BEFORE THE UNITED STATES DEPARTMENT OF EDUCATION, REHABILITATION SERVICES ADMINISTRATION RANDOLPH-SHEPPARD ACT ARBITRATION

Case No. R-S/12-10

In the Matter of

JOE MURPHY, GARY CROCKER, TOM EVANS, NNABUAKU GREEN, RODGER HOOD, PAUL PATCHE, AND JAMES HOWIE, Complainants,

and

STATE OF CALIFORNIA, DEPARTMENT OF REHABILITATION, Respondent.

TriPartite Panel: Sylvia Marks-Barnett, Chair; Andrew Freeman, Vendors Designee; Claire Le Flore, California Department of Rehabilitation Designee

Date: January 29, 2016

APPEARING FOR THE COMPLAINANTS:

Susan Rockwood Gashel, Esq., Attorney for Complainants

APPEARING FOR THE COMPANY:

Elizabeth K. Colegrove, Esq., California Department of Rehabilitation, Office of Legal Affairs and Regulations, Attorney for Respondent

FINDINGS OF FACT AND DECISION

The parties, having failed to resolve this matter prior to these arbitration proceedings, designated Andrew Freeman, by the Complainants/Vendors, and Claire Leflore, by the Respondent, to be their Panel member, respectively, and who, in turn, selected the undersigned Chairperson, in accordance with the Randolph-Shepherd Act, 20 USC §107, et seq. (RS Act).

PROCEDURAL BACKGROUND

The Complainants submitted a Complaint For Arbitration on March 1, 2013, claiming dissatisfaction with the Departmental adoption, on February 12, 2013, of the Proposed Decision, rendered after a full evidentiary hearing, which took place on January 22 and 23, 2013. Before the hearing here, on the Complaint, Complainants moved to file an Amendment. To this, the Respondent made no objection.

Pursuant to the statutory procedures contained in the RS Act, the undersigned was notified other selection as Panel Chairperson, on April 29, 2015, along with the other panel members, to hear and decide the matter in dispute.

The hearing of this matter was held on October 5 and 6, 2015, in a meeting room, at the Holiday Inn, Capital Plaza, located at 300 J Street, Sacramento, California. The hearing commenced at 9:00 a.m., as scheduled, and concluded on the second day.

At the hearing, a transcriber was used; copies of the transcript, and all Exhibits, were provided to both parties, and the Panel members. No issue was raised as to whether this matter properly being before the Panel for decision, whether all steps of the arbitration procedure had been followed or whether the Panel had the authority to render the decision in this matter.

All witnesses were sworn, testimony and evidence was received. James Howie, Complainant and Vendor (Howie); Joe Murphy, Complainant and Vendor (Murphy); Joe Xavier, the current Director of the California Department of Rehabilitation (Director Xavier); Gary Crocker, Complainant and Vendor (Crocker); Debra Meyer, former Manager, Business Enterprise Program (Manager Meyer); Tom Linker, licensed blind vendor and former officer in the California Vendors Policy Committee (CVPC) (Chairman Linker); Tom Evans, Complainant and Vendor (Evans); and Paul Patche, Complainant and Vendor (Patche) were called by the Complainants. The Respondent called Director Xavier, William Shirah, Staff Service Manager (Manager Shirah); and Elena Gomez, Deputy Director for the Specialized Services Division (Deputy Director Gomez) were called by the Respondent. Both parties received the opportunity for cross-examination and rebuttal.[1] Both parties each submitted post-hearing briefs and reply briefs. The reply briefs were received by December 14, 2015, at which time the record was closed. The parties agreed that, in order to accommodate production of the transcript of these proceedings, together with the respective year-end calendars of the Panel, the 30-day time within which the Decision was to be rendered could be extended to January 29, 2016.

STATEMENT OF THE ISSUES

From the filings and the evidence, the issues that arose are whether the actions of the Respondent California Department of Rehabilitation (DOR), taken with respect to the Complainants, as complained of herein, were arbitrary and capricious; and, if so, are the Complainants entitled to compensatory damages and attorney fees.

[1] Nnabuaku Green, Complainant and Vendor (Green) and Roger Hood, Complainant and Vendor (Hood) did not attend the hearing, for the reason, as provided by Complainants' attorney, that neither of them were able to attend due to financial circumstances. Attorney for DOR agreed that if they were here, they would testify as was provided in their respective Declarations, which were admitted without any objection by Attorney for DOR.

