

UNITED STATES DEPARTMENT OF EDUCATION
REHABILITATION SERVICES ADMINISTRATION

In the Matter of the
Arbitration of a Dispute Between

R-S/12-01

THERESA TAYLOR, Petitioner

v.

STATE OF WISCONSIN,

DEPARTMENT OF WORKFORCE DEVELOPMENT Respondent

Appearances:

Attorney Susan Rockwood Gashel, appearing on behalf of the Petitioner.

Attorney Sheri Pollock, Deputy Chief Legal Counsel, Wisconsin Department of Workforce Development, Secretary's Office, appearing on behalf of the Respondent.

ARBITRATION AWARD

By letter date-stamped July 23, 2015, the United States Department of Education (USDOE), Office of Special Education and Rehabilitative Services, Rehabilitation Services Administration notified Respondent that the Secretary authorized "the convening of an arbitration panel to hear and render a decision on the issues raised in the complaint and first amended complaint" filed by Petitioner. In said letter the above-named parties were told to each select an arbitration panel member. Theresa Taylor selected for her panel member Joe Cordova and the Wisconsin Department of Workforce Development selected for its panel member Charlene Dwyer. They in turn, pursuant to the letter's directive, selected a third member to serve as the neutral panel chairperson.

By letter date-stamped March 29, 2017, the USDOE confirmed the appointment/agreement of Dennis P. McGilligan to serve as panel chairperson in the arbitration between the above-named parties.

Hearing was held on September 26, 2017 at the Wisconsin Department of Workforce Development, 201 E. Washington Avenue, Madison, Wisconsin, at which time the parties were given an opportunity to present evidence and arguments. At hearing the parties agreed to extend the amount of time available for the arbitration panel to issue a decision from thirty (30) to sixty

(60) days following the close of record. (Tr. pp. 8, 205). The hearing was transcribed. The parties completed their briefing schedule on December 12, 2017.

The parties were unable to stipulate as to the issues before the arbitration panel. Therefore, the panel frames the issues as follows:

1. Did the SLA act in an arbitrary, capricious and biased manner by failing to follow its rules, regulations, policies and procedures when it selected a permanent operator for the RCI/STF business site and/or by failing to place Theresa Taylor as permanent operator for RCI/STF thereby violating the Randolph-Sheppard Act, implementing regulations, state rules, regulations, policies and procedures?
2. If so, what is the appropriate remedy?¹

Based upon the entire record and the arguments of the parties, the arbitration panel issues the following Award.

FINDINGS OF FACT

1. The Wisconsin Department of Workforce Development (DWD), Division of Vocational Rehabilitation (DVR) oversees the Business Enterprise Program (BEP) in its capacity as a state licensing agency (SLA) under the federal Randolph-Sheppard Act, 20 U.S.C. Section 107 et seq.
2. Theresa Taylor (Taylor) has been a licensed blind vendor through the State of Wisconsin, DWD, DVR, BEP for 11 years or since 2006.
3. Taylor was appointed in 2006 to the Southern Wisconsin Center (SWC) site, which consists of veterans' facilities, buildings for persons with cognitive disabilities and Ellsworth Correctional, which is a woman's minimal security facility, a small work release facility without security restrictions. She continues to operate the SWC site.
4. Taylor was not interviewed before the appointment to the SWC site. She was designated as an interim operator.
5. Taylor was trained by Joelyn Belsha (Belsha), another BEP operator, because the previous operator had moved to another facility. BEP designated Belsha as interim operator during the six month period of in-service training for Taylor.
6. On October 2, 2007, SLA called Taylor and made her temporary (interim) operator for Racine Correctional Facility (RCI), the Sturtevant Transitional Facility (STF) and the Racine Youthful Offender Correctional Facility (RYOCF) vending machines. When Taylor was called and asked to take over RCI/STF and RYOCF, she was asked to be at those facilities in

¹ In the absence of agreement by the parties as to the issues before the arbitration panel, the panel relies, in part, on the framing of the issues for hearing and decision as contained in the convening letter from USDOE for the arbitration panel to the parties date-stamped July 23, 2015.

an hour and a half with product; Taylor responded by saying “I’ll be there.” She assumed responsibility for all three facilities that day. She remained interim operator for nearly four years until permanent operators were selected, as further discussed in these findings.

7. When Taylor took over RCI/STF and RYOCF, their physical condition was a disaster; machines were empty; equipment was broken; there was mold in the machines; labels were missing from machines and the coin box lacked coins. Customers were angry. By 2011 the facilities/machines were very presentable (“they looked and ran well” without a lot of service) and had selections in them that customers wanted. A regular schedule was maintained ensuring the machines remained full.
8. Kim Pomeroy of DWD, who served as SLA director at the time, established a written policy/procedure dated December 3, 2010 for selecting the operator for BEP site bids which included the following policy statement: “DWD 60 is the administrative authority which governs this policy and procedure. BEP goals will be promoted in the selection of operators for sites through a fair, consistent and equitable interview process.” The procedure portion stated as follows: (1) SLA will establish an interview panel comprised of one SLA staff, one Elected Committee of Blind Vendors (ECBV) nominee, one site facilities manager or designee and, to the extent possible, one external committee member; (2) The BEP Director will approve interview questions and benchmarks; (3) Candidate scores on interview questions will be considered as part of the selection process; (4) When appropriate, each candidate will be asked to bring their resume with two references to the interview which will be considered as part of the selection process and (5) the interview panel will submit a written recommendation with justification to the BEP Director for selection of an operator for a specific site.
9. In July 2011 the SLA began the bidding process to appoint a permanent operator for each of these sites, using its permanent site selection process noted above.
10. Of the three locations offered for bid RCI was the largest location and had estimated annual gross sales of \$237,000; RYOCF was a smaller location with estimated annual gross sales of \$98,573 and STF was the smallest with estimated annual gross sales of \$24,032. Taylor had operated the three sites at a profit. (Exhibit No. 17, p. 2, Finding of Fact No. 3).
11. On July 21, 2011, the ECBV voted to adopt the SLA’s proposal for which sites should be “Stand Alone” and which should be “Add On.” ECBV also approved, by unanimous vote, putting the sites out for bids as proposed by SLA. Belsha was on the committee at that time and there is no indication that she abstained from voting that day.
12. On July 22, 2011, RYOCF was bid as an “Add On” site.
13. On August 24, 2011 Taylor, Belsha and two other candidates interviewed for the RYOCF site.

14. On or about August 26, 2011 Greg Feypel of SLA called Taylor and they discussed the RCI/STF bid situation. Taylor questioned why RYOCF was put out first as an “add-on,”² with RCI and STF later to be bid as a “stand-alone.”³ Feypel told Taylor SLA wanted a site of hers to give to Belsha. Feypel said it was because Belsha’s sales at her then-current facility, UW-Parkside, were going down and she was not making enough money to survive. Feypel said he wanted to help the program by giving Belsha something so she could survive. Feypel asked Taylor what would be the best case scenario for her if SLA took something from her. At first Taylor didn’t want to give anything up and said “no” because she had worked very hard to make the sites she operated profitable. Later she decided it was in her best interest to cooperate with SLA’s request. She came up with her own proposal to help Belsha generate enough profits then called Feypel back with a proposal to give Belsha SWC including 11 buildings and 38 vending machines. Taylor felt that there were a number of benefits to this proposal including it was closer to Belsha’s home than the RCI/STF sites; it had free on-site storage; it had accessible buildings and machines; Belsha had run it in the past; it had gross annual income for 2011 of \$105,000 with an estimated average profitability for 2011 of 23%; it would keep the four prisons together and it would not cause as much of a financial hardship to herself while helping Belsha be more profitable.
15. Feypel told Taylor he would present her proposal to the rest of the SLA staff at an upcoming meeting and get back to her with their response. Taylor phoned Feypel about a week later and he advised her that they hadn’t given him any answers/response. Taylor never heard anything more about her proposal or any other type of agreement that could have been reached between herself and the SLA.
16. On August 31, 2011 SLA sent a bid notice for RCI and STF (combined) to all BEP operators. This combined site was bid as a “Stand Alone” site. Taylor and Belsha along with two other operators bid on the RCI/STF site
17. ECBV minutes for the September 13, 2011 meeting state:

RSVW Report: . . . Kent reported that it was the aim of everyone to improve the program and one way was to do all that we can to improve the profitability of each operator. This generates the question of what would be a satisfactory profit margin for any given operator depending on data of each operation.
18. On September 15, 2011 SLA sent Taylor a written notice and offer as successful candidate on RYOCF which she accepted by signature on September 19, 2011 and which was received by SLA on September 23, 2011.
19. On September 16, 2011 SLA sent Taylor a letter advising that she would be interviewed for RCI/STF on October 5, 2011 and stating that the interview panel “will consist of SLA

² An “add-on” site “is typically a very small site that doesn’t provide much employment opportunity on its own, so it’s being added to an operator’s existing site as well.”

³ A “stand-alone” site is “a large enough site so that when an operator bids and accepts a stand-alone site, the thought is that they will give up their existing sites because that site provides an employment opportunity large enough . . . for one person.”

representative(s), a BEP Operator, and a representative of the RCI facility.” She was advised that she could choose to use her interview status (score) from the RYOCF for the RCI/STF bid and not have to re-interview but she chose to re-interview because she felt the location would expect that.

20. On October 5, 2011 the interview panel of Feypel and two BEP vendors interviewed Taylor, Belsha and two other candidates. No site representative from RCI/STF was on the panel. Michael Redd, RCI director, delayed about two weeks in responding to Feypel’s requests that he join the panel and when he replied, he was unable to attend the interviews. At the interview Taylor offered Feypel a copy of Redd’s very favorable letter of recommendation complimenting Taylor’s four-year operation. Redd addressed the letter to Feypel who, after making a joking remark about the letter stating that Taylor was a terrible operator, proceeded without reading the letter to the other two panelists. There is no evidence that the letter was incorporated into the interview or decision-making process. The panel asked each candidate four questions: (1) how a candidate resolved a problem of customer needs not being met; (2) whether the candidate encouraged team spirit in her business; (3) steps the candidate has taken to successfully manage business profit/loss and (4) how the candidate has performed supervisory tasks such as planning, organizing, assigning, delegating control and verifying business goals etc. Each panelist individually graded the answers to the questions without consultation and while there were evident changes indicated by cross-outs and re-writes of numbers of scores for each question there is no explanation in the record for the changes. Belsha’s overall score was 101; Taylor’s 96 and the two other candidates received scores of 75 and 65. Selection of the RCI/STF site operator was based solely on the highest interview score.
21. On October 11, 2011 SLA sent notice to the successful candidate, Belsha, selecting her as permanent operator for RCI/STF.
22. On October 20, 2011 Taylor filed a grievance with SLA regarding Belsha’s selection for RCI/STF. Taylor alleged that the decision was made in violation of Wis. Admin. Code Section DWD 60.08, particularly that “[t]he licensee deemed to be best suited for an available business enterprise shall be selected.” The grievance also complained that the “letter of recommendation” from Redd was not acknowledged properly during the interview process. Taylor asked “that no transfer of RCI/STF take place until a resolution to my grievance occurs.”
23. On November 8, 2011, a grievance hearing was conducted by Pomeroy. According to Pomeroy’s notes, among Taylor’s concerns were (1) she believed the decision was based upon “social need” rather than best operator for the site because Belsha’s site (UW-Parkside) was not doing well; (2) Feypel ignored Redd’s letter of recommendation and Redd was not on the panel; (3) some time before RCI/STF was awarded Feypel contacted her and told her that they were taking something from her and asked what would be the best case scenario for her (to which she replied with a proposal that received no response); (4) the four questions asked were extremely general to a business and had nothing to do with prison sites up for bid and (5) she and her family were suffering economically due to the selection.

