 2011 interview.
4. The Screening Selection Sub-Committee was advised of a selection meeting by letter dated August 10, 2011.
5. The Screening Committee was made up of all Elected Committee Members that did not apply for the Fort Polk vacancy and the Randolph-Sheppard Program Manager.
6. Since approximately February 2011, LWC has paid the law firm of Shows, Cali & Walsh for legal services related to the vending facility at Fort Polk in part from money in the Blind Vendor Trust Fund.

⁹ In the Legal Fees Complaint, Claimants request that the Arbitration Panel grant the following relief:

Direct the Respondent Louisiana Workforce Commission to 'identify all Randolph-Sheppard program funds expended from the Blind Vendors Trust Fund for legal services provided by private law firms from the date the blind vending facility program was transferred to the Louisiana Workforce Commission;

Direct the Respondent to deposit into the Louisiana Blind Vendors Trust Fund all monies wrongfully expended for legal services as determined in the first request for relief, above, together with appropriate interest thereon.

Direct the Respondent to issue forthwith a public apology to the blind vendors of Louisiana for its improper use such vendors' program funds; and

Direct the Respondent to reimburse the Complainants in this matter for all legal fees and expenses incurred by them in prosecuting the grievance and this arbitration.

As required by RSA Arbitration Rules, the Panel of Arbitrator's has adopted the findings of fact and conclusions of law below:

IV. PANEL FINDINGS OF FACT

1. The vending contract for the Fort Polk, Louisiana military base ("Fort Polk") involves an approximate 86 million dollar obligation to provide and operate food services to the Fort Polk, Louisiana military base for a primary term of 5 years.
2. A food services vacancy at Fort Polk was created when Eugene Breaud, a blind vendor, participant in the Randolph-Sheppard blind vendor program, and manager of the vending facilities at the Fort Polk under a contract with the United States Department of the Army became ill in December of 2010 and eventually passed away in January 2011.
3. The LWC contracted with the Shows, Cali & Walsh, LLP law firm ("the law firm") for assistance and representation in the Fort Polk bid selection process.
4. The LWC has compensated the law firm for services rendered in connection with the bid process, the administrative hearing on the filed grievances and the review and evidentiary hearing requested by the Complaints for Arbitration before this panel. At least some of the funds paid by the LWC to the law firm from the Blind Vendors Trust Fund ("the Trust Fund") administered by the State of Louisiana.
5. The Trust Fund is held by the State of Louisiana and contains combined deposits from vending machines on Federal properties and State properties. Neither the Department nor the LWC has designated the Trust Fund as a set aside fund.
6. The funds expended from the Trust Fund for Medical Insurance Stipends to Blind Vendors has exceeded the total amount of funds deposited from money from vending machines on Federal properties in each year in which this matter has been proceeding.
7. On February 28, 2011, the LWC announced a satellite bid to provide interim management for the facility at Fort Polk.¹⁴ A second satellite vacancy announcement for the same location was issued on March 15, 2011.¹⁵ It is not disputed that placing an interim manager at the location, did not require a selection process, or to have a selection process for a satellite manager. The announcements included directions for how to apply for the vacancy, as well as what would be required of all potential candidates to fill the vacancy. It also set forth minimum qualifications to be selected to operate the facility.¹⁶ It is not disputed that LWC awarded the satellite contract to Miles Kimball.
8. On July 8, 2011, LWC issued a vacancy announcement and request for applications to all licensed managers regarding an anticipated opening for management of the Fort Polk vending facility, (VF# 7214 "Fort Polk vacancy announcement") on a permanent basis.
9. The Fort Polk vacancy announcement included seven (7) minimum qualifications to be

selected to operate the facility. For the first time for the Fort Polk facility, the minimum qualifications included the requirement that the "...LICENSED MANAGER CANNOT HAVE AN OUTSTANDING DEBT TO SUPPLIERS/VENDORS SUCH AS SOFT DRINK SUPPLIERS, SNACK SUPPLIERS, WHOLESALE FOOD SUPPLIERS AND INSURANCE SUPPLIERS (SIC); APPLICANT MUST PROVIDE PROOF THAT OUTSTANDING (SIC) DEBTS ARE NOT OWED TO SUPPLIERS/VENDORS. PROOF MAY INCLUDE ZERO-BALANCE LETTERS OR THE PAST 4 INVOICES SHOWING PAIN (SIC) IN FULL SUPPLIERS/VENDORS."

10. It is not disputed that the Elected Committee previously requested that the Zero Balance requirement be included in the minimum qualifications, and that the Committee was not given advance notice that the new requirement would be included as a minimum requirement in the Ft. Polk vacancy announcement.

11. It is not disputed that nine (9) blind vendors submitted applications in response to the Fort Polk anticipated vacancy announcement.

12. Randolph-Sheppard Program Manager Joseph Burton reviewed all nine applications, and determined that only one application—submitted by Lee Frazier- met all seven minimum qualifications, making Mr. Frazier the only eligible applicant for selection. No members of the Selection Committee, a subset of the Elected Committee, participated in the eligibility review of applications. Mr. Burton notified his Superiors of the disqualification of all but one of the applicants and was instructed to proceed with the normal Selection Process.

13. On behalf of the LWC, Burton sent a notice to the Selection Committee stating that the interview of Lee Frazier was set for August 5, 2011.

14. No member of the Selection Committee attended, and the interview of Lee Frazier was conducted.

15. Mr. Burton advised the Selection Committee, a subcommittee of the Elected Committee that a sole blind vendor, Lee Frazier, had filed a completed application, had been determined to be eligible, and advised that a meeting of the Selection Committee was scheduled for August 16, 2011 to discuss his qualifications. Although eligible members of the Section Committee attended, all chose to leave before the discussion of qualifications, and therefore voluntarily did not participate in the review.

16. Members of the Selection Committee attended the meeting, but chose to leave. Burton scheduled another Selection Committee meeting, but no eligible member of the Selection Committee chose to attend.

17. The LWC awarded the Fort Polk anticipated vacancy to Lee Frazier.

18. The Elected Committee and individual members of the Elected Committee timely filed Grievances, and thereafter, Complaints for Arbitration.