FACTS

The parties agreed to stipulate to the following facts:

1. Licensed blind vendors have operated vending facilities at Safety Roadside Rest Areas (SRRA)s, in California, since the 1970's.
2. From 1995 through 2008, California SRRA vendors paid $200 per month per site to the DOR, with DOR reimbursing the California Department of Transportation (CalTrans)

3. for the costs of utilities to operate the vending machines at the SRRAs, pursuant to the terms of an Interagency Agreement (IA), between DOR and CalTrans.

4. At its November 4, 1995, meeting, the CVPC, a committee elected by California's licensed blind vendors, endorsed the monthly utility fee and the reimbursement arrangement between DOR and CalTrans.

5. Blind vendors on no other State property are required to pay for utilities.

6. In 2008, the IA between DOR and CalTrans expired. At that time, Manager Meyer determined that blind vendors would no longer be required to pay CalTrans $200 per month per site for the costs of utilities to operate the vending machines at the SRRAs.

7. Effective September 1, 2012, DOR and Ca!Trans entered into an interim six month IA, for the period September 1, 2012, through February 28, 2013.

8. Under this interim IA, the blind vendors who were operating vending facilities at SRRAs were, among other requirements, required to: (1) resume providing $200 per month to DOR to reimburse CalTrans in the same amount for the cost of utilities, (2) pay a refundable three-month deposit in the amount of $600, per facility, to DOR, and (3) if/when a separate electric meter was installed at the SRRA site, the vendors were to begin paying the utility company directly.

9. On November 28, 2012, the CVPC unanimously passed a motion objecting to the re-institution of the practice of requiring the SRRA vendors to pay for utilities. In a February 7, 2012, letter, the CVPC advised DOR that it "fully supports the objections of vendors located at State roadside rests to the efforts of CalTrans and DOR in requiring those vendors to pay for electrical costs at these roadside rest areas."

From the evidence, it was established, in general terms, that, pursuant to the RS Act, and Regulations promulgated thereunder, the DOR was designated by the US Secretary of Education as the State Licensing Agency (SLA) for the State of California, to issue licenses to blind persons authorizing them to operate a vending facility on Federal or other property, located within the State and to obtain the vending facilities. This is all accomplished under the program administration of the BEP. Further, in order to accomplish the establishment of vending facilities, the DOR enters into IAs with other State Departments, also known as the "host agency", which covers all the facilities the respective Departments have available. As the

facilities become available, the BEP announces the availability of specific facilities, a description of the details of the facility and the opportunity for blind licensees to apply.

Once a blind licensee is selected, he is required to sign, as the Vendor, a Vendor's Operating Agreement (OA), the terms of which govern his obligations, as well as those of the DOR and the host agency, as to the particular facility. Attached to the OA, as Exhibits, are the host agency Permits, as to the particular facility and the IA with the particular host agency.

Howie:

In addition to the stipulated facts, Howie testified that the announcement for the SRRAs he currently operates, Hunter Hill, California Highway Patrol Weigh Station and US Forest Service, Facility No. 3-1032-S, did not require any payments from him for utilities, but, in fact, sometime in 2012, he had to sign a new OA which required him to pay $200 per month for electricity. As to storage, the announcement indicated that it would be provided; however, what actually was at the site was only about 200 square feet, while his needs are for 1,000 sq. feet. Further, the announcement indicated that the projected gross would be more than $15,000 per month. He has never had that much in monthly receipts and is in fact netting only about $30,000 per year.

The documentary evidence pertaining to Howie's claims consists of an Announcement, for Facility No. 3-1032-S (RX24), two OAs (PXs 24 and 30) and his Declaration (PX46). The Announcement, which had a closing date of May 4, 2011, controverts Howie's claim that it did not require any payments from him for utilities.

Howie's first OA, for this Facility (PX24) was dated June I, 1011, and it provided, at p. 7, that Howie would be responsible to pay all debts arising from the operation of the vending facility. The OA incorporated, by attachment, at p. 14, *et seq.,* the Encroachment Permit, also known as the IA, between DOR and CalTrans, dated June 29, 2010, as to Facility #1032, Hunter Hill SRRA. It provided that the Permitee (DOR) would follow, among other things, California Streets & Highways Code, §220.5. This Section, at (d) reflects that Cal Trans shall determine the costs for any operations related to the vending machines and shall be reimbursed for those costs from the revenues derived from the operation of the machines.

Howie's second OA for this facility (PX30) was dated October 1, 2012. It contained, at p. 8, the same language as found in the first OA, as to Howie's responsibility for payment of all debts arising from the operation of the vending facility. However, the attached IA #DOR 28737, at p. 16, was much more specific as to the responsibility to reimburse Ca!Trans for utility payments. And, as a new attachment to the OA, Exhibit K, at p. 24, explicitly devoted to "Electric Service Payments", directed the Vendor, to pay $200 per month per site to DOR, as the required reimbursement; unless the site is serviced by a separate utility meter, in which case, the Vendor is to pay the amount billed by the utility provider directly to that provider. In the former instance, the Vendor was also required to pay a deposit equal to three months' charges. Howie stated in his Declaration that he paid $200 per month for electricity starting in October, 2012.