24. On November 22, 2011 Pomeroy sent Taylor a grievance denial letter citing as reasons for the decision the Department's responsibility "to select the best suited operators from among persons licensed to operate business enterprises." The letter added: "To ensure a consistent, fair and equitable selection process, the SLA implemented a collaborative selection process in 2010 that resembles the State hiring process." The letter also noted that resumes and references are not requested of the interviewees because SLA is responsible for personnel records of BEP operators and is familiar with the training and performance of each operator. The letter concluded by noting that "[t]he selection process was reviewed with the ECBV for their active participation and the process was supported by them." Nowhere was it stated that any of the interview panel members outside SLA had access to resumes/reference letters to review as part of the selection process.
25. On December 19, 2011, Taylor filed an appeal of the decision made by SLA denying her grievance over the selection of Belsha as operator for RCI/STF. In her appeal Taylor claimed that denial of her grievance was in violation of DWD 60.08. She stated that none of the issues that she brought to the attention of SLA during the appeal process were addressed. She added that SLA had not provided documentation that supported their decision nor did they sufficiently explain why procedures were not followed. Again, Taylor requested that no transfer of sites take place until a final resolution to her grievance occurred.
26. Thereafter, the SLA convened a hearing panel to conduct a full evidentiary hearing (FEH) on Taylor's appeal. A hearing was held on May 8, 2012.
27. At the appeal hearing, Feypel denied saying that SLA would take a site away. He claimed his conversation with Taylor was just trying to explain the "Stand-Alone" versus "Add-On" site.
28. The FEH panel issued a written "Recommendation Under Wis. Admin. Code Section DWD 60.05(3) On Grievance Concerning Business Enterprise Procedure Operator Selection" on May 30, 2012. The panel found the disputed interviews "were not conducted in accordance with written policy SLA had established and ECBV had approved and that the selection of Belsha instead of Taylor was not adequately justified under the clear standard of Wis. Admin. Code Section DWD 60.08 that "[t]he licensee deemed to be best suited for an available business enterprise shall be selected." The panel also found that "the evidence and our findings clearly support that SLA might well have considered factors outside the ambit of selecting the candidate best suited for the business being bid, particularly managing profitability among various vendors and improving the program overall." The panel added: "While in other contexts these would be acceptable, if not laudable, goals they are inconsistent with the sole applicable legal selection standard of Section DWD 60.08." The panel concluded: "we do not believe that the selection policy as written and approved by ECBV was flawed, but rather that it was not applied fully and correctly in this particular selection."
29. The FEH panel made six recommendations to rectify the flawed interview process. The recommendations included:

- a. Set aside the selection of Belsha as permanent operator for RCI/STF.
 - b. Give all four candidates an opportunity to interview again with an entirely different panel comprised as the selection policy directs and with total disregard of the prior interviews and scores.
 - c. Prepare new interview questions and benchmarks, including at least one question tailored to the specific facility involved in the bid to determine . . . each candidate's relevant past experience and other skills and abilities germane to the operation of the particular business location.
 - d. Adhere to other items in the selection policy including accepting resumes and references if offered by a candidate and consideration of relevant factors other than the interview scores as they relate to determining which operator is best suited for the location involved.
 - e. Require the interview panel to submit a written recommendation to the SLA with justification.
 - f. Select the candidate in accordance with this recommendation who is best suited for that business enterprise regardless of the candidate's need or the otherwise acceptable objective of evening out sites among operators.
30. After considering the recommendations, DVR acting administrator Michael Greco issued SLA's final decision/order on June 12, 2012. Greco ordered:
- a. The DVR BEP staff will conduct a new interview process to decide on the permanent operator for the RCI/STF. Ms. Belsha will continue as the RCI/STF operator during the new selection process.
 - b. The same four candidates will be invited to interview with a new interview panel, composed in accordance with BEP policy and with no reference to the previous interviews and scores.
 - c. The interviews will use new questions and benchmarks and will include one question related to the specific facilities involved.
 - d. The BEP staff shall ensure that all candidates are told that resumes and references are not to be submitted during the selection process or brought to the interview.
 - e. The interview panel members will submit a written recommendation on the selection of the RCI/STF operator, with an explanation on the basis of the interview questions, the benchmarks, and the qualifications of the candidates.

31. On July 23, 2012 Taylor filed a complaint with the Office of Civil Rights, USDOE, against the SLA for its “response” to the FEH. In her complaint Taylor complained she was discriminated/retaliated against by the SLA in violation of DWD 60.08. She indicated the last act of the discrimination occurred on June 12, 2012. For a remedy Taylor requested that “she be placed as permanent operator of the vending sites, as well as, financial compensation for the loss of revenue and hardship resulting from the state licensing agency’s actions.”
32. On March 12, 2013, “DWD 60.08 Stand Alone Location Selection of Best Suited Operator Procedure” was adopted by the SLA in active participation with the ECBV. The changes made by the SLA and the ECBV were intended/designed to improve the likelihood that the BEP operators would be as profitable as possible and to ensure quality customer service to the vending facilities. Belsha served on the ECBV at the time. Feypel was still on BEP staff during this period.
33. The selection procedures for a stand-alone site included a knowledge test worth 30 points, an interview worth 20 points, proximity to site worth 5 points and a performance review worth 45 points. Under the performance review section of the selection procedure the first four questions had points awarded based on timeliness of monthly reports and other performance factors including resolution of valid customer complaints. The last two questions were based on past operator cost of goods sold percentage and net profit percentage prior to commissions and/or rents. Only 9 points out of a possible 100 points (9%) were based on past vending sales or net profits.
34. When Taylor got notice of the new procedures for the selection of an operator for a stand-alone location, she noticed that it provided for “more points for profitability” and different aspects of your business. She asked SLA if the information that would have been taken in 2011 was going to be used to answer those question and the point system “or if it was going to be current business information, and they told me current.”
35. Taylor testified the reason she asked was “because they took the most profitable part of my business . . . it’s very different to look at my profitability in 2011, when I was running prison accounts . . . the markup is higher in a prison . . . you can charge a whole lot more in a prison than you can in a veteran’s facility or in a cognitively disabled building” where the residents are getting money from the State as a reward to use in vending machines so the prices have to stay low.
36. Taylor testified she “felt that to use current data would-there’s no way that I could compare because then the other candidates, obviously, are using current data and Ms. Belsha is now running an extremely profitable location.” Taylor stated her profit margins were much smaller at the time of the second interview and the State knew that because she reported those numbers to them on a monthly basis. For question number 5 under “performance review” there was no way Taylor could score the maximum number of points (3) regarding “Operator cost of goods sold percentage.” With respect to question number 6 - profit percentage prior to commissions/rent - Taylor added it would be impossible for her to obtain a profit of greater than 25% for the maximum number of points (6).

37. On June 18, 2013, the four applicants for the RCI/STF site were invited to again interview for the RCI/STF “Stand Alone” site on June 27.
38. On June 26, 2013, Taylor informed SLA by email that “[D]ue to my pending appeal regarding this matter,” she would not be attending the re-interview on June 27. In her email to SLA, Taylor stated that she “strongly” disagreed with the re-interview because it was “unethical and does not follow the decision rendered by the panel members of the evidentiary hearing.” Taylor added it was “unacceptable to conduct a re-interview for a site bid out 2 years ago, based on an operators current business status. All candidates statuses have drastically changed during the last two years, including many aspects that directly effects [sic] the outcome of Thursdays re-interview.”
39. Using the approved procedures and adhering to the June 2012 Greco final Decision and order, the site was awarded to one of the applicants who interviewed, Belsha.
40. The FEH panel’s Findings of Fact, conclusions and “**RECOMMENDATION**” are, in their entirety, hereby confirmed and adopted by the arbitration panel as if they are its own. A copy of the FEH panel’s May 30, 2012 decision and “**RECOMMENDATION**” is attached hereto and made a part of this Award.
41. The SLA’s June 12, 2012 final Decision and order to require the applicants for the RCI/STF site to re-interview was, at the time, a generally reasonable and appropriate remedy for the errors identified by the FEH panel. The re-interview criteria in the final decision and order were also, in part, reasonable and appropriate to ensure a fair selection process.
42. The SLA’s decision to revise its selection process between June 2012 and June 2013 was proper in order to respond to the concerns and recommendations expressed by the FEH panel and in order to improve the BEP program.
43. The SLA’s decision to ignore/omit the FEH panel’s recommendation that it should accept resumes and references in the re-interview process was arbitrary and capricious and designed to prevent Taylor from being selected as permanent operator of RCI/STF.
44. The year plus delay between the SLA’s June 12, 2012 Decision requiring the original applicants for the RCI/STF site to re-interview and the June 27, 2013 re-interview was arbitrary, unreasonable and unfairly prejudiced Taylor’s chances of successfully re-interviewing for the RCI/STF site.
47. Taylor has suffered \$105.38 per day in lost profits from the date Belsha was installed at the RCI/STF site to present.
48. Taylor has incurred legal fees and costs totaling \$18,357.88
49. SLA arbitrarily, capriciously and in a biased manner failed to award Taylor the RCI/STF site during the two selection processes described above as shown by the following:

- a. Feypel asked Taylor on or about August 26, 2011 to voluntarily give up one of her then-current sites because SLA believed Belsha's then-current salary was too low and that SLA wanted to give Belsha one of her sites because SLA wanted to "even out" things.
- b. Feypel on May 8, 2012 falsely denied that he made that statement.
- c. Feypel on October 5, 2011 failed to read Redd's highly favorable recommendation to the other panel members even though Redd was in the best position to evaluate Taylor's past work performance at RCI.
- d. The FEH panel on May 30, 2012 found that the first interviews were not conducted in accordance with the written policy that SLA established and ECBV approved, and that the selection of Belsha instead of Taylor "was not adequately justified under the clear standard of Wis. Admin. Code Section 60.08" which states "[t]he licensee deemed to be best suited for an available business enterprise shall be selected."
- e. SLA subsequently refused to implement the FEH's panel's recommendation that SLA accept resumes and references in the re-interview process, thereby preventing Taylor from using Redd's highly favorable recommendation.
- f. SLA's reselection process was re-designed to award Belsha the RCI/STF site by awarding 9 points based on the amount/goods sold and her profitability in operating that site while at the same time never considering Taylor's earlier sales and profitability when she operated those same sites.
- g. SLA delayed for over a year in creating a new selection process, thereby giving Belsha a considerable advantage in building up her sales/profits at her more profitable prison site while Taylor had less profitable operations through no fault of her own.