V. APPLICABLE LAW AND ANALYSIS

Claimants bear the burden of proving its claims that the LWC violated federal and state law and regulations when it selected Lee Frazier as the successful applicant for the Fort Polk vacancy.

A. The Selection Process Complaint

The Claimants argue that the LWC improperly included in the Fort Polk vacancy announcement a requirement that the successful applicant have “zero” balances with all vendors; improperly applied that requirement by determining that eight of the nine applicants were not eligible because they did not address the zero balance requirement in their applications, and did not allow them to supplement their applications prior to the eligibility termination; improperly accepted an incomplete application from Lee Frazier; and made the selection of the successful applicant without the “active participation” of the Elected Committee as required.

The decision of the Arbitration Panel must be based on the findings of fact and the applicable law. The role of the Arbitration Panel is to determine whether the LWC has complied with the requirements of applicable law and regulations. The Arbitration Panel is not empowered to determine what, in its opinion, would have been the preferred selection process to fill the Fort Polk vacancy or whether the LWC should have retained a law firm and once it made that decision, from what source of funds the LWC should have used to compensate the law firm. The Arbitration Panel can only rule on the legality of the process used, not the wisdom or legislative policy underlying it. As discussed above, the Act creates employment opportunities for blind persons by establishing a program under which the Department designates a SLA in each state charged with the responsibility of issuing to blind persons licenses for the operation of vending facilities on federal property. Under the Act, preference is given to licensed blind vendors in the selection of operators of vending facilities on Federal Property.¹⁰ In the State of Louisiana, the Louisiana Workforce Commission (“LWC” or “Respondent”) operates as the SLA designated by the Department.

The Louisiana Administrative Code, Title 67, Part VII, Chapter 5, requires the LWC, as the Louisiana SLA, to “...carry out assignment and transfer of licensed managers through business enterprise vacancy announcements, eligibility verification, and establishing and convening a screening committee.” Louisiana program rules also authorize the SLA to develop minimum qualifications “specific to the characteristics of the vacant enterprise, and set forth certain criteria which must be included in vacancy announcements issued by the SLA. (See LAC 67:VII.519.E.1 and LAC 67:VII.519.E.1.a.i-iv.) The evidence in the record establishes that the LWC issued the vacancy announcement, which included minimum qualifications criteria, followed its established procedure as it carried out its responsibility for eligibility verification,

¹⁰ The Act, § 107a (b),107(b).

and established and convened the screening committee for the Fort Polk facility in compliance with the Louisiana Program Rules.

It is unfortunate that not all members of the Elected Committee addressed the zero balance requirement in their applications for the Fort Polk facility. It is not disputed, however, that the LWC included the new requirement as a minimum qualification in its announcement, and that the vacancy announcement included a clear statement that incomplete applications would not be considered: “INCOMPLETE APPLICATIONS OR APPLICATIONS RECEIVED AFTER THE DUE DATE WILL NOT BE CONSIDERED.” It is not disputed that eight of the nine applicants did not include information regarding the zero balance requirement; and therefore, it is concluded that the LWC acted within its authority to determine eligibility when it determined that these applications were incomplete and would not be considered. Reopening the bid process would be a significant policy deviation from established protocols.

The Claimants also argue that the application submitted by Lee Frazier, the successful applicant, was not complete and that the LWC erred in determining that he submitted a complete application, and in finding that Frazier eligible for further consideration. Specifically, the Claimants argue that Mr. Frazier provided non-responsive answers to the inquiry regarding his past experience, and that he provided unverified, handwritten information in response to the zero balance requirement. It is not disputed, however, that Mr. Frazier provided a response to each inquiry, including the zero balance requirement. Based on the evidence in the record, and the applicable law, it is concluded that the sufficiency of Mr. Frazier’s application was subject to review and verification by LWC and that LWC acted within its discretion to determine eligibility and was not arbitrary or capricious.¹¹

Claimants also argue that the process for the selection of the Lee Frazier was fatally flawed because the LWC failed to allow the Elected Committee “active participation” in the “development and administration of a State system for the transfer and promotion of Blind Vendors,” as required by 34 C.F.R. § 395.14(b)(3). The evidence in the record establishes that after the LWC determined the eligibility of Lee Frazier, the LWC attempted on at least two occasions to allow the Elected Committee to participate in the selection process through participation in the interview and review of his qualifications. Twice they were given the opportunity to question qualifications. Twice they refused. It is not disputed that the Elected Committee voluntarily refused to allow even one member to participate in either meeting. The LWC then voted to designate Mr. Frazier as the successful applicant.

A review of the record also reveals that the Elected Committee actively participated in other aspects of the selection process including drafting and editing the TAG Manual, and suggesting changes in vacancy announcements, including the addition of the zero balance requirement.

¹¹ The Claimants argue that the Technical Assistance and Guidance (“TAG”) Manual was not properly completed and promulgated and even if it were, LWC did not comply with its provisions regarding the solicitation process. Therefore, the Claimants contend that LWC cannot rely on the TAG Manual to bolster its arguments that it has complied with all requirements. The evidence in the record is that at the time of the events leading to the filing of the grievances in this matter, the TAG Manual was a work in progress that was essentially written and edited by members of the Elected Committee. Because a final document was not included in the record, it is concluded that compliance with the provisions of the TAG Manual are not relevant to the issues before the Arbitration Panel.

Based on the discussion herein, the Arbitration Panel finds that the Complaints did not meet their burden of proving that the LWC violated applicable law or regulations when the LWC acted in good faith and in compliance with federal and state law and regulations in the selection process for the Fort Polk vacancy.

B. The Legal Fees Complaint

The Respondent LWC hired the law firm of Shows, Cali & Walsh LLP (“the law firm”) to provide legal advice on, among other issues, the application and selection process for the Fort Polk vacancy, and the law firm represents the LWC in grievances brought by the Elected Committee and individual blind vendors, and in the instant arbitration proceeding. The Claimants argue that the LWC is improperly compensating the law firm from the Trust Fund in violation of federal and state statutes and regulations, and that the Elected Committee was neither consulted nor informed that the Trust Fund would be the source of the payments to the law firm, thereby denying the Elected Committee its right to active participation in the decision to retain and compensate the law firm from the Trust Fund. The Elected Committee further argues that it was not made aware that the LWC was using the Trust Fund to make these payments until after it had started the grievance process. Claimants argue that the United States Congress “clearly intended the Elected Committee to be thoroughly engaged and participate in major programmatic decisions,” and that the Elected Committee is not merely an advisory committee.