While the announcement indicated that the facility included an on-site storage room, it did not indicate what the square footage of the storage room was.

Murphy:

Murphy testified that he bid on his current facility in 2009 in response to an Announcement that was silent as to vendor obligation to pay for electricity. Then, in October, 2012, he was told he would have to pay $200 per month, plus a deposit of $600, for electricity until a meter was installed, at which time he would have to pay off the meter. A meter was installed in August, 2013. He signed the original OA in 2009, but it has been amended four times after that. He was threatened with termination if he did not sign. He has been a party to OAs for other facilities in the past and they have never been amended. His current OA is for a period of only two years.

In about July, 2012, there was an informational meeting about the new OAs requiring payments for electricity between Director Xavier, of the DOR, someone from CalTrans and members of the CVPC, which he attended. There was not active participation, as the new IA had already been negotiated, there had been no opportunity for the CVPC to see the IA before, with a chance to provide input. There was a second meeting between the same parties; this time, Cal Trans was negotiating for a higher monthly payment. On February 15, 2013, Murphy, writing, on behalf of the Complainants and himself, told Director Xavier the vendors would sign new OAs, but under protest, and asked that DOR establish a payment plan for vendors who were unable to pay the full amounts for electricity as scheduled and develop a policy concerning the deposits that were to be paid.

As to the issue of storage, the Announcement indicated that he would have to provide. In view of this, he rented storage space of 1,000 square feet, for $1,100 per month; however, once he had to start paying for electricity, he could not afford to continue with that expense, so he purchased a new residence, in January 2014, with shop space, which is what he uses for storage.

The documentary evidence pertinent to Murphy's claims consists of an Announcement for Vending Facility #6-1029-S, as to Camp Roberts SRRA (North and South Bound), Shandon Roadside Rest (East Bound) and Atascadero Mental Hospital (RX22), two OAs (PXs 19 and 25) and his Declaration (PX41). The Announcement, which had a closing date of August 21, 2009, corroborates Murphy's claim that it did not require any payments from him for utilities. It was also silent as to the provision of storage space.

The first OA (PX19), dated October 15, 2009, however, at p. 8, provides that "the Vendor shall pay all debts arising from the operation of the vending facility." Attached, at p. 24, *et seq.,* is the CalTrans Permit concerning Northbound and Southbound Camp Roberts SRRA, which incorporates, by reference, IA, DOR#26095 (RXI 7), expired, but considered in full force and effect until a new IA is executed. This expired IA provided that Cal Trans was to provide electricity (p.2), but, at p. 5, DOR agreed to reimburse CalTrans for utility costs at $200 per month per site. Lastly, attached was the Permit concerning Shandon SRRA (at p. 26), which likewise incorporated by reference the expired IA.

The second OA (PX25), dated October 1, 2012, to be effective for the period set forth in the attached IA (DOR#28737) (p. 12), i.e. through February 28, 2013, provides, as does the former OA, that the Vendor shall pay all debts arising from the operation of the facility.

In the IA, at p. 14, CalTrans agreed to pay for utilities that were needed to operate vending facilities that did not have independent meters, but for which CalTrans would have to be reimbursed, relying on Streets & Highways Code (SHC), §220.5.

DOR, at p. 15-16, agreed to amend OAs between DOR and Vendors, incorporating the IA terms, in particular, the Vendors' obligations to pay to DOR $200 per month for the purpose of reimbursing CalTrans, except for those sites where there were independent meters for which the Vendor was to pay the utility directly; to transmit to CalTrans quarterly $200 per month per site as reimbursement for electric utility services costs; and that, in the event of a conflict between the provisions of the IA and a Vendor's OA, the terms of the IA should prevail. Lastly, this OA included, at p. 37, the same Exhibit K**,** concerning specific directions for the Vendors' obligation to pay for electricity, as was mentioned above, in connection with Howie.

A third OA, at p. 39, dated March 1, 2014, to be effective for the period set forth in attached IA, DOR Agreement #29202, (at p. 60), i.e. through February 28, 2017, provides, as does its predecessor amendment, that the Vendor shall pay all debts arising from the operation of the facility. Likewise, the IA, at p. 63, the obligations of CalTrans to pay for utilities, in the first instance, were mirrored as above. Further, the same is the case for Exhibit K, concerning directions for the Vendors' obligation to pay for electricity.