Based on the above and foregoing Findings of Fact and the record as a whole, the arbitration panel makes and issues the following

CONCLUSIONS OF LAW

1. The Wisconsin Department of Workforce Development, Division of Vocation Rehabilitation (SLA) acted in an arbitrary, capricious and biased manner when it violated the Randolph-Sheppard Act, implementing regulations and state rules and regulations by failing to follow its rules, policies, procedures and regulations for selection of a permanent operator for the RCI/STF business site in 2011 and 2013.
2. The Wisconsin Department of Workforce Development, Division of Vocation Rehabilitation (SLA) violated the Randolph-Sheppard Act, implementing regulations and state rules, regulations, policies and procedures by acting in an arbitrary, capricious and biased manner toward Theresa Taylor during the aforesaid selection processes and/or by failing to place Taylor as permanent operator for the RCI/STF business site in 2011 and 2013.

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND AWARD

PROCEDURAL HISTORY

On October 5, 2011, the SLA interviewed Taylor, Belsha and two other candidates to be the permanent operator of vending services at the combined stand-alone site at the Racine Correctional Institution and the Sturtevant Transitional Facility (RCI/STF). On October 11, 2011, SLA notified the successful candidate, Belsha, of her selection as the permanent operator for RCI/STF. On October 20, 2011, Taylor filed a grievance over this decision, which was denied after an administrative review, including a meeting with Taylor on November 8, 2011, by letter dated November 22, 2011 from DVR Section Chief/BEP Director Kim Pomeroy to Taylor. On December 19, 2011 Taylor appealed this decision and the SLA convened a FEH panel to hear her appeal. A hearing was held on May 8, 2012 and on May 30, 2012 the panel issued a written "RECOMMENDATION." After considering the panel's recommendations, the DVR acting administrator Michael Greco issued the SLA's final decision and order on June 12, 2012 ordering the SLA to conduct new interviews to select the permanent operator for the site. Taylor filed a complaint over this response with the Office of Civil Rights, USDOE on July 23, 2012.

In May 2013 the SLA was notified by the USDOE that Taylor had filed a complaint over the selection of Belsha as permanent operator of RCI/STF in October 2011. On October 8, 2013, Taylor filed an amended complaint in the matter. On October 18, 2013 the SLA notified USDOE that it was objecting to the convening of an arbitration hearing under 34 CFR 395.13 for the following reasons: "(1) this request comes more than one year after the decision issued on June 12, 2012; (2) the SLA proceeded to comply with the review decision by designing a new selection process and scheduling new interviews and (3) Ms. Taylor declined to participate in the interviews." In a letter to Taylor's attorney, Gashel, date-stamped July 23, 2015, USDOE, after requesting and receiving responses from DVR and Taylor, notified the SLA as follows:

We have reviewed the complaint and the first amended complaint filed by you on behalf of Theresa Taylor against the Wisconsin Department of Workforce Development (DWD), Division of Vocational Rehabilitation (DVR), the State licensing agency (SLA) designated to administer the Randolph-Sheppard program. You request that an arbitration panel be convened pursuant to the Randolph-Sheppard Act, 20 U.S.C. 107d-1(a) and 107d-2, and the implementing regulations at 34 CFR 395.13. The Rehabilitation Services Administration (RSA) received a letter from you indicating that settlement efforts with the SLA have been unsuccessful. You request that RSA proceed to convene the arbitration panel.

In sum, you allege that the SLA violated the Randolph-Sheppard Act, implementing regulations and state rules and regulations by failing to place Ms. Taylor as permanent operator for the Racine Correctional Institution and Sturtevant Transitional Facility and provide her financial compensation as a result. On May 8, 2012, the SLA held a state fair hearing on this matter. Although not granting the relief that Ms. Taylor sought, the hearing officers

ordered the SLA to conduct a new interview process in order to select the permanent operator for the two facilities. You further allege that the SLA violated this order by establishing a new interview policy that did not conform to the circumstances at the time of the original interview and again resulted in denying Ms. Taylor's placement as the permanent operator. A complete statement of the facts alleged and the relief sought is contained in the complaint and first amended complaint for arbitration.

By this letter, the Secretary authorizes the convening of an arbitration panel to hear and render a decision on the issues raised in the complaint⁴ and first amended complaint.

STANDARD OF REVIEW

The SLA argues that Taylor has the burden of proof. It cites two Randolph-Sheppard cases which described the burden of proof to require the petitioner to show by a preponderance of the evidence that the SLA's actions were without cause and were arbitrary and capricious. These rulings stated:

In these proceedings, it is the burden of the Petitioner to show by a preponderance of the evidence that the Commission has not acted for cause and has applied and enforced the rules and regulations in an arbitrary and capricious manner. It is only upon such a showing that this panel may reject the decision of the Commission and direct an appropriate remedy. IN THE MATTER OF THE ARBITRATION BETWEEN: S Petitioner vs. MICHIGAN COMMISSION FOR THE BLIND Respondent, 1997 WL 34979676 (Arbitrator Submitted Awards).

(See also, *Bird v. Oregon Commission for the Blind*, 2010 WL 5143288, "the panel majority rule that the Oregon Commission for the Blind violated the Act by operating the Randolph-Sheppard program in an arbitrary and capricious manner when it")

⁴ In its brief at p. 2 the SLA claims the actual date of Taylor's complaint is not apparent. It states that Wis. Admin. Code DWD 60.05(4) "requires a complaint to the United States Department of Education to be filed within 30 days of the notice of the result of the fair hearing." The SLA adds: "Without information as to when her initial complaint was filed, there is no way to determine if it was timely. The SLA continues its objection filed with USDOE over it (sic) jurisdiction over this complaint as it relates to the June 12, 2012 [decision] as it was untimely." However, by its letter to the SLA date-stamped July 23, 2015 USDOE appears to have rejected the SLA's timeliness objection to jurisdiction by moving both the complaint and the first amended complaint to hearing and decision before an arbitration panel over the SLA's timeliness objections contained in its October 18, 2013 letter to USDOE noted above. (Exhibit No. 21, p.1). Moreover, Wis. Admin. Code Section DWD 60.05(4) states that an aggrieved party who is dissatisfied with a decision of the administrator in DWD 60.05(3) has thirty (30) working days, not thirty days as alleged by the SLA in its brief, within which to file a complaint with the secretary of the USDOE. The acting administrator for the SLA issued a final decision in this dispute following the evidentiary hearing panel's recommendations on June 12, 2012. Thirty (30) working days from June 12, 2012 was July 25, 2012. Taylor filed her complaint with the USDOE Office of Civil Rights on July 23, 2012 within the timeframe provide for by Wis. Admin. Code 60.05(4).

Taylor, on the other hand, argues that this panel “is directed to, in accordance with the provisions of subchapter II of chapter 5 of Title 5, give notice, conduct a hearing, and render its decision[.]” 20 U.S.C. 107d-2(a). That subchapter provides, at 5 U.S.C. 556(d) that the proponent of an order has the burden of proof, and an order may issue “in accordance with the reliable, probative and substantial evidence.” Accordingly, Taylor submits it has the burden to prove by **substantial** evidence “that Respondent violated the R-S Act and Wisc. Admin. Rule Section 60.08. (Emphasis in the Original). This is something more than a mere scintilla but something less than the weight of the evidence.” Pennaco Energy v. U.S. Dep’t of Interior, 377 F.3d 2247, 1156 (10th Cir. 2004).

In addition, the substantial evidence standard was adopted by the United States District Court for the Western District of Wisconsin in State of Wisconsin Department of Workforce Development, Division of Vocational Rehabilitation v. United States Department of Education, 667 F. Supp. 2d 1007, 1017-18 (U.S. District Court, WD Wisconsin 2009). In that case the District Court found that substantial evidence review requires courts to determine whether there is a rational relationship between the facts found and the ultimate decision that was reached. Id. The District Court added that the 7th Circuit defined substantial evidence as “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” Id. The District Court concluded that “[t]echnically, this is not the same standard of review as arbitrariness and capriciousness, but the difference is almost indistinguishable.” In that case the District Court went on to find that the arbitration panel’s decision was supported by substantial evidence and the record facts were “sufficient to allow the arbitration panel to reach the rational conclusion that plaintiff failed to comply with its responsibilities under state and federal law, that this failure caused . . . Dickey’s loss of her vending site.” Id.

Based on Taylor’s arguments and Wisconsin Department of Workforce Development, supra, the arbitration panel finds that Taylor must prove by substantial evidence that the SLA is guilty of the conduct complained of.

However, even assuming, arguendo, that the preponderance of evidence test should be used, the panel finds that Taylor in any event has met that heavier burden.

DISCUSSION

General Background

The Randolph-Sheppard Act was enacted to provide employment opportunities for the blind by granting priority to blind persons who desire to operate vending facilities on federal property. 20 U.S.C. 107(b). The Act divides responsibility for the “blind vendor” program between state and federal agencies. (Exhibit No. 28, Tab 3). At the federal level, the Secretary of Education is responsible for interpreting and enforcing the Act’s provisions and for designating state licensing agencies. 20 U.S.C. 107a, 107a(a)(5), 107b; 34 C.F.R. 395.5, 395.8. At the state level, state licensing agencies implement the program. 20 U.S.C. 107a(b). The State of Wisconsin Department of Workforce Development (DWD), Division of Vocational Rehabilitation (DVR), is the state licensing agency (SLA) designated to administer the Randolph-Sheppard Act in Wisconsin.

It is the duty of the SLA to cooperate with the Secretary in carrying out the Act's purpose. 20 U.S.C. 107b(1). It is required to issue such regulations, consistent with the provisions of the Act, as may be necessary for the operation of this program. 20 U.S.C. 107b(5). Not only does the Act require that the SLA maintain promotion and transfer policies for blind operators but it is required to ensure the participation of the ECBV "in the development and administration of a transfer and promotion system for blind licensees." 20 U.S.C. 107b-1(3)(C). A committee of blind vendors is voted upon by all licensed vendors in a state. 20 U.S.C. 107b-1(2). In Wisconsin it is termed the Elected Committee of Blind Vendors (ECBV). (Tr. p. 46).

The SLA operates the Wisconsin Business Enterprise Program (BEP). (Exhibit No. 30). The legal basis for BEP is derived from the Act, 20 USC 107, Wisconsin Statute Chapter 47 and Chapter DWD 60, Wis. Admin. Code. Id. The purpose of BEP is to enlarge economic opportunities for the legally blind. Id. BEP establishes, maintains and provides vending and food services across Wisconsin through its statewide small business program. Id. BEP works with both the public and private sectors on matching qualified blind business operators with the private and public facilities that need vending and food services. Id. BEP strives to enhance the program to provide more and better employment opportunities for blind individuals across Wisconsin. Id.

Section DWD 60.08(1) states that it is the DWD's responsibility to select operators for a business enterprise from among persons licensed to operate business enterprises. It also requires that the "licensee deemed to be best suited for an available business enterprise shall be selected" and if a committee of operators and department staff is appointed, it is "to make a recommendation about the best suited licensee for the available business enterprise."

As noted by Taylor, "[i]t is elementary that an agency must follow its own rules made in conformity with an enabling statute." Stern by Mohr v. Wisc. Dep't of Health & Family Servs., 569 N.W.2d 79, 83 (Ct. App. 1997). "Where the rights of individuals are affected, it is incumbent upon agencies to follow their own procedures." Morton v. Ruiz, 415 U.S. 199, 235 (1974). The 2010 Policy and Procedure is such a rule/procedure. It "creates or modifies rights that can be enforced against the agency." See, Nat'l Latino Media Coal. V. FCC, 816 F.2d 785, 788. Likewise, the Wis. Admin. Code is such a rule. Blind licensees are entitled to file a request for a full evidentiary hearing whenever "dissatisfied with any action arising from the operation or administration of the vending facility program." 20 U.S.C. 107d-1(a). If the blind licensee "is dissatisfied with any action taken or decision rendered as a result of such a hearing, he may file a complaint with the Secretary who shall convene a panel to arbitrate the dispute." Id. The decision of such panel shall be final and binding on the parties except as otherwise provided in the Chapter. Id.