1. The Payment of Legal Fees to a Private Law firm

Claimants assert that the Respondent’s payment of legal fees from Trust Fund funds to a private law firm for the purpose of representing Respondent LWC violates the Randolph-Sheppard Act, 20 U.S.C. § 107d-3(c), federal regulations at 34 C.F.R. §§ 395.8 and 395.9 and Louisiana Program Rules at 67 LAC VII:519.F.5. Although Section 107d-3(c) of the Act and 34 C.F.R. § 395.8 requires that upon majority vote of the State’s blind vendors, LWC, as the Louisiana SLA, to use income from vending machines located on federal property for the establishment of retirement and pension plans, health insurance contributions, and for the provision of paid sick leave and vacation time for blind vendors. Any remainder must be used for equipment purchase and maintenance, management services, and assuring a minimum return to the vendors. LWC Accounting Director Wayne Knight, testified without rebuttal that testified that all funds derived from vending machines located on Federal property used for the mandated purposes discussed above. In addition, documentary evidence establishes that for the years 2011-2016, the amount of funds expended for the federally-mandated purposes far exceed the amount of income derived from vending machines located on federal property. (See Respondent’s Exhibits 15, 16, 37 and 38) The Claimants provided no evidence sufficient to rebut Respondent’s evidence showing that the income derived from vending machines located on federal property was expended in accordance with federal mandates. Therefore, it must be concluded that the LWC for the years relevant to this proceeding, 2011-16 the LWC expended all income from all vending machines on federal property in accordance with federal mandates, and therefore, the LWC did not violate Section 107d-3(c) of the Act and 34 C.F.R. §395.8 when it paid the legal fees to the Shows, Cali law firm.

The Claimants also argue that the Respondent violated the federally-promulgated set-aside provisions. The use of set-aside funds is governed by 20 U.S.C. 107b, 34 CFR 395.3 and 34 CFR 395.9. Claimants contend that because the Trust Fund consists of "monies collected from certain vending machines located on state, federal, and other property pursuant to the Randolph-Sheppard Act," it is a set aside as contemplated by 20 U.S.C. 107b, and that when the LWC accepted its role as the State licensing agency, it explicitly agreed to abide by the provisions of the Randolph-Sheppard Act codified at 20 U.S.C. 107b., which provides as follows:

A State agency for the blind or other State agency desiring to be designated as the licensing agency shall, with the approval of the chief executive of the State, make application to the Secretary and agree-

- (3) that if any funds are set aside, or caused to be set aside, from the net proceeds of the operation of the vending facilities such funds shall be set aside, or caused to be set aside, only to the extent necessary for and only for the purposes of (A) maintenance and replacement of equipment; (B) the purchase of new equipment; (C) management services; (D) assuring a fair minimum return to operators of vending facilities; and (E) retirement or pension funds, health insurance contributions, and provision for paid sick leave and vacation time, if it is determined by a majority vote of the blind licensees licensed by such State agency, after such agency provides to each such licensee full information on all matters relevant to such proposed program, that funds under this paragraph shall be set aside for such purposes: *Provided, however*, that in no event shall the amount of such funds to be set aside from the net proceeds of any vending facility exceed a reasonable amount which shall be determined by the Secretary.

The federal regulation governing the use of set aside funds can be found at 34 CFR 395.9:

34 CFR 395.9 -- The setting aside of funds by the State licensing agency.

- (a) The State licensing agency shall establish in writing the extent to which funds are to be set aside or caused to be set aside from the net proceeds of the operation of the vending machines and, to the extent applicable, under §395.8(c) in an amount determined by the Secretary to be reasonable.
- (b) Funds may be set aside under paragraph (a) of this section only for the purposes of:
 - (1) Maintenance and replacement of equipment;
 - (2) The purchase of new equipment;

- (3) Management services;¹²
- (4) Assuring a fair minimum return to vendors; or
- (5) The establishment and maintenance of retirement or pension funds, health insurance contributions, and provisions for paid sick leave and vacation time, if it is so determined by a majority vote of blind vendors licensed by the State licensing agency, after such agency provides to each such vendor information on all matters relevant to such purposed purposes.

(c) The State licensing agency shall further set out the method of determining the charge for each of the above purposes listed in paragraph (b) of this section, which will be determined with the active participation of the State Committee of Blind Vendors and which will be designed to prevent, so far as practicable, a greater charge for any purpose than is reasonably required for that purpose. The State licensing agency shall maintain adequate records to support the reasonableness of the charges for each of the purposes listed in this section, including any reserves necessary to assure that such purposes can be achieved on a consistent basis.

Claimants argue that federal regulations provide that funds generated from the operation of vending facilities on federal property should be used first for the healthcare needs of the blind vendors and then for the other approved uses for set-aside funds. According to the Claimants, although funds generated by State and other property are not automatically directed to the healthcare needs of the blind vendors, they are still used only for the purposes enumerated in 34 CFR 395.9(b), those same exclusive purposes for which LWC agreed it would use any and all money that it set aside.

The evidence in the record, however, establishes that Louisiana does not participate in the set-aside program. Charles Monk, LWC Blind Services Executive Director testified, without rebuttal, that Louisiana does not participate in any set-aside program. His testimony is corroborated by RS-15 reports that the LWC submits to the federal government. These reports indicates that it does not levy a set-aside on the managers.