Murphy stated, in his Declaration, that he started paying off the meters on August 1, 2013; that he signed all amendments to his. OAs under duress; that for utilities, he paid $3,000: to CalTrans, from August through October, 2012, and to DOR, from March through July, 2013; and $51,478.82 to PG&E, from September, 2013, through July, 2015.

Crocker:

Crocker testified that he has operated his current SRRA since 2001. At the time this facility was announced, the Announcement indicated that he would have to pay for electricity. In 2008, he received written notification from Manager Meyer that Vendors were no longer obligated to pay for utilities and he would receive a refund for payments that he had made. He signed an amended OA, March 7, 2012, because he was told the OA would be terminated if he didn't. He submitted a request for a payment plan, but never received any response. So, on April 15, 2012, he initiated his own payment plan. All payments that were made, pursuant to his plan, were accepted and cashed.

At his facility, he has about 90 sq. ft. of storage space. He has had to rent a warehouse, which costs about $500 per month, with a utility expense of $100-$300 expense. He did not recall as to whether the Announcement addressed storage.

The documentary evidence pertinent to Crocker's claims consists of an Announcement for Vending Facility #3-817-S, as to Erreca SRRA (North and South Bound) (RXI 9), two OAs (PXs 20 and 26), and his Declaration (PX42). The Announcement, which had a closing date of October 20, 2000, corroborates Crocker's statement that he would be required to pay for electricity. It was also reflected that there was 90 sq. ft. of storage space per side, but that additional space was recommended to be provided by the Vendor at an estimated cost of $500 per month rent.

The first OA, dated February 1, 2001, effective for the period of the attached Articles Of Agreement[2] , reflected, at p. 8, that "the Vendor shall pay all debts arising from the operation of the vending facility." However, the Articles of Agreement, at p. 11, contained the agreement of CalTrans to provide at its own cost all utilities (water, gas, sewer, etc.) used for the vending facility.

The amendment to the OA, dated October 2012, effective for the period of the attached IA, through February 28, 2013, also provided, at p. 8, as did its predecessor OA, that the Vendor was to pay for all debts arising from the operation of the vending facility. The IA attached to this amended OA, at p. 13, was the same #DOR 28737, mentioned above in connection with Murphy. Similarly, Exhibit K, mentioned above in connection with Murphy and Howie, concerning specific directions for the Vendors' obligation to pay for electricity, was also included.

A second amended OA followed, dated March I, 2014, effective through February 28, 2017, which copied the terms and provisions of the previous amendment.

Crocker stated, in his Declaration, that on March 22, 2013, Manager Meyer wrote to him to give him notice that he was required to send $3,600 to DOR ($1,200 for a deposit and $2,400 for electricity for the months of September, 2012, through February, 2013). She also advised him, in that letter, failure to pay could be grounds to terminate his license as a blind vendor. He has paid for electricity $29,200 to DOR, for the period from February, 2001, through December, 2007; $8,800, to DOR, for the period from April 2013, through November, 2014; and $7,169, to Pacific Gas & Electric, for the period from December, 2014, through August, 2015.

Evans:

The testimony of Evans was that he had been operating his current vending facility, Coalinga SRRA (North/Southbound) and Coalinga State Hospital, since 2008. The Announcement for these facilities was silent as to payment of utilities. Even though the Announcement did have an item for "other operating expenses," this did not suggest to him that he would be liable for electricity.

[2] In this instance, the Articles of Agreement, appear to be in the nature of the host agency Permit, mentioned above, which constitutes the agreement between DOR and Cal Trans, as to the operation of the particular vending facility at the Erreca SRRA.

He signed the amended OA because he was told that if he did not, it would be terminated. Under the amended OA, he was required to pay $400 per month for electricity.

He found the storage space to be insufficient, about which he complained, to no avail. He has to rent additional storage space; the rent for this is $662.50 per month, with current attendant utility costs of about $40-$50 per month. He had been paying more for the utility costs at the storage space, but he had to reduce this expense in order to allocate money for the electricity at the facility, which he did by eliminating some of the electrically-powered equipment kept in storage.

His response to Manager Meyer's letter demand for payment of $3,600 for the cost of electricity was his question as to whether he had to pay for the months that the SRRA was closed. He, in fact, wrote on six different occasions. Any response he received from DOR was to merely postpone any decision on his query. He believes that he ultimately did pay for the months that the SRRA was closed and that this was eventually refunded to him.