First Interview⁵

⁵ The SLA limits its written argument to whether it complied with its responsibilities under the Randolph-Sheppard Act by the final agency decision of June 12, 2012 and the June 2013 re-interview while at the same time claiming the October 2011 interview/selection process was fair and reasonable. To the extent an argument might be made that "[t]his is not an issue/question for this panel to respond to" because it was already reviewed and responded to by the FEH panel and a final decision issued by the SLA, DVR acting administrator, the arbitration panel disagrees. Taylor complained about the fairness of the October 2011 interview/selection process in her timely complaint filed

At the time of the first interview at issue in this case, the BEP's selection and transfer policy was governed by "Policy/Procedure Operator Selection for Site Bids." (Exhibit No. 5). The policy provides that "BEP goals will be promoted in the selection of operators for sites through a fair, consistent and equitable interview process." Id. It also provides that an interview "is a powerful factor in the selection process" and that interview questions will help the SLA to "identify whether the candidate has the behaviors, skills and experience needed to achieve BEP goals." Id. The procedure requires:

- a. An interview panel that is comprised of representation from one (1) SLA staff, one ECBV nominee, one site facilities or designee and to the extent possible, one member from an external member.
- b. Candidate scores on interview questions will be considered as part of the selection process.
- c. When appropriate each candidate will be asked to bring their Resume with two references to the interview which will be considered as part of the selection process.
- d. The interview panel will submit a written recommendation with justification to the BEP Director for selection of an operator for the specific site. Id.

When Taylor bid for RCI, as she walked into the interview, she handed Feypel an August 23, 2011 letter from RCI and STF Correctional Management Services Director Michael S. Redd. The letter said that Taylor had provided vending service for the facilities for the past four years. (Exhibit No. 7). The letter stated that Taylor had provide stocking and repair of vending machines, provided equipment repair, solicited product information and provided a smooth refund process. Id. The letter also stated that "we have not experienced any problems regarding product availability, equipment repair and no difficulty with staff receiving any refunds." Id. The letter added that Taylor had "always

with the USDOE in July 2012. She repeated her complaint about the fairness of the aforesaid interview/selection process in her first amended complaint filed on October 8, 2013. The FEH panel did not have final authority to decide and remedy the violations of SLA policy and procedure found in the interview/selection process first appointing Belsha as permanent operator of RCI/STF. The DVR acting administrator had such final authority but failed to act in a manner consistent with the recommendations and conclusions of the FEH panel as well as Section DWD 60.08. Consequently, the arbitration panel has jurisdiction to decide whether the 2011 interview process for selection of a permanent operator for RCI/STF violated DWD 60.08 and the 2010 Policy & Procedure for Site Bids. Such a conclusion is reinforced by the USDOE, Office of Special Education and Rehabilitative Services, Rehabilitation Services Administration letter to Howard Bernstein, Chief Legal Counsel, Wisconsin Department of Workforce Development, wherein the federal agency states that by the terms of the letter "the Secretary authorizes the convening of an arbitration panel to hear and render a decision on the issues raised in the complaint and the first amended complaint." The letter concludes the central issue for the arbitration panel "is whether, by failing to place Ms. Taylor as permanent operator for the two facilities and to compensate her for the loss of income, the SLA violated the Randolph-Sheppard Act, implementing regulations and state rules and regulations." The October 2011 interview/selection process, the final decision by the acting DVR administrator in June 2012 and the re-interview in June 2013 all easily fall within the framework of this directive from the USDOE to address the issues raised by the complaint and first amended complaint.

maintained a professional appearance, worked well within the entrance guidelines” and “demonstrated the ability to communicate effectively.” *Id.* Redd concluded in his letter that Taylor had “exceeded expectations as a vending operator/owner” and that he “would highly recommend Taylored Treats to continue to provide vending service for RCI and STF.” *Id.*

There was no facility representative present at the interview for RCI/STF. (Exhibit No. 17, Finding of Fact No. 16, p. 3). Feypel was present at the interview as the BEP representative, as were Jim Howard and Chris Fisher, two blind operators. (Tr. pp. 33-34; Exhibit Nos. 9, 10 11).

Feypel did not read the letter from Redd to the two other individuals on the interview panel. (Tr. pp. 34-35).

Instead, Feypel joked that the letter said that Taylor “is a terrible operator and they don’t want her anymore.” (Tr. p. 34). Taylor did not take offense because “it was a definite joke.” *Id.* There is no evidence in the record what the two blind operators on the interview panel thought of Feypel’s joke.

At the interview for RCI/STF Taylor received a score of 96. (Exhibit No. 13). Belsha received a score of 101. *Id.* Blind vendor panel member Howard scoring of 8-10 points is crossed out, with 6 points written in, thus lowering Ms. Taylor’s score. (Exhibit No. 9, pp. 5-6). Howard’s score sheet for Belsha shows his scoring of 5-7 points is crossed out, with 8 points written in, thus raising Belsha’s score. (Exhibit No. 9, pp. 11-12). Howard’s score sheet also shows that his scoring of 5-7 points is crossed out, with 9 points written in, thus raising Belsha’s score. (Exhibit No. 9, pp. 13-14). “[T]here is no explanation in the record” for these changes. (Exhibit No. 17, Finding of Fact No. 16, p. 3).

The panel did not submit a written recommendation with justification to the BEP Director. On October 11, 2011 SLA sent notice to Belsha, selecting her as permanent operator for RCI/STF. (Exhibit No. 17, Finding of Fact No. 17, p. 3). The selection was based solely on the highest interview score. *Id.*

DWD 60.08 provides for the selection of operators for business enterprises from among persons licensed to operate business enterprises. “The licensee deemed best suited for an available business enterprise shall be selected.”

SLA policy and procedure provides that “BEP goals will be promoted in the selection of operators for sites through a fair, consistent and equitable interview process.” (Exhibit No. 5). The aforesaid interview and selection process was not fair because the record supports a finding the SLA considered factors “outside the ambit of selecting the candidate best suited for the business being bid, particularly managing profitability among various vendors and improving the program overall.”

It also provides for a specific procedure to help ensure that this is done. *Id.* The record is clear that this procedure was not followed. (Tr. pp.33-35, 38, 88-90, 174-177; Exhibit No. 17). Specifically (1) the RCI site facilities manager Redd or his designee was not on the interview

panel, as the September 16 letter to Taylor represented; (2) the panel did not accept Redd's letter of recommendation (see discussion below); (3) the selection was based solely on the interview score whereas the policy said scores would be considered as *part of the selection process* and (4) there was no evidence presented of a written recommendation with justification made to the BEP Director. (Exhibit No. 17, p. 4).

The arbitration panel concludes that the interviews were not conducted in accordance with SLA written policy and procedure and that consequently the selection of Belsha instead of Taylor was not adequately justified under the clear standard of Wis. Admin. Code DWD 60.08 that "[t]he licensee deemed to be best suited for an available business enterprise shall be selected."

Taylor filed a grievance over the matter which was denied by the SLA and processed through the steps of the SLA grievance procedure to a full evidentiary hearing (FEH) before a hearing panel.

Full Evidentiary Hearing (FEH) **RECOMMENDATION**

On May 30, 2012, after hearing the matter on May 8, 2012, the FEH panel unanimously recommended that SLA:

1. Set aside the selection of Belsha as permanent operator for RCI/STF.
2. Give all four candidates an opportunity to interview again with an entirely different panel comprised as the selection policy directs and with total disregard of the prior interviews and scores.
3. Prepare new interview questions and benchmarks, including at least one question tailored to the specific facility involved in the bid to determine each candidate's ability to meet the physical requirements needed and each candidate's relevant past experience and other skills and abilities germane to the operation of the particular business location.
4. Adhere to other items in the selection policy including accepting resumes and references if offered by a candidate and consideration of relevant factors other than the interview scores as they relate to determining which operator is best suited for the location involved.
5. Require the interview panel to submit a written recommendation to the SLA with justification
6. Select the candidate in accordance with this recommendation who is best suited for that business enterprise regardless of the candidate's need or the otherwise acceptable objective of evening out sites among operators. (Exhibit No. 17, p. 5).

The "**RECOMMENDATION**" from the FEH panel is well written and persuasive. The panel's recommendations to the SLA are supported not only by Findings but also by convincing rationale contained in the DISCUSSION section of the decision.

Some of the recommendations are self-explanatory and need no elaboration. For example, requiring the interview panel to submit a written recommendation to the SLA with justification as required by the SLA's Policy/Procedure for selecting operators for a site bid is clear on its face.

The FEH panel's recommendation that the SLA "adhere to other items in the selection policy including accepting resumes and references if offered by a candidate" was further explained in the DISCUSSION section of the **RECOMMENDATION**. The panel explained its recommendation:

We recognize that the term "when appropriate" does allow for SLA's exercise of some discretion in determining whether a candidate's resume and references will be considered and that SLA does have information available to it about a candidate's performance based on records and skills as demonstrated by their having a license. However, resumes and references are almost universally recognized as appropriate and helpful in job interviews and the avowed intent to mirror Wisconsin civil service provisions favor that SLA's discretion should be exercised in favor of accepting such materials and considering them in the process of selecting the licensee best suited for an available business enterprise. Furthermore, it seems to us unreasonable to ignore a candidate's successful operation of the precise facility at issue for such a long time-four years. (Exhibit No. 17, pp. 4, 5).

The FEH panel's recommendation that resumes and references be accepted if offered by the candidate is further explained and supported by other parts of the decision/opinion and **RECOMMENDATION**. For example, the SLA did not have a site facilities manager or designee on the interview panel that selected Belsha as the operator for RCI/STF as required by the aforesaid Policy/Procedure. (Exhibit Nos. 5 and 17, Finding of Fact No. 16, p. 3). Consequently, without the reference letter from Redd, who was the Correctional Management Services Director for RCI/STF, the interview panel would have little or no knowledge and information about Taylor's performance for the previous four years at RCI/STF. This is particularly true since the questions asked "were directed at general skills in management, conflict resolution, and problem-solving." (Exhibit No. 17, Finding of Fact 22, p. 4; Tr. p. 79). The questions "were not individualized for the facility." *Id.* As noted by the panel, an applicant's past work experience at the site location in question is relevant and it is reasonable to provide such information to an interview panel.

Moreover, the FEH panel's next paragraph in the DISCUSSION section of the **RECOMMENDATION** sets forth additional reasons to accept resumes and reference letters from sources outside the SLA and to consider same when making an operator selection. The panel explains:

Finally, the evidence and our findings above clearly suggest that SLA might well have considered factors outside the ambit of selecting the candidate best suited for the business being bid, particularly managing profitability among various vendors

and improving the program itself. While in other contexts these would be acceptable, if not laudable, goals they are inconsistent with the sole applicable legal selection standard of DWD 60.08.