Respondent LWC also contends that under federal and state law, the SLA can expend funds from the trust fund "for any purpose associated with the Randolph Sheppard Act" and that the Fort Polk facility was a small portion of the Louisiana Business Enterprise Program. A review of applicable states reveals that under La. R.S. 23:3043(B) and La. R.S. 23:3045(B), and

¹² The term "management services" means supervision, inspection, quality control, consultation, accounting, regulating, in service training, and other related services provided on a systematic basis to support and improve vending facilities.

the provisions of the Louisiana Program rules at LAC 67:Part VII.21 provide the LWC with the authority to expend funds for the purposes described under the Act and the state law, and contains no prohibition against expenditures for legal fees associated with the Act.

Claimants point out that LWC's general counsel, Peter Wright, testified that State law cannot authorize payments that are not contemplated by federal law. Mr. Wright also testified that the State's Risk Management Fund is the proper source for State funds in the defense of lawsuits seeking damages. This is not a suit for damages falling under Risk Management, and The Complaints for Arbitration involved in this proceeding are filed within established procedures mandated by Randolph-Sheppard. Unrefuted testimony clearly established that administration costs of State run programs are paid by the funds allotted to those programs.

The Arbitration Panel finds that the transfer and promotion responsibilities of the LWC, the grievance process, administrative hearings and arbitration are inherent parts of the Randolph-Sheppard program and that the expenses created by the blind vendors' use of the program are necessary expenses of administering the program and as such are an authorized use of the Trust Fund. LSA RS 23:3045.B specifically allows Trust Fund money from state vending machines to be distributed for any purpose consistent with the provisions of the Act. Therefore, the Arbitration Panel concludes that the expenditures by LWC's from the Trust Fund for payment of the contested legal fees is not in violation of State and Federal law.

2. "Active Participation"

Claimants also argue that even if LWC could successfully prove that the payment of legal fees to the law firm was, and is, an appropriate use of set-aside funds under 20 U.S.C. § 107b and 34 CFR 395.9, and that it has not demonstrated that it sought the active participation of the Elected Committee in determining to spend funds to retain counsel to oppose the Elected Committee as required by federal and state law and regulations.

Section 107b-1, and implementing federal regulations and state law require the LWC to provide each licensee with relevant financial data on the on the operation of the state vending program, conduct the annual election of the Elected Committee, and ensure that the responsibilities of the Elected Committee include participation with the LWC "in major administrative decision and policy and program development decisions affecting the overall administration of the State's vending facility program."

A review if the evidence in the record and the applicable law leads to the conclusion that the hiring of a law firm in 2011 for legal advice for program matters, including the grievance process, does not constitute a major administrative decision. Claimants seek participation rights in the administration of the LWC office. LWC did not seek counsel to create a program or a system for the bid offering. LWC hired counsel to assure compliance with the system that had been in use with the blind vendors. The decision to use outside counsel rather than staff attorneys is a purely internal administrative decision and in no way appropriate for participation, active or otherwise, from the blind vendors or the Elected Committee. Testimony established that attorney fees for staff attorneys were also charged to the programs for which the work was done. This has

become a major expense solely due to the continued challenges from the blind vendors as the grievances and Complaints for Arbitration were heard in accordance with the provisions of the Randolph Sheppard program.

Claimants cannot bootstrap this process into being a major policy by the fact they have created great need for LWC to have representation. The “policy” questions at issue are simply “whether the LWC retains counsel to defend grievance charges brought against its actions,” and if so, “is it more efficient to continue with existing legal counselor to use staff time or retain outside counsel?” The extent of the required representation is directly proportional to the Claimants activity. There is no policy decision as to whether LWC should provide a grievance/arbitration remedy, which federally-mandated. Extent of representation aside, there is no plausible justification for saying Claimants have a right to participate in the decision LWC makes in selecting counsel to address Claimants’ filings under a Federal program.

Finally, it is noted that the evidence in the record, through the unrebutted testimony in the record, that after the LWC retained the law firm, the LWC has advised Elected Committee on budgetary matters related to that representation.

Based on the evidence in the record, it is concluded that the LWC did not violate federal and/or state law when it retained the law firm and compensated the law firm through payments from the Trust Fund.

C. The LWC’s Alleged Suppression of Evidence

The LWC argued in a Motion in Limine that Federal dollars were not used to pay legal fees. The Motion was granted, excluding evidence of such legal fees. At the arbitration hearing, Mr. Wright provided testimony that Federal dollars did accumulate in the Trust Fund, but annually they were totally expended on Insurance Stipends. Through a selected section of cross examination, the Claimants suggest that counsel for LWC misrepresented facts in their Motion in Limine and gained tactical advantage. A reading of Mr. Wright’s entire testimony clearly supports the position taken by counsel in the prior granted motion. To find a misrepresentation would require a finding that all of the money that goes into the Trust Fund in Louisiana becomes “set aside” money and limited by narrow Federal restrictions. The Panel finds no authority to extend such a requirement. The interpretation of law by counsel in their representation to this Panel in the Motion in Limine is consistent with this Panel’s position.

VI. CONCLUSION

In conclusion, there is no evidence that the LWC operated outside its authority, in contravention of public policy, or was arbitrary or capricious.

For the reasons assigned above, all Claims asserted in Complaint for Arbitration filed by John Burt et al in R-S/1107 and all Claims asserted in Claim or Arbitration filed by Terry Camardelle et al in R-S/11-08 are denied in full. Given the resolution of these matters, it is not necessary for the Panel of Arbitrators to consider the Claimant’s request for remedy.

PANEL OF ARBITRATORS

Debra Simmons Neveu
Chair, Panel of Arbitrators

W. Ross Foote
Member, Panel of Arbitrators

Rocky Marchiano, dissenting (attached)
Member, Panel of Arbitrators

**UNITED STATES DEPARTMENT OF EDUCATION
REHABILITATION SERVICES ADMINISTRATION
FEDERAL ARBITRATION PANEL**

Case Number R-S/11-07
and
Case Number R-S/11-08

Consolidated

In the Matter of the Arbitration Between:

JOHN BURT, ET AL
CLAIMANTS
AND

TERRY CAMARDELLE, ET AL
CLAIMANTS

-VS-

THE LOUISIANA WORKFORCE COMMISSION
RESPONDENT

**DISSENTING OPINION AND PROPOSED AWARD SUBMITTED TO THE
TRIPARTITE PANEL**

BY ROCKY MARCHIANO

PART I – INTRODUCTION

The Consensus Opinion and Award of the Tripartite Panel arouses such moral outrage partially assuaged only by recent circumstances which have seen a new permanent Randolph-Sheppard Manager selected for Fort Polk in a transparent, uncontested process. Rather than conform to a strict reading of the applicable laws and regulations the Majority has chosen to exercise a broad interpretation of the Randolph-Sheppard Act, associated state laws and regulations. Such broad interpretation enhances the authority of the State Licensing Agency while diminishing the Federally mandated role and responsibilities of the Blind Vendor Elected Committee.