The FEH panel made several Findings of Fact to support this conclusion. For example, the panel found in late August “Feypel and Taylor discussed the RCI/STF bid situation” and “Feypel expressed the thought of giving Belsha RCI/STF due to her UW-Parkside location not being profitable and to ‘even out’ things.” (Exhibit No. 17, Finding of Fact No. 11, p. 2). At the same time, the panel noted that ECBV minutes for the September 13, 2011 meeting stated:

RSVW Report: . . . Kent reported that it was the aim of everyone to improve the program and one way was to do all that we can to improve the profitability of each operator. This generates the question of what would be a satisfactory profit margin for any given operator depending on data of each operation.

These two events preceded interviews taking place on October 5, 2011 for RCI/STF.

On the other hand, the FEH panel noted that Feypel “denied saying that SLA would take a site away. He claimed his conversation with Taylor was just trying to explain the ‘Stand-Alone’ versus ‘Add-On’ site.” (Exhibit No. 17, Finding of Fact No. 23, p. 4). Obviously, based on its Findings and conclusions, the panel credited Taylor’s testimony and story of what happened on this matter.

The conclusion by the FEH panel that the SLA probably considered factors outside the ambit of selecting the candidate best suited for the RCI/STF business site is supported by the record evidence herein. In this regard the arbitration panel points out that the record is replete with evidence that SLA was intent on placing obstacles in front of Taylor as she went through the selection/interview process and taking the RCI/STF site from Taylor and giving it to Belsha. Taylor provided uncontroverted evidence in support of her claim that the SLA broke the rules and was biased in favor of Belsha during the 2011 interview/selection process. (Tr. pp. 23, 25-30, 36, 41-45, 47, 49, 53, 60-63, 67, 75, 78-79, 83, 90-91, 99; Exhibit No. 6). The SLA did not provide any persuasive rebuttal evidence; nor did it call or subpoena Feypel, Greco or anyone else to testify persuasively to a different point of view. (Tr. p. 25).

The FEH panel was given a difficult task. The question before it was whether the SLA in “selecting the operator for permanent assignment of Racine Correctional Institution (RCI) and Sturtevant Transitional Facility (STF)” violated Wis. Admin. Code DWD 60.08. The panel made its Findings and reached a conclusion that the selection policy as written and approved by ECBV was not flawed, “but rather it was not applied fully and correctly in this particular selection.” The arbitration panel also finds that the 2010 policy/procedure operator selection for site bids was violated when the SLA selected Belsha over Taylor for the RCI/STF business site in October 2011.

In addition to the violations of written procedure found, the FEH panel concluded that “the evidence and our findings above clearly suggest that SLA might well have considered factors outside the ambit of selecting the candidate best suited for the business being bid, particularly

managing profitability among various vendors and improving the program overall.” (Emphasis added). The panel came very close to saying that the SLA had configured the bid process in order to favor Belsha over Taylor for RCI/STF. However, it chose words carefully in order to retain credibility when making a **RECOMMENDATION** to SLA on how to do things the right way. A review of the panel’s recommendations in their entirety reveals a carefully crafted package of reforms designed to create an as fair as possible re-interview process for the disputed position not only for Taylor but everyone involved. The arbitration panel is persuaded that the FEH panel recommendations should have been followed in their entirety not only because the SLA violated policy and procedure when it selected Belsha over Taylor for RCI/STF but because it demonstrated bias during the 2011 selection process.

Decision of the DVR Administrator on the Grievance of Theresa Taylor

On June 12, 2012, Michael Greco, acting DVR administrator, made the final decision on Taylor’s grievance over “the selection of the permanent Business Enterprise Program (BEP) vending operator for the combined Racine Correctional Institution and Sturtevant Transitional Facility vending machine business locations (RCI/STF).” (Exhibit No. 18). In his final decision Greco noted that a review panel held a hearing on the matter on May 8, 2012 and “provided a recommended decision.” After reviewing the file in the matter and the review panel’s recommendations, Greco issued the following final decision:

1. The DVR BEP staff will conduct a new interview process to decide on the permanent operator for the RCI/STF. Ms. Belsha will continue as the RCI/STF operator during the new selection process.
2. The same four candidates will be invited to interview with a new interview panel, composed in accordance with BEP policy and with no reference to the previous interviews and scores.
3. The interviews will use new questions and benchmarks and will include one question related to the specific facilities involved.
4. The BEP staff shall ensure that all candidates are told that resumes and references are not to be submitted during the selection process or brought to the interview.
5. The interview panel members will submit a written recommendation on the selection of the RCI/STF operator, with an explanation on the basis of the interview questions, the benchmarks, and the qualifications of the candidates.

The parties are in disagreement over the fairness of several of these directives.

Regarding the acting DVR administrator’s first directive, Taylor argues that the DVR decision allowing Belsha to continue as operator ignored the FEH panel’s finding that the 2011 interview was flawed. Instead, Taylor submits the DVR decision should have returned her to RCI/STF pending the re-interview.

The SLA argues, on the other hand, that while Taylor was not named the interim vendor while the second interview process proceeded, neither was Ms. Belsha named the permanent vendor, consistent with the panel's recommendation.

The FEH panel did not say who should serve as interim operator while a second interview process was held. It did not determine that Taylor was more suited than Belsha for operator appointment or vice versa. It simply recommended that the SLA "set aside the selection of Belsha as permanent operator for RCI/STF." The SLA did not clearly comply with this recommendation. Instead, it decided to conduct a new interview process to decide on the permanent operator for the RCI/STF while Belsha continued as the RCI/STF operator during the new selection process. It did not say that Belsha would be serving as the permanent or interim operator while doing so. One might reasonably infer that because the SLA was conducting a new interview process to decide on a permanent operator for the disputed site that Belsha was no longer the permanent operator. However, SLA did not expressly say that. Nor did the SLA provide any evidence of a rescission of Belsha's permanent appointment made on October 11, 2011. (Exhibit No. 17, Finding of Fact No. 17, p. 3).

The SLA argues that because Belsha had been operating the vending at this location for several months it would have been "unnecessarily disruptive to appoint a different interim operator until the permanent operator was selected." However, the SLA offered no evidence to support this contention. To the contrary, in October 2007 SLA made Taylor interim operator for RCI/STF and RYOCF. She was asked to be at those facilities in an hour and a half with product which she did. She took over all facilities in one day, all at once and started cleaning up and improving the vending operations so that by 2011 she was running an operation that "exceeded expectations." (Tr. pp. 32-33; Exhibit No. 7). Taylor's past performance proves that someone could have taken over the RCI/STF site on an interim basis without disrupting the vending business.

The SLA did not offer any explanation or reason for not expressly complying with this recommendation. It was easy enough to do. As such, the arbitration panel finds the SLA's failure to follow this recommendation of the independent hearing panel arbitrary and capricious. At a minimum it gave the appearance, certainly to Taylor, nothing had changed. It also potentially positioned Belsha to remain as permanent operator of RCI/STF especially given some of the decisions (or lack thereof) discussed below.

The FEH panel also recommended that SLA "[a]dhere to other items in the selection policy including accepting resumes and references if offered by a candidate." (Exhibit No. 17, Recommendation No. 4, p. 5).

Instead, the acting DVR administrator decided: "The BEP staff shall ensure that all candidates are told that resumes and references are not to be submitted during the selection process or brought to the interview." (Exhibit No. 18). Again, the acting administrator gave no explanation for his decision not to comply with the FEH panel's recommendation. Nor was the acting administrator's specific rationale for his decision to bar reference letters at the new interview adequately explained by the SLA at the arbitration hearing. On its face this refusal by SLA to accept reference letters from applicants if offered at the new interview as recommended by the FEH panel is arbitrary and capricious for the same reasons noted above.

It also deprived Taylor of a powerful asset in her attempt to become permanent operator of RCI/STF. The policy/procedure for operator selection for site bids in effect at the time, (Exhibit No. 5), stated that “interview questions will be considered as part of the selection process.” The FEH panel recommended not only that reference letters be accepted if offered but that SLA consider relevant factors other than interview scores as they relate to determining which operator is best suited for the location involved as required by the selection policy. (Exhibit No. 17, Recommendation No. 4, supra). What could be more relevant to Taylor’s qualifications for permanent operator for RCI/STF than her previous experience managing said business location. As noted by the FEH panel, it is “unreasonable to ignore a candidate’s successful operation of the precise facility at issue for such a long time-four years.” (Exhibit No. 17, p. 5).

In the grievance Taylor filed over the decision of the SLA to select Belsha as permanent operator for RCI/STF in October 2011, Taylor noted that her letter of recommendation from the Correctional Management Services Director for RCI/STF “was not acknowledged properly during the interview.” (Exhibit No. 14, p. 1). In other words it was not accepted, read and/or shared with panel members other than the SLA representative on the panel making a negative joking reference to it upon receipt. In her letter denying Taylor’s grievance, the DVR Section Chief/BEP Director stated resumes and references were “not requested of the interviewees because the SLA, under DWD 60, is responsible for personnel records of the BEP operators and is familiar with the training and performance of each operator.” (Exhibit No. 15, p. 2). However, there is no evidence in the record that such information was shared with the interview panel and/or made part of the selection process.

Moreover, the selection policy in effect at the time required “a fair, consistent and equitable interview process.” (Exhibit No. 5, p. 1). It is clear from reviewing the entire package of recommendations from the FEH panel that they all were important and necessary in order for the SLA to conduct the selection process fairly “and correctly”, (Exhibit No. 17, p. 5), something it did not do in October 2011. Id. When making its recommendation that reference letters be accepted as part of the selection process, the panel noted: “resumes and references are almost universally recognized as appropriate and helpful in job interviews.” Id. The panel added: “the avowed intent to mirror Wisconsin civil service provisions favor that SLA’s discretion should be exercised in favor of accepting such materials and considering them” in selecting the licensee best suited for the available business enterprise. Id. This recommendation was especially important given the panel’s conclusion that “the evidence and our findings above clearly suggest that SLA might well have considered factors outside the ambit of selecting the candidate best suited for the business being bid.” Id. A positive reference would have helped negate the internal bias SLA demonstrated during the selection process in favor of selecting Belsha as permanent operator.

Based on all of the above, the arbitration panel finds it reasonable to conclude that DVR acting administrator Greco acted in an unfair, arbitrary and capricious manner when he directed in his final decision issued on June 12, 2012 that resumes and references were not to be submitted during the selection process or brought to the interview.

June 27, 2013 Interview

Taylor argues DWD's claim that the SLA decision to revise the interview process was not arbitrary or capricious because it was done "without regard to the situation with the RCI/STF re-interview" is irrelevant because its implementation was unfair. In this regard Taylor claims that implementation of the revised selection process by means of 2013 data instead of 2011 data was designed to insure that Belsha would be selected as permanent operator.

The SLA disagrees. It argues that the old process was tweaked to improve the likelihood BEP operators would be as profitable as possible and to ensure quality customer service to vending facilities which would all lead to the improved economic health of the BEP program and vendors. The SLA adds the selection process in 2013 relied on performance data, operator knowledge and interviews and "avoids the 'social need' factor that Ms. Taylor testified was a major consideration in the first decision." The arbitration panel agrees that the 2013 selection process was an improvement over the 2011 process. It adhered to the FEH panel's recommendations to broaden the factors considered when selecting a permanent operator. In particular, it was responsive to the recommendation that new interview questions and benchmarks be prepared to determine each candidate's relevant past experience and other skills and abilities germane to the operation of the particular business location and to the recommendation that the selection process consider relevant factors other than interview scores to determine which operator is best suited for the location involved.