For the rest, this Dissent is unapologetically submitted to the Tripartite Panel.

PART II – FACTUAL BACKGROUND

In July 2010, the Louisiana Workforce Commission (“LWC”) assumed administrative responsibility over the Louisiana Randolph-Sheppard Business Enterprise Program as the Program’s designated state licensing agency. On July 8, 2011, a vacancy was announced for the Program’s Fort Polk facility, and the application process began for appointing a new permanent manager for the location. Ten applications were submitted to LWC. Following submission, nine of the ten applications were declared ineligible by Joseph Burton, the Randolph-Sheppard Program Manager. On August 16, 2011, it was announced that applicant Lee Frazier had been appointed the permanent manager of the Fort Polk Facility.

At some point prior to March, 2011 LWC unilaterally retained the law firm of Shows, Cali & Walsh (“Shows, Cali”) to run the Fort Polk facility selection process. Shows, Cali also represented LWC in the course of the instant arbitrations and the preceding administrative evidentiary hearing. LWC has paid (and continues to pay) the legal fees/expenses of Shows, Cali using funds from the Louisiana Blind Vendors Trust Fund.

PART III – FINDINGS OF FACT, CONCLUSIONS OF LAW AND REASONS

1. Findings Relating to the Fort Polk Selection Process

The selection and process of selection undertaken for the Fort Polk vending facility should be declared null and void because (i) the application of the winning bidder, Lee Frazier, was incomplete on its face because it did not meet the minimum selection guidelines for the Fort Polk facility established by LWC and (ii) the Elected Committee, both standing alone and vis-à-vis the Screening Committee, were denied active participation in the Fort Polk facility selection process in violation of both the Randolph-Sheppard Act (the “Act”) and Title 67 of the Louisiana Administrative Code.

(i) Application of Lee Frazier

The July 8, 2011 vacancy announcement for the Fort Polk facility included, as a minimum qualification, the requirement that the applicant “licensed manager cannot have an outstanding debt to suppliers/vendors such as soft drink suppliers, snack suppliers, wholesale food suppliers and insurance suppliers; applicant must provide proof that outstanding debts are not owed to suppliers/vendors. Proof may include zero-balance letters or the past 4 invoices showing pai[d] in full from suppliers/vendors.”¹³

Putting aside the issue of whether the Fort Polk minimum selection guidelines were or should have been developed with the active participation of the Elected Committee, the application of the winning bidder, Lee Frazier, was incomplete on its face because, it, like the

¹³ Joint Exhibit #1, page 4

applications from the eight licensed vendors summarily disqualified by Joseph Burton, the Randolph-Sheppard Program Manager, did not include the required proof of no debt owed to suppliers/vendors, despite assertions to the contrary by LWC.¹⁴ It is noteworthy that testimony of the State Officials consistently pointed to their effort for a “transparent” selection process although it was Mr Burton, who alone, visually evaluated each application against the eligibility requirements and made the selection of Mr Frazier by disqualifying the other applicants. No other State Official visually examined any application submitted until *after* the selection of Mr Frazier had been made.

A copy of Mr. Frazier’s application was jointly submitted as an Exhibit to the Arbitration Panel by LWC and the Claimants.¹⁵ Other than a handful of receipts showing payment for purchased goods by credit card at the time of purchase (*e.g.*, Sam’s Club receipts), no invoices submitted by Mr. Frazier show “paid in full *from* suppliers/vendors.” There are handwritten “paid” notations on certain of the invoices (some referencing check numbers), but these notations, standing alone, do not demonstrate that such invoices were “paid in full” (more is needed, such as a copy of the referenced cancelled check or an invoice produced by the vendor also showing that payment for the invoiced goods was applied/credited on a certain date). Further, in response to a question in the body of the Fort Polk application requiring the applicant to “Indicate the highest level of education and specialized training (Name and Location / Dates Attended / Major),” Mr. Frazier stated: “I retain common sense of which is not taught in the class room or in books!” One of the Licensing requirements under the Louisiana Business Enterprise Program is to “be a high school graduate or have a GED.”¹⁶ Both Mr. Frazier’s statement and his submitted resume are not responsive to the question on the Fort Polk application verifying this requirement although all other applicants were responsive to this specific question.

(2) Fort Polk Facility Selection Process

In accordance with §107b-1(3) of the Act, Federal regulations promulgated under the Act provide that the blind vendors Elected Committee shall both “*actively participate* with the State licensing agency in major administrative decisions and policy and program development decisions affecting the overall administration of the State’s vending facility program” and “*actively participate* with the State licensing agency in the development and administration of a State system for the transfer and promotion of blind vendors” (emphasis added).¹⁷

While, it is true that under regulations governing the operation of Louisiana’s Business Enterprise Program, LWC is tasked with the “Assignment [and] Transfer of Licensed Managers,”¹⁸ it cannot do so in a way that abdicates the responsibilities assigned to it as a state licensing agency under §107b-1(3) of the Act to “ensure that [the Elected Committee’s] responsibilities include (A) participation, with the State agency, in major administrative decisions and policy and program development and [. . .] (C) participation, with the State agency, in the development and administration of a transfer and promotion system for blind licensees.” Nor can LWC arbitrarily ignore state administrative law procedures specifically applicable to the

¹⁴ See, LWC’s Post-Arbitration Brief, pages 20-21

¹⁵ See, Joint Exhibit 2(a)

¹⁶ 67 LAC §521(2)(f)

¹⁷ 34 C.F.R. §395.14(b)