Taylor does not take issue with "the changes made to the interview policy per se." Instead, she "objects to the fact that 9 out of a possible 100 points (9%) were to be based on sales after Ms. Belsha took over RCI/STF, rather than the sales when Ms. Taylor was operating RCI/STF." She asks why she should have participated in the interview when the pivotal amount of points (9%) was stacked against her. She concludes that "[C]learly, her participation would have been futile because DWD ensured that she would be disadvantaged in the interview."

The SLA counters that Taylor's testimony at the arbitration hearing proves otherwise. (Tr. pp. 63-69). It notes on many of the questions Taylor admitted there was no reason for her not to receive the maximum points. (Tr. pp. 63-66). "Only 9 points out of a possible 100 points (9%) were based on past sales or net profits." Thus, her participation in the interview was not futile.

It is clear that Taylor was disadvantaged in comparison to Belsha answering questions 5 and 6 in the Performance review section of the 2013 selection process. (Tr. pp. 42-45, 66-67). That is because the profit margins are much higher in prison than in a veteran's facility or cognitively disabled housing. *Id.* On these two questions it was impossible for Taylor to get the highest score possible. (Tr. p. 45).

The SLA is correct that these are only two questions out of many. It is possible that Taylor could have done well on other questions. However, as the total interview scores from the first interview show the point difference between Taylor and Belsha was small; 101 for Belsha to 96 for Taylor. Only a total of 5 points separated the two candidates. The scores on these two questions might have made the difference between Belsha and Taylor as to who scored the highest on the interview. It was reasonable for Taylor to perceive, based on the flawed 2011

interview process and subsequent missteps by the SLA, that this was just another part of the effort by the SLA to disadvantage her in the new interview.

However, the bigger problem here is the year plus delay between decision of the acting DVR administrator to order a new interview process and the date the new interview took place. On June 12, 2012, the acting DVR administrator directed the DVR BEP staff to “conduct a new interview process to decide on the permanent operator for the RCI/STF.” (Exhibit No. 18). It was not until June 27, 2013 that the new interview took place. (Exhibit No. 20, pp. 1-2). The SLA did not give a good reason or explanation for the lengthy delay.

Lorrie Lange became BEP manager in December 2012. (Tr. p. 126, 147). Between June 2012 and December 2012 her position was “mostly vacant . . . there was . . . a significant length of time, being at least four to five months, where that position was vacant.” (Tr. p. 147). She did not know that this was an outstanding item “until May 2013 when DWD received a letter from RSA indicating there was a complaint that had been filed and they wanted a status.” (Tr. p. 149). At that point she had a discussion with staff and legal counsel and the “directive by acting administrator, Mr. Greco, was brought to my attention, that there were action items, included in the directive.” Id. So she promptly began the process to set up the interview. Id.

No other explanation was offered by the SLA at the arbitration hearing for the year plus delay in scheduling the second interview. No reason was given why Greco didn't immediately implement his final decision. No reason was offered why Feypel who was on BEP staff at the time and who was an integral part of the first interview process didn't follow through on the acting administrator's directive to conduct a new interview. No reason was given why someone else did not follow through on this matter. It is clear that the SLA simply dropped the ball. And that delay made it difficult for Taylor to compete for the permanent operator position at RCI/STF because it gave Belsha, who took over the RCI/STF business site in January 2012, (Tr. p. 49), a year and a half to build up her sales/profits at a more profitable prison site while Taylor had less profitable operations. If the new interview had taken place within a month or so of the acting administrator's Decision, which was the normal practice, (Tr. 165), Taylor would have been better positioned to interview successfully for the permanent operator position and answer the disputed questions noted above.

The arbitration panel believes that the year plus delay in holding the new interview was not fair or equitable. It was arbitrary and capricious because the SLA simply failed to do on a timely basis what it said it was going to do to comply with the FEH panel's recommendation. Taylor's candidacy for the permanent operator position at RCI/STF was severely harmed as a result of the SLA's inaction and delay in carrying out Greco's final decision and the SLA violated Section DWD 60.08 (1) by its conduct.

Conclusions

The arbitration panel finds that the SLA violated its own rules, regulations, policies and procedures regarding selection of permanent operators for a business site by its conduct of the October 5, 2011 interview for the RCI/STF permanent operator; by its final decision in response to the FEH panel's recommendations; by its conduct of the new interview in late June 2013 more

than a year after the acting DVR administrator directed BEP staff to conduct a new interview and by acting in an arbitrary, capricious and biased manner toward Taylor throughout the selection processes.

As noted above, an agency like the SLA must follow its own rules and procedures made in conformity with the enabling statute, the Randolph-Sheppard Act. The 2010 policy/procedure for selection for site bids is such a rule/procedure as is the Wis. Admin. Code Chapter DWD 60 entitled “Supervised Business Enterprises Operated by Blind Persons.” (Exhibit No. 28). It was in effect for both the 2011 and 2013 interview/selection process. It requires the SLA to select the licensee “best suited for an available business enterprise” something it didn’t do during the aforesaid selection processes. The SLA has a responsibility under the Randolph-Sheppard Act and the Act’s enabling regulations to follow its rules and regulations for the selection and promotion of permanent operators for the available business enterprise. *Id.* The SLA violated its own rules, policies and procedures and the Randolph-Sheppard Act and its enabling regulations by its actions/conduct herein.

A question remains as to the appropriate remedy.

REMEDY

Taylor states she should be immediately awarded the RCI/STF site given DWD’s efforts to ensure that its preferred operator was awarded the RCI/STF facilities and DWD’s unfairness toward Taylor described above. Taylor also states that the panel should award money damages and legal fees and costs because the Wisconsin Dept. of Workforce Development, *supra*, a case relied upon by the SLA, was wrongly decided; because a line of cases supports its position that the panel has the authority to award monetary damages; because arbitrators have broad authority to order any type of relief under the *Uniform Arbitration Act, Section 12* and because withholding monetary damages would lead to grossly inequitable results to blind vendors and frustrate the intent of Congress to provide them with meaningful remedies.

The SLA asserts that it would be unfair to automatically appoint Taylor, thus denying Belsha her livelihood with no due process.⁶ It claims that, at most, it should be ordered to conduct another selection process with the panel describing that process if it does not approve of the SLA’s process or that the panel could order the SLA to award the next available vending site to Taylor without competition.

The SLA also argues that the Randolph-Sheppard Act does not provide for monetary damages. It claims that “The R-S Act says nothing about what relief can be granted at any of the three levels when the grievance is initiated by a blind licensee . . . *The statute does not expressly authorize the award of damages,*” citing New Hampshire v. Ramsey, 366 F.3d 1, 7 (1st Cir. 2004). The SLA adds there is a lack of express language in the Act authorizing the arbitration panel to issue money damages and that there is no expressed substantive remedy for damages as

⁶ This hollow claim ignores the fact that the SLA from 2011 to the present has deprived Taylor of her due process when it chose to engage in the misconduct described in the above Findings of Fact and, in particular, in Finding of Fact No. 49 which unjustly enabled Belsha to profit at Taylor’s expense.

requested by Taylor, which is why the panel does not have the authority to award her damages under the Act.

The SLA also argues that this issue was settled in Wisconsin Dept. of Workforce Development, supra, where Federal Judge Barbara Crabb ruled that Randolph-Sheppard arbitration panels could not:

[s]ubject 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. Id. 1015

In addressing this remedial issue, it must be noted at the outset that arbitrators have wide authority to fashion remedies.

The United States Supreme Court thus stated in Enterprise Wheel:⁷

When an arbitrator is commissioned to interpret and apply the collective bargaining agreement, he is to bring his informed judgment to bear in order to reach a fair solution of a problem. This is especially true of remedies.

The United State Supreme Court subsequent stated in Misco that “where it is contemplated that the arbitrator will determine remedies for contract violations that he finds, courts have no authority to disagree with his honest judgment.”⁸ The United States Court of Appeals for the Seventh Circuit similarly ruled: “[t]he authority to decide the meaning and application of the agreement, necessarily implies authority to prescribe a remedy.”⁹ The Uniform Arbitration Act states: “the fact that the relief was such that it could not or would not be granted by a court of law or equity is not ground for vacating or refusing to confirm the award.”¹⁰

While this matter does not deal with a collective bargaining agreement, the parties have contracted to provide “any blind licensee dissatisfied with any action arising from the operation or administration of the vending facility program an opportunity for a fair hearing, and to agree to submit the grievances of any blind licensee” not resolved by such hearing to arbitration as provided in section 107d-1 of the Act. 20 U.S.C. Section 107b.(6). Section 107d-1(a) states that if a blind licensee is dissatisfied with “any action” taken or decision rendered as a result of the full evidentiary hearing they may file a complaint with the Secretary who shall convene a panel to arbitrate “the dispute” without any limitation on the arbitrator’s remedial authority. One of the “actions” or “disputes” herein centers on whether Taylor is entitled to monetary relief, legal fees and costs as requested in her complaint and first amended complaint filed with the USDOE.

⁷ United Steel Workers of America v. Enterprise Wheel and Car Company, 363 U.W. 593, 805 S. Court 1358, (1960)

⁸ Paperworkers v. Misco, Inc., 484 U.S. 29, 126 LRRM 3113, 3117 (1987).

⁹ Dexter Axle Co. v. Machinists Dist. Lodge 1314, 418 F.3d 762, 769 (7th Cir. 2005).

¹⁰ 7 U.A.A. Section 5, (1955).

The Third Circuit Court of Appeals thus has stated: “the relationships between the blind vendor and the state, like conventional employment relationships is essentially contractual.” See Delaware Dept. of Health and Social Services, Division for the Visually Impaired v. United States Department of Education, 772 F. 2d 1123, 1136 (3rd. Cir. 1985).

As for Judge Crabb’s ruling, she added that “The Court of Appeals for the Seventh Circuit has never had occasion to address the intersection of state sovereign community and the Randolph-Sheppard Act”; that the Circuit Courts of Appeals are split over this issue and that cases which have sustained the awarding of money damages are “no longer good law”, citing Federal Maritime Commission v. South Carolina State Ports Authority, 535 U.S. 743, 122 S. Ct. 1864, 152 L.ED. 2d. 962 (2002) (Id., at Paragraphs (3) and (4), where the Court ruled that a party could not bring suit against the state.

That case is not controlling. It centered on the Shipping Act of 1984 rather than the Randolph-Sheppard Act and it was brought in federal court without the state’s consent. Here, by contrast, the State of Wisconsin has voluntarily agreed to arbitrate “any actions” or “disputes.” The Court in Federal Maritime, supra, also found that the administrative proceeding in that matter bore a strong resemblance to federal civil litigation because the Federal Rules of Court Procedure were followed and because the role of an administrative law judge there was similar to that of an Article III judge. None of that is true here, as this matter is an arbitration proceeding and not a “suit.”

The panel therefore does not need to defer to Judge Crabb’s decision, as the Seventh Court of Appeals has ruled that “a district court decision does not have precedential value.” See Wirtz v. City of S. Bend, 669 F.3d 860, 863 (7th Cir. 2012).

Taylor correctly points out that accepting DWD’s view “would leave DWD free to appoint any person it wanted to any position, regardless of any presently effective regulation, policy, or procedure.” Absent clear language in the Randolph-Sheppard Act authorizing such a result, there is no basis for finding that Congress meant to limit an arbitrator’s traditional remedial authority to award monetary relief here.

That was the conclusion reached by the United States Court of Appeals for the Third Circuit in Delaware, supra, when it ruled that an arbitration panel properly awarded monetary relief and legal fees under the Randolph-Sheppard Act.

There, the Court conducted an extensive analysis of the legislative history surrounding the Randall-Sheppard Act and found that:

Except for the unique judicial review provision, there is no indication in the text of the legislation or in any legislature history suggesting that congress used the term arbitration in any manner different from its conventional usage in other contexts such as the Federal Arbitration Act. . . , and that no member of Congress ever suggested that the scope of relief which could be awarded in these arbitration proceedings, agreed to by virtue of a state’s voluntary participation in the

Randolph-Sheppard program, was in any degree different than that available in other arbitration proceedings. (Id. 1130).

The Court added:

Congress was surely aware that arbitrators proceeding under the authority of the Federal Arbitration Act or under the authority of the Uniform Arbitration Act, as a matter of course awarded retrospective compensatory relief in appropriate cases. (Id. 1136).

The Court concluded that by agreeing to participate in the Randolph-Sheppard Act (and the arbitration program) a state “has agreed to the remedies which that program requires . . . [T]he waiver of sovereign immunity with respect to arbitration could hardly have been made more clearly.” (Id. 1136).

The United States Court of Appeals for the Ninth Circuit reached the same conclusion in Premo v. Martin, 119 F.3d 764 (1997), when it upheld an arbitration award which granted monetary relief and legal fees under the Randolph-Sheppard Act. The Court found that the state had waived its sovereign immunity claim by agreeing to participate in arbitration proceedings which do “not limit the authority of arbitration panels convened under the Act to award compensatory relief.” (Id. 769).

The Court added:

the evidence that Congress conditioned state participation in the Randolph-Sheppard program on consent to federal judicial enforcement of compensatory awards is overwhelming. (Id. 770).

Thus, there is conflicting legal authority and no settled law over whether monetary relief and legal fees can be awarded under the Randolph-Sheppard Act.

The panel concludes that Delaware, supra, and Premo, supra, constitute substantial legal authority authorizing the award of monetary relief,¹¹ and that they are more persuasive than those court decisions reaching the opposite result.

Given the SLA’s bad faith throughout this matter, the arbitration panel concludes that Taylor must be made whole by making her the permanent operator at the RCI/STF site; by awarding her compensatory relief for the profits she lost because of the SLA’s bad faith misconduct and by awarding legal fees and costs.¹² The panel shall retain its remedial jurisdiction for at least sixty (60) days to resolve any disputes arising over the application or interpretation of the remedy and it shall automatically extend its remedial jurisdiction if necessary.

¹¹ See Winkelman v. Kraft Foods, Inc., 2005, WI App. 25, Paragraph 1213, 279 Wis.3d. 335, 693 N.W. 2d. 256; City of Madison v. Local 311, 133 Wis. 2d. 186, 191, N.W. 2d. 766, 769 (Ct. App. 1986).

¹² See Premo, supra and Delaware, supra, which awarded legal fees and costs. See also Alyeska Pipeline Co. v. Wilderness Society, 421 U.S. 240 (1975) where the United States Supreme Court ruled that legal fees can be ordered when a party has acted in bad faith.

Based on all of the above, and the record as a whole, the panel therefore issues the following

AWARD

1. The SLA acted in an arbitrary, capricious and biased manner by failing to follow its rules, regulations, policies and procedures when it selected a permanent operator for the RCI/STF business site and/or by failing to place Theresa Taylor as permanent operator for RCI/STF thereby violating the Randolph-Sheppard Act, implementing regulations, state rules, regulations, policies and procedures.
2. The SLA shall place Theresa Taylor as the permanent operator at RCI/STF within thirty (30) days of the date of entry/issuance of this Award, with DVR providing her with an operating agreement and a copy of the permit/agreement between the agency and DVR. The SLA shall also provide to Taylor all necessary support/assistance to be successful in managing RCI/STF as it would to any other permanent operator in the BEP program.
3. The SLA (DWD, DVR) shall pay compensatory damages to Theresa Taylor as the rate of \$105.38 per day from the date Joelyn Belsha was installed at RCI/STF to the date Taylor is installed as the permanent operator at RCI/STF.
4. The SLA shall pay all of Theresa Taylor's legal fees and costs which so far amount to \$18,357.88, along with ALL other reasonable legal fees and costs incurred in bringing about the implementation of the remedy ordered herein.
5. The SLA shall immediately modify its procedures for selecting operators to include the following notice to all parties:
 - a. When a final decision is issued by the Division Administrator following a Full Evidentiary Hearing panel appeal review, the decision correspondence shall contain the next step appeal process as outlined in DWD 60.05 (4) as follows:

(4) If the aggrieved party continues to be dissatisfied with the decision under sub. (3), the individual may, within 30 working days after the date of the notification of the fair hearing outcome, file a complaint with the secretary of the USDOE who will convene an ad hoc arbitration panel to make a final and binding decision on the parties. (See 34 CFR 395.13)
 - b. Following findings and recommendations of a FEH panel, the remediation steps, if any, contained in a DVR/SLA final decision shall be implemented in a timely manner.
6. The arbitration panel shall retain remedial jurisdiction for at least sixty (60) days to resolve any issues arising over the application or interpretation of the remedy and it shall automatically extend its remedial jurisdiction if necessary.

Dated at Madison, Wisconsin this 10th day of January, 2018

Randolph-Sheppard arbitration panel

Dennis P. McGilligan, Arbitrator, Chair arbitration panel date 1/10/18

Joe Cordova, Member, arbitration panel date 2/1/18 I concur

Charlene Dwyer, Member, arbitration panel date 2/5/18 I dissent

Charlene Dwyer, Arbitration Panel Member
Dissent opinion February 5, 2018

Dear Arbitration Panel Chair McGilligan and fellow panel member Cordova,

I am writing to register my dissent opinion to the January 10th Arbitration Award sent by Panel Chair McGilligan.

I organized supporting rationale for my dissent opinion in accordance with specific findings of fact and conclusions contained in Chair McGilligan's January 10th Proposed Arbitration Award document. Findings and conclusions with which I dissent are found in other sections of the document. My dissent and supporting rationale apply to all statements in the January 10th document related to the findings responded to below.

I maintained the number sequence of the findings for each of my opinions. I have proposed an alternative award that addresses the SLA administrative shortcomings in conducting the first interview and delays in conducting the re-interviews.

Findings:

40. The FEH panel's Findings of Fact, conclusions and "RECOMMENDATION" are, in their entirety, hereby confirmed and adopted by the arbitration panel as if they are its own. A copy of the FEH panel's May 30, 2012 decision and "RECOMMENDATION" is attached hereto and made a part of this Award.

Dissent Opinion: I do not agree that the FEH panel's Findings of Fact, conclusions and "RECOMMENDATION", are, in their entirety, hereby confirmed and adopted by me as an arbitration panel member as they are my own.

The FEH panels, Findings of Fact, conclusions and RECOMMENDATION" were made to the SLA in accordance with Wisconsin Statute DWD 60.05 (3) rules which clearly state . . . *The panel shall make a recommendation to the division administrator who shall notify the grievant of his or her final decision by certified mail within 10 working days after receipt of the panel's recommendation.* The DVR administrator is the designated authority to accept the FEH panel's recommendation and determine whether the recommendations should be adopted in full or in part. The acting DVR Administrator adopted five of the six FEH panel recommendations in his final decision issued on June 12, 2012 (Exhibit 18).

The acting DVR Administrator's decision not to adopt the final recommendation for the second interview process relative to accepting resumes and references is supported by the operator selection site procedure. The procedure in 2011 and 2013 references the submission of Resumes and references (Exhibit 5) stating that

when appropriate, each candidate will be asked to bring their Resume with two references to the interview which will considered part of the selection process.

On November 22, 2011 Pomeroy sent Taylor a grievance denial letter (Exhibit 15) noting that resumes and references were not requested of the interviewees in 2011 because

. . . the SLA, under DWD 60 is responsible for personnel records and the BEP operators and is familiar with the training and performance of each operator. The selection process was reviewed with the ECBV for their active involvement and the process was supported by them.

Per an e-mail distributed to BEP operators (Exhibit 20 page 4), it was announced that

On March 12, 2013, the SLA in active participation with the Elected Committee of Blind Vendors jointly approved the Procedure for the Selection for the Best Suited Licensee for an available Business Enterprise location.

The 2013 EVCB supported procedure maintained the SLA's responsibility to determine when resumes and references should be brought to an interview. In accordance with the acting DVR Administrators final decision of 2012 and in accordance with the rationale previously established by DVR BEP Director Kim Pomeroy, resumes and references were not accepted at the second interview of the 2011 candidates for the RCS/STF site.

All Taylor grievance response actions taken by the FEH panel, SLA, ECBV were in full compliance with the Business Enterprise Program Administrative Grievance rules in DWD Chapter 60.05. These rules were approved at the time of DWD adoption by the US Department of Education indicating the DWD Administrative Rules comply with the Randolph Sheppard Act.

A case precedent of seriously compromising the scope of responsibility and authority of both the SLA and the ECBV in establishing operator selection procedures would occur if the arbitration panel's decision is based, in part, on the failure of the DVR Administrator to adopt the FEH panel's recommendation to accept resumes and references at the re-interview.

41. The SLA's June 12, 2012 final decision and order to require the applicants for the RCI/STF site to re-interview was, at the time, a generally reasonable and appropriate remedy for the errors identified by the FEH panel. The re-interview criteria in the final decision and order were also, in part, reasonable and appropriate to ensure a fair selection process.

Dissent opinion – In accordance with the rational presented in dissent opinion 1, my opinion is the re-interview criteria of the SLA's June 12, 2012 final decision and order were fully reasonable and appropriate to ensure a fair selection process.

43. The SLA's decision to ignore/omit the FEH panel's recommendation that it should accept resumes and references in the re-interview process was arbitrary and

capricious and designed to prevent Taylor from being selected as permanent operator of RCI/STF.

Dissent opinion: In accordance with the rationale presented in dissent opinion for finding 40, the re-interview criteria of the SLA's June 12, 2012 final decision and order was not arbitrary and capricious nor designed to prevent Taylor from being selected as a permanent operator of RCI/STF.

44. The year plus delay between the SLA's June 12, 2012 Decision requiring the original applicants for the RCI/STF site to re-interview and the June 27, 2013 re-interview was arbitrary, unreasonable and unfairly prejudiced Taylor's chances of successfully re-interviewing for the RCI/STF site.

Dissent opinion: I agree that the SLA's year-long process for developing a new interview process and conducting the second interview was too long. However, while the SLA testified to the arbitration panel that interviews would normally be conducted within three months of a site opening (Tr. p. 165), that period was necessarily lengthened by the requirement to develop a new and multi-faceted interview procedure and take the new procedure to the Elected Committee for their active participation review and feedback.

I estimate an interview announcement and establishment process of one to two months preceded by an additional four months for the new interview process and benchmarks development and the time to engage the ECBV in active participation review. Ms. Taylor may, or may not, have been disadvantaged by an interview delay of six to seven months. According to the SLA, the delay appeared to be due to a vacancy in the BEP Director position in June 2012 and poor SLA communication with the new BEP Director upon her arrival in December 2012 (Tr. p. 164).