¹⁸ 67 LAC §519.E

assignment and transfer of licensed managers, which procedures were ostensibly adopted to facilitate compliance with the responsibilities imposed on state licensing agencies under the Act. As explained further below, LWC's conduct throughout the Fort Polk bid process not only violated state administrative law procedures governing the assignment and transfer of licensed managers, but also prevented the Elected Committee from actively participating in the Fort Polk selection process, in violation of §107b-1(3) of the Act and Federal regulations promulgated under the Act.¹⁹

Under state administrative law procedures, LWC was specifically charged with carrying out the assignment and transfer of the Fort Polk facility "through business enterprise vacancy announcements, eligibility verification, and *establishing and convening a screening committee*" (emphasis added).²⁰ Specifically, as part of any selection process:

- "The SLA shall provide a list of eligibility criteria and *refer eligible applicants to the screening committee*"(emphasis added);²¹ and
- "*The screening committee shall be established and convened by the SLA. The screening committee will consider applicants for assignment and transfer. The committee shall make recommendation(s) to the SLA or designee. At least one member of the screening committee shall be a representative of the elected committee of managers*" (emphasis added).²²

At no point prior to LWC's selection of Mr. Frazier as the winning bidder for the Fort Polk facility was a meeting of "a screening committee" properly convened to "*consider applicants for assignment and transfer*" to the Fort Polk facility referred to it by LWC. Further, at no point prior to LWC's selection of Mr. Frazier did LWC receive the required recommendations of an "*established and convened*" screening committee.

Under state administrative law procedures, it is not possible to convene a screening committee meeting without the participation of at least one member who is also a representative of the Elected Committee. Although LWC may have designated Joseph Burton, Program Manager, "Chair of the Screening Committee," Mr. Burton was not a representative of the Elected Committee. Thus, he had no authority, acting alone, to deliver any recommendations regarding the Fort Polk selection process to LWC. No authority is cited by LWC authorizing it to act in contravention of state administrative law procedures. As such, the selection process for the Fort Polk facility was not valid.

Separate and apart from the issue of whether LWC complied with state administrative law procedures in the Fort Polk selection process is the issue of whether LWC engaged the active participation of the Elected Committee in the Fort Polk selection process, in compliance with §107b-1(3) of the Act. It is hard for LWC to argue that it engaged the active participation of the

¹⁹ 34 C.F.R. §395.14(b)

²⁰ 67 LAC §519.E.1.a

²¹ 67 LAC §519.E.2

²² 67 LAC §519.E.3

Elected Committee when it, at first, affirmatively responded to requests from the Elected Committee to hold an emergency meeting regarding the Fort Polk selection process by scheduling an emergency Elected Committee meeting on August 16, 2011 at 1:00 p.m. then arbitrarily and unilaterally cancelling the scheduled Elected Committee meeting on the day of the meeting to proceed with the Fort Polk selection process. LWC was put on notice that the Elected Committee had multiple concerns with the Fort Polk selection process. By refusing to even hear the Elected Committee's concerns, LWC affirmatively denied the Elected Committee the opportunity to actively participate in the Fort Polk selection process, in violation of the mandates of the Act. Active participation is a two-way street.

2. Findings Relating to the Blind Vendors Trust Fund and the Retention of Shows, Cali

(i) Blind Vendors Trust Fund

Under the operation of the Randolph-Sheppard Act, monies from the Louisiana Blind Vendors Trust Fund cannot be used to pay the legal fees/expenses of a law firm retained by a state licensing agency to provide advice and representation in the course of blind vendor evidentiary hearings and the arbitration of blind vendor grievances.

When the Louisiana State Legislature established the Blind Vendors Trust Fund, funds were caused to be set aside from the net proceeds of the operation of certain vending facilities within the state for the express purpose of providing "assistance to Louisiana citizens who are legally blind and who participate in the Blind Enterprise Program established through the federal Randolph-Sheppard Act."²³

The Louisiana Blind Vendors Trust Fund consists of "monies collected from certain vending stands, vending machines, cafeterias, and other small business concessions located on state, federal, and other property pursuant to the Randolph-Sheppard Act."²⁴

Under §107(b)(3) of the Randolph-Sheppard Act (the "Act"), LWC, as a designated state licensing agency under the Act, specifically agreed, upon submission of its application with the Secretary of Education, "that if any funds are set aside, *or caused to be set aside*, from the net proceeds of the operation of the *vending facilities*," such funds may only be used for five permitted expense categories.²⁵

The term "vending facilities" is not defined in the Act, itself. The regulations promulgated under the Act, however, provide that a "vending facility" means "automatic vending machines, cafeterias, snack bars, cart service, shelters, counters, and such other

²³ La. R.S. §23:3041

²⁴ La. R.S. §23:3043(A)

²⁵ Specifically: "(A) maintenance and replacement of equipment; (B) the purchase of new equipment; (C) management services; (D) assuring a fair minimum return to operators of vending facilities; and (E) retirement or pension funds, health insurance contributions, and provision for paid sick leave and vacation time, if it is determined by a majority vote of blind licensees licensed by such State agency, after such agency provides to each such licensee full information on all matters relevant to such proposed program" *See*, 20 U.S.C.. §107(b)(3)

appropriate auxiliary equipment which may be operated by blind licensees.”²⁶ Put differently, a “vending facility” is an umbrella term for multiple categories of vending operations, including “vending machines.” Notably, no distinction is made in the definition between “state” and “Federal” vending *facilities*.

Without substantiation, LWC maintains that §107(b)(3) of the Act, quoted above, “pertains to set-aside funds and the purposes for which such funds may be expended,”²⁷ referencing further 34 C.F.R. §395.9, which, according to LWC “pertains to the setting aside of funds by the [state licensing agency] and the purposes for which the funds may be set aside.”²⁸ LWC’s argument, however, that “Pursuant to this Title [read: 34 C.F.R. §395.9], there is no setting aside of funds program in the Louisiana Randolph-Sheppard program, therefore LWC is not in violation of 20 USC §107(b)(3) because there are no set-aside funds in Louisiana,”²⁹ is not only based on circular logic, it is also a red herring. The term “set-aside funds” appears nowhere in the body of the Act, itself, and, notably, nowhere within the Title specifically referenced by LWC: 34 C.F.R. §395.9. Rather, 34 C.F.R. §395.9 provides that “[t]he State licensing agency shall establish in writing the extent to which funds are to be *set aside or caused to be set aside from the net proceeds of the operation of the vending facilities* and, to the extent applicable, from vending machine income under §395.8(c),” tracking the “set aside or caused to be set aside” language appearing in §107(b)(3) of the Act (emphasis added).