While I consider the delay in conducting the second interview to be an administrative shortcoming on the part of the SLA, I do not agree that it rises to the level of an arbitrary, capricious and biased action.

49. SLA arbitrarily, capriciously and in a biased manner failed to award Taylor the RCI/STF site during the two selection processes described above as shown by the following:

- a. Feypel asked Taylor on or about August 26, 2011 to voluntarily give up one of her then-current sites because SLA believed Belsha's then-current salary was too low and that SLA wanted to give Belsha one of her sites because SLA wanted to "even out" things.

Dissent opinion: This is Ms. Taylor's hearsay testimony regarding a phone conversation. Mr. Feypel on May 8, 2012 in his testimony to the Full Evidentiary Hearing panel denied saying that the SLA would take a site away. He claimed his conversation with Taylor was just trying to explain the "Stand-Alone" versus "Add-On" site (Exhibit 17 p.4)

The proposed finding is based on a 2011 phone conversation without formal written follow-up. Ms. Taylor's and Mr. Feypel's testimony at the Full Evidentiary Hearing, as outlined in the Findings of Fact issued by the FEH panel (Exhibit 17), constitutes a he said, she said difference in recollection.

b. Feypel on May 8, 2012 falsely denied that he made that statement.

Dissent opinion: There is no clear evidence other than Ms. Taylor's hearsay contested testimony to the FEH panel that Mr. Feypel made a false statement during the May 8, 2012 full evidentiary hearing. Mr. Feypel's summarized testimony as reported in the Findings of Fact issued by the FEH panel (Exhibit 17 p.4) should be given equal weight to Ms. Taylor's testimony.

c. Feypel on October 5, 2011 failed to read Redd's highly favorable recommendation to the other panel members even though Redd was in the best position to evaluate Taylor's past work performance at RCI.

Dissent opinion: Feypel did not fail in his decision to not read Taylor's recommendation from Redd to the interview panel in October 2011. The SLA, in accordance with its operator selection procedures, chose not to request resumes or references for this interview. A reasonable explanation was offered to Ms. Taylor in BEP Director Pomeroy's November 22, 2011 grievance denial letter (Exhibit 15) noting that resumes and references were not requested of the interviewees in 2011 because

. . . the SLA, under DWD 60 is responsible for personnel records and the BEP operators and is familiar with the training and performance of each operator. The selection process was reviewed with the ECBV for their active involvement and the process was supported by them.

Because references were not requested by the SLA for the interview and to assure a fair, consistent and equitable interview process as required by the Operator Selection for Sites policy (Exhibit 5), it was appropriate for Mr. Feypel to set aside Ms. Taylor's letter of reference.

d. The FEH panel on May 30, 2012 found that the first interviews were not conducted in accordance with the written policy that SLA established and ECBV approved, and that the selection of Belsha instead Taylor "was not adequately justified under the clear standard of Wis. Admin. Code Section 60.08 which states "the licensee" deemed to be best suited for an available business enterprise shall be selected . . .

Agree

e. SLA subsequently refused to implement the FEH's panel's recommendation that SLA accept resumes and references in the re-interview process, thereby preventing Taylor from using Redd's highly favorable recommendation.

Dissent opinion: The acting DVR Administrator's decision not to adopt the recommendation relative to accepting resumes and references is supported by the operator selection site procedure. The procedure in 2011 and 2013 references the submission of Resumes and references (Exhibit 5) stating

that when appropriate, each candidate will be asked to bring their Resume with two references to the interview which will be considered part of the selection process.

On November 22, 2011 Pomeroy sent Taylor a grievance denial letter (Exhibit 15) noting that resumes and references were not requested of the interviewees in 2011 because

. . . the SLA, under DWD 60 is responsible for personnel records and the BEP operators and is familiar with the training and performance of each operator. The selection process was reviewed with the ECBV for their active involvement and the process was supported by them.

Per an e-mail distributed to BEP operators (Exhibit 20 page 4), it was announced that

On March 12, 2013, the SLA in active participation with the Elected Committee of Blind Vendors jointly approved the Procedure for the Selection for the Best Suited Licensee for an available Business Enterprise location.

The 2013 EVCB supported procedure maintained the SLA's responsibility to determine when resumes and references should be brought to an interview. In accordance with the acting DVR Administrator's final decision of 2012 and the rationale previously established by DVR BEP Director Kim Pomeroy, resumes and references were not accepted at the prior candidate's second interview for the RCS/STF site.

All Taylor grievance response actions taken by the FEH panel, SLA, ECBV were in full accordance with the Business Enterprise Program Administrative Grievance rules in DWD Chapter 60.05. These rules were approved at the time of DWD adoption by the US Department of Education indicating the DWD Administrative Rules comply with the Randolph Sheppard Act.

A case precedent of seriously compromising the scope of responsibility and authority of both the SLA and the ECBV in establishing operator selection procedures that are compliant with state and federal program rules and regulations would occur if the arbitration panel's decision is based on the decision of the DVR Administrator not to adopt the FEH panel's recommendation to accept resumes and references.

f. SLA's reselection process was re-designed to award Belsha the RCI/STF site by awarding 9 points based on the amount/goods sold and her profitability in operating that

site while at the same time never considering Taylor's earlier sales and profitability when she operated those same sites.

Dissent Opinion: The SLA's BEP Director at the time of the second interviews testified (Tr. p153-154) that the reselection process was re-designed to

... make the criteria more objective and also to offer different methodologies

... why you'll see the variety regarding the testing, where you have your 15 multiple-choice questions,

... and then the performance review criteria was added as well . . .

... it was never meant to exclude anyone. If anything, it was meant to include.

Because, as I said, the variety of methods or ways to earn the points in this was the goal.

The SLA followed the FEH panel's recommendations as contained in the final decision of the acting DVR Administrator to prepare new interview questions and benchmarks to include each candidate's relevant past experience and other skills and abilities germane to the operation of the particular business location (Exhibit 17 p. 5)

In their active participation role, the ECBV reviewed and approved the new interview procedures and benchmarks. All BEP operators had the opportunity to review the new procedures and performance benchmarks at their Fall 2012 annual meeting. There is no evidence that any operator, including Ms. Taylor, had an issue with the new procedure or the benchmarks awarded in the new performance review section of the selection process.

The new operator selection process and benchmarks had the potential to advantage or disadvantage any BEP operator and yet no concerns were documented during the review period that the new process was faulty or biased. The ECBV active participation review resulted in support for the new process.

Ms. Taylor is most concerned with the costs of goods percentage (performance question #5) which is benchmarked at 1 to 3 points, and the operator net profit (performance question #6) which is benchmarked at 2 to 6 points. The low to high range of combined possible points for these two questions is 3 to 9. If she had received the lowest benchmark on both questions, Ms. Taylor could have been disadvantaged between 3 to 6 points out of 100 by not receiving the maximum available points for both questions. (Exhibit 27 pp.2-3).

My opinion is that a potential disadvantage, for any candidate, of 3-6 points on a 100-point multi-faceted selection process reviewed and approved by BEP peers does not constitute selection bias.

g. SLA delayed for over a year in creating a new selection process, thereby giving Belsha a considerable advantage in building up her sales/profits at her more profitable prison site while Taylor had less profitable operations through no fault of her own.

Dissent opinion: The new selection process required several months of preparation as previously outlined in my opinion on finding 44. The period of delay following a reasonable amount of time to prepare the new selection process and engage the ECBV in active participation review was estimated at four months. Announcing interviews, selecting candidates and coordinating calendars for an interview team is expected to take an additional 1-2 months. It is my opinion that there was a 6-7 month delay the SLA is accountable for due to administrative oversights. However, I don't consider this length of time in 2013 sufficient to do harm to Ms. Taylor's interview re-interview competitiveness.

Conclusions

The arbitration panel finds that the SLA violated its own rules, regulations, policies and procedures regarding selection of permanent operators for a business site by its conduct of the October 5, 2011 interview for the RCI/STF permanent operator; by its final decision in response to the FEH panel's recommendations; by its conduct of the new interview in late June 2013 more than a year after the acting DVR administrator directed BEP staff to conduct a new interview and by acting in an arbitrary, capricious and biased manner toward Taylor throughout the selection processes.

Dissent opinion: In conclusion, my opinion is the SLA did not violate its own rules, regulations policies and procedures by its final decision in response to the FEH panel's recommendations, by its conduct of the new interview in late June 2013 and did not act in an arbitrary, capricious and biased manner toward Taylor throughout the selection process.

As noted above, an agency like the SLA must follow its own rules and procedures made in conformity with the enabling statute, the Randolph-Sheppard Act. The 2010 policy/procedure for selection for site bids is such a rule/procedure as is the Wis. Admin. Code Chapter DWD 60 entitled "Supervised Business Enterprises Operated by Blind Persons." (Exhibit No. 28). It was in effect for both the 2011 and 2013 interview/selection process. It requires the SLA to select the licensee "best suited for an available business enterprise" something it didn't do during the aforesaid selection processes. The SLA has a responsibility under the Randolph-Sheppard Act and the Act's enabling regulations to follow its rules and regulations for the selection and promotion of permanent operators for the available business enterprise. *Id.* The SLA violated its own rules, policies and procedures and the Randolph-Sheppard Act and its enabling regulations by its actions/conduct herein.

Dissent opinion: There were SLA administrative shortcomings in conducting the first interview and in assuring a timely re-interview. However, in my opinion, there is no evidence that the SLA did not follow rules, policies and procedures and the Randolph-Sheppard Act in following the FEH Panel's recommendation to prepare a new and more

adequate interview process and in using it to re-interview the original RCS/STF site candidates.

Was Ms. Taylor the best suited operator in both 2011 and 2013? It is my opinion we cannot make this assumption. Ms. Belsha has been a BEP operator longer than Ms. Taylor. Ms. Belsha was also made interim operator for six months in 2006 at RCI/STF during which time she trained Ms. Taylor for her interim assignment in conducting business at the site. Ms. Belsha's BEP operator experience and selection as the interim operator and site trainer in 2006 is evidence of her suitability to conduct business at this site.

AWARD

1. In consideration of its administrative flaws in conducting the first interview and unwarranted delay in conducting the re-interview, the SLA should in consultation with Ms. Taylor, either
 - a. Award Ms. Taylor one or more of her current interim sites, or
 - b. Award Ms. Taylor the next available site.
2. The SLA shall immediately modify its procedures for selecting operators to include the following notice to all parties:
 - a. When a final decision is issued by the Division Administrator following a Full Evidentiary Hearing panel appeal review, the decision correspondence shall contain the next step appeal process as outlined in DWD 60.05 (4) as follows:
 - (4) If the aggrieved party continues to be dissatisfied with the decision under sub. (3), the individual may, within 30 working days after the date of the notification of the fair hearing outcome, file a complaint with the secretary of the USDOE who will convene an ad hoc arbitration panel to make a final and binding decision on the parties. (See 34 CFR 395.13)
 - b. Following findings and recommendations of a FEH panel, the remediation steps, if any, contained in a DVR/SLA final decision shall be implemented in a timely manner.
3. The arbitration panel shall retain remedial jurisdiction for at least sixty (60) days to resolve any issues arising over the application or interpretation of the remedy and it shall automatically extend its remedial jurisdiction if necessary.

2/5/18

Charlene Dwyer, Member, arbitration panel