“Set-aside funds” is a defined term³⁰ under the Federal regulations promulgated under the Act (34 C.F.R. §395, *et sec.*) and is used elsewhere in Part 395 (*i.e.*, outside of 34 C.F.R. §395.9).³¹ Under a plain language reading of the Act itself, however, LWC, as a state licensing agency, cannot conveniently ignore spending restrictions under §107(b)(3) of the Act applicable to “any” *funds set aside or caused to be set aside* from the net proceeds of the operation of program vending facilities by arguing that “any” funds refers only to “set-aside funds.”

While Louisiana may not have a set-aside fund assessment upon blind vendors, by operation of state law, funds (specifically, unassigned vending machine income resulting from contracts between the SLA and 3rd party vending machine contractors) are *caused to be set aside* from the net proceeds of *vending facilities* located on state-owned property (or on property leased by the state/state agencies) in order to fund the Blind Vendors Trust Fund, triggering the spending restrictions under §107(b)(3) of the Act.

While it is also true that, per La. R.S. §23:3045(A), the Blind Vendors Trust Fund is partially funded by residual income from vending machines located on *Federal* property accrued to LWC (as the state licensing agency) through the operation of the Act and Federal regulations (*see*, 20 U.S.C. §107d-3(c) and 34 C.F.R. §395.8, respectively), these funds, which by LWC’s own admission represent a small portion of the total funds held in the Blind Vendors Trust Fund, are not at issue here because they were ostensibly used to pay a minority portion of the annual

²⁶ 34 C.F.R. §395.1(x)

²⁷ *See*, LWC’s Post-Arbitration Brief, page 34

²⁸ *See*, LWC’s Post-Arbitration Brief, page 34

²⁹ *See*, LWC’s Post-Arbitration Brief, page 34-35

³⁰ *Set-aside funds* means “funds which accrue to a State licensing agency from an assessment against the net proceeds of each vending facility in the State’s vending facility program and any income from vending machines on Federal property which accrues to the State licensing agency.” 34 C.F.R. §395.1(s)

³¹ *See*, for example, 34 C.F.R. §395.15(3)

cost of health insurance stipends for licensed vendors, in accordance with the Act and regulations promulgated under the Act.

What is at issue is whether there are restrictions on the use of Blind Vendors Trust Fund money collected from vending machines located on *state* property. In relevant part, La. R.S. §23:3045(B) provides that such money “shall be distributed for any purpose consistent with the provisions of the Randolph-Sheppard Act.” Returning to the Act, because such money, by operation of Louisiana law, is “caused to be set aside from the net proceeds of the operation of vending facilities,” it can only be used for the purposes stated in §107(b)(3) of the Act. The portions of both LWC’s and the Claimants’ arguments addressing the general involvement/participation of the licensed vendors in the Blind Vendors Trust Fund expenditure process is not strictly relevant here because of the gateway issue of whether the payments made to Shows, Cali using Blind Vendors Trust Fund monies is permitted under §107(b)(3) of the Act; although, the Claimants’ assertion that they were denied “active participation” in the retention of Shows, Cali as required by the Act and the Federal regulations promulgated under the Act is valid and addressed separately, below.³²

It has been established that LWC, using Blind Vendors Trust Fund monies, has paid and continues to pay for legal services provided by Shows, Cali in connection with its retention of Shows, Cali to provide advice and representation in the course of blind vendor evidentiary hearings and the arbitration of blind vendor grievances.³³ The payment of the legal fees/expenses of a law firm retained by a state licensing agency to provide advice and representation in the course of blind vendor evidentiary hearings, the arbitration of blind vendor grievances, and other litigations does not fall under any of the five permitted expense categories identified in §107(b)(3) of the Act. This is because such expenditures are not for the purposes of (A) the maintenance and replacement of equipment; (B) the purchase of new equipment; (C) management services;³⁴ (D) assuring a fair minimum return to operators of vending facilities; or and vacation time.

Indeed, LWC’s use of funds caused to be set aside from of the operation of certain vending facilities within the state to pay Shows, Cali not only violates §107(b)(3) of the Act but also the stated purpose of the Louisiana Blind Vendors Trust Fund, which is “to provide assistance to Louisiana citizens who are legally blind and who participate in the Blind Enterprise Program established through the federal Randolph-Sheppard Act.” The Blind Vendor Trust Fund was not created to provide assistance to LWC, as the state licensing agency, in disputes against the legally blind Louisiana citizens participating in the Blind Enterprise Program that it agreed to serve.

Further, in any consideration of the Blind Vendor Trust Fund as a set-aside fund subject to the Randolph Sheppard Act, one must weigh the testimony of LWC Fiscal Director Wayne

³² See, discussion under the heading “Retention of Shows, Cali,” below.

³³ See, Respondant’s Motion for Partial Summary Judgment at ¶ 7

³⁴ *Management Services* means “supervision, inspection, quality control, consultation, accounting, regulating, in-service training, and other related services provided on a systematic basis to support and improve vending facilities operated by blind vendors” and “does not include those services or costs which pertain to the on-going operation of an individual facility after the initial establishment period.”

Knight²³ in which confirmed that the Blind Vendors Trust Fund is, in fact, a fund where *funds are caused to be set aside* while the testimony of LWC Chief Counsel Peter Wright²⁴ confirmed that LWC could not authorize payments not contemplated by Federal Law.

Finally,

(ii) Retention of Shows, Cali

The decision by LWC to initially retain Shows, Cali to run the Fort Polk selection process was made without the active participation of the Elected Committee in violation of the Randolph-Sheppard Act and Federal regulations promulgated under the Act.

In accordance with §107b-1(3) of the Act, Federal regulations promulgated under the Act provide that the blind vendors Elected Committee shall both “*actively participate* with the State licensing agency in major administrative decisions and policy and program development decisions affecting the overall administration of the State’s vending facility program” and “*actively participate* with the State licensing agency in the development and administration of a State system for the transfer and promotion of blind vendors.”²⁵

LWC argues that it was not required to engage the active participation of the Elected Committee in its decision to retain Shows, Cali because “The decision to pay for legal services from Randolph-Sheppard funds is not a major administrative decision affecting the overall administration of the Randolph-Sheppard program and is there not a decision that LWC, as the [state licensing agency] is mandated to engage the [elected committee].³⁵ But, here, LWC misses the point. Separate from the decision of “how to pay” Shows, Cali is LWC’s decision to engage Shows, Cali in the first place. It is clear from testimony throughout the arbitration hearing and throughout the evidentiary hearing that the role Shows, Cali played in the Fort Polk selection process represents a departure from past practice. Without any input from the Elected Committee, Shows, Cali attorney Mary Ann White was invited by LWC to participate in (i) conference calls regarding the Fort Polk selection process, (ii) a scheduled August 16, 2011, meeting of the Elected Committee to discuss the Fort Polk selection process that was summarily cancelled by LWC and (iii) the meeting held on August 16, 2011 during which Lee Frazier was selected and awarded the Fort Polk vending location.

LWC’s decision to initially retain Shows, Cali to run the Fort Polk selection process can be parsed several ways. First, the decision to retain an outside law firm to manage the selection process for a vending facility holding a contract worth \$86 million (the largest contract for the Business Enterprise Program) was both a “major administrative decision” and a “program development decision” affecting the overall administration of the State’s vending facility program” thereby requiring the active participation of the Elected Committee. Second, the

²³ See Testimony of Wayne Knight, Vol 3, Page 45, Line 8 thru page 46 Line 13

²⁴ See Testimony of Peter Wright, Vol. 2, Page 79, Line 13 thru Line 17

²⁵ LWC’s Post-Arbitration Brief, page 34

²⁶ Respondent’s Second Motion in Limine, Page 5

²⁷ See Testimony of Wayne Knight, Vol 3, Page 34, Line 4 thru Page 39, Line 21

²⁸ Fed. R. Civ. Pro. 26

²⁹ Louisiana Rules of Professional Conduct, Rule 3.4

authority and access granted to Shows, Cali by LWC in the Fort Polk selection process were actions taken “in the development and administration of a State system for the transfer and promotion of blind vendors” thereby requiring the active participation of the Elected Committee. The Elected Committee is not an advisory committee. It cannot actively participate in administrative and development decisions if it is only informed about such decisions after they are made.

(iii) Conduct of Shows, Cali & Walsh

Respondent, represented by Shows, Cali & Walsh, sought and was granted a Second Motion in Limine based, in part, on Shows, Cali & Walsh sworn statement to the Panel that Claimants assertion of Respondent’s use Federal Matching Funds in paying Shows, Cali was “incorrect”.²⁶ Testimony from Respondent’s witness Wayne Knight is at odds with the sworn statement of Shows, Cali in the Second Motion in Limine.²⁷

Shows, Cali by seeking to suppress evidence discoverable under Federal Rule of Civil Procedure 26(b)(1)²⁸ violated Rule 3.4 “Fairness to Opposing Party and Counsel” of the Louisiana Rules of Professional Conduct.²⁹

The evidence of suppression, and for that matter the entire motions practice of Shows, Cali, has left this Panelist both distressed and incredulous over the conduct of Ms White and Ms Dufrene as Officers of the Court.

The conduct of Shows, Cali could be construed as an utter contempt for the duties of this Panel and the seriousness of these proceedings. The matter of Shows, Cali conduct is better addressed by the Louisiana Disciplinary Officer for review and imposition of appropriate sanctions.

IV. PROPOSED AWARD IN DISSENT

1. The permanent manager selection and process of permanent manager selection undertaken for the 2011 Fort Polk vending facility is hereby declared null and void.
2. Mr. Frazier is hereby designated as the “interim manager” at the Ft Polk facility retroactive to August 16, 2011 and until relieved by a properly selected permanent vending facility blind manager.
3. LWC is hereby ordered to make a accurate accounting of all Blind Vendor Trust Fund monies expended on legal services from the date the Program was transferred to and established under LWC to date. Such accounting shall be presented to the Panel at the Damages Award Hearing.
4. LWC is hereby ordered to (i) within 90 calendar days from the Damages Award Hearing deposit into the Blind Vendor Trust Fund all monies wrongfully expended for legal services,

together with interest thereon, and (ii) issue a public apology in person from the LWC Executive Director to each participant in the Louisiana Business Enterprise Program for the improper use of these funds.

5. The State of Louisiana, through LWC, is hereby ordered to pay all reasonable attorneys fees and expenses incurred by the Claimants in connection with prosecuting their complaints (including fees and expenses associated with the earlier-held full evidentiary hearing). Such fees shall be submitted at the Damages Award Hearing and shall not be paid out of the Blind Vendors Trust Fund.
6. The State Hearing Officer's Order of Summary Judgement in the February 6, 2012 Evidentiary Hearing is hereby vacated.

**BEFORE THE
UNITED STATES DEPARTMENT OF EDUCATION
REHABILITATION SERVICES ADMINISTRATION
PANEL OF ARBITRATORS**

CASE NO. R-S/11-07

and

CASE NO. R-S/11-08

ADDENDUM

On August 17, 2017 Respondent filed for Leave to Refile Dispositive Motion of Mootness asserting the underlying claim seeking invalidation of the Port Polk Contract with Lee Frazier in this Arbitration is moot due to the expiration of that same Contract on August 9, 2017. In light of the Panel Award granting the relief sought, and the lateness of the filing, the Request to File the Exception of Mootness is in itself moot and is hereby denied.

**Debra Simmons Neveu
Chair, Panel of Arbitrators**

**W. Ross Foote
Member, Panel of Arbitrators**

**Rocky Marchiano,
Member, Panel of Arbitrators**