The documentary evidence pertinent to Evan's claims consists of an Announcement for Vending Facility #1-815-S, as to Coalinga SRRA (North and South Bound) (RX20), two OAs (PXs 21 and 27), and his Declaration (PX43). The Announcement, which had a closing date of April 27, 2007, made no note that the Vendor would be required to pay for electricity. It did note, in the Financial Data Section, that $400 per month would be needed for utilities, but noted, as well, that there was no storage on the premises, whereby the Vendor would need to provide his own warehouse, at a rent of$1,000 per month.

The first OA, #29699, dated February 1, 2008, effective for the period of the attached contract between IA, reflected, at p. 8, that "the Vendor shall pay all debts arising from the operation of the facility. The IA, as to the SRRA, had a term of three years, unless sooner terminated by written notice by either party or amended, at p. 11. The number of this IA was 21887. DOR agreed to reimburse Cal Trans cost for utilities at the rate of $200 per month per site. Also included, as an attachment, were Articles of Agreement, dated November 3, 1998, which were between DOR and CalTrans and was specific as to Coalinga SRRA. In this Agreement, at p. 19, CalTrans agreed to provide at its own cost and expense all utilities used for the vending facility. There was no requirement for the Vendor to pay or reimburse CalTrans for this costs.

OA #26966 was amended, and superseded, by Agreement #28936, which was dated October I, 2012. On p. 8, thereof, is the provision requiring the Vendor to pay all debts arising from the operation of the facility. Attached is the IA #28737, which is for six months and carries the same terms as the same numbered agreement, concerning Howie, Murphy, and Crocker, all mentioned above.

OA #28936 was again amended, and superseded, by Amendment #29173, which was dated September 1, 2013, and attaching an IA DOR#29094, with a term of six months, effective until February 28, 2014. In the IA, CalTrans agreed to pay for utilities needed to operate vending facilities at SRRA sites which do not have independent electric service, at p. 56; DOR agreed to pay to CalTrans $200 per month per site as reimbursement for utility costs, at p. 57; and to

issue or amend OAs between DOR and Vendors at SRRA sites, incorporating the terms of the IA, including the Vendors' obligations to submit $200 per month to the DOR for the purpose of reimbursing CalTrans for utility costs, unless the vending facility has independent metered electric service, in which case the Vendor's obligation will be to pay the electric utility directly, at p. 57.

A third amendment to the OA, superseding Amendment #29173, was numbered 29254, which was dated March 1, 2014. This Amendment attached IA DOR#29202, with a term of three years, expiring on February 28, 2017. In the IA, DOR, at p. 80, once again agreed to pay for utilities as stated in the preceding paragraph; likewise, to enter into OAs or OA Amendments with Vendors at SRRA sites, incorporating the terms of this IA, including the Vendors' obligations to submit $200 per month to DOR for reimbursing Cal Trans for utility costs as indicated above, at p. 82; and, where there is no independent metered electric service, DOR agreed to transmit quarterly to CalTrans, $200 per month per site, as reimbursement for utility costs incurred by CalTrans, at p. 83. Lastly, the Amended OA includes Exhibit K, the same as described above concerning Howie, Murphy, and Crocker.

Evans stated in his Declaration that the storage space provided at the SRRA site is too small, it is intermittently closed for extended periods of time, without notice and, even when open, the configuration is such that access to the space is also inadequate. The rent for his off-site storage space is as testified to above. Until 2013, he never paid for electricity for the SRRA. The Announcement for the SRRA did not indicate that he was to pay for electricity.

He received a letter, dated July 18, 2012, from Manager Meyer, advising all SRRA vendors they would have to pay for electricity, at $200 per month per site, and those payments should be made to CalTrans. In response, he paid CalTrans $1,200.

In 2013, he signed, under duress an amended OA, which was retroactive to October 1, 2012. This was followed by a letter from Manager Meyer advising that he was required to send to DOR $3,600, $1,200 of which was for a deposit, and the remaining $2,400 was for electricity for September, 2012, through 2013. This did not take into account that one of the sites was closed from April I through August 15, 2013, nor did it give him credit for the $1,200 he had paid directly to CalTrans. He spoke in person and by telephone with, and sent emails to, DOR, seeking credit and offsets. He received no response. On September 24, 2013, he paid $3,600 to DOR. On October 1, 2013, Colegrove acknowledged, by email, receipts of $3,600 from Evans, and receipt of a waiver from CalTrans for the months one of the sites was closed.

Hood:

Complainant Rodger Hood (Hood) did not attend the hearing, so there is no testimony of his to consider. However, some documentary evidence that pertains to Hood's claims was admitted. This consists of OAs (PXs23 and 29) and his Declaration (PX45). No announcement for the facility which is the subject of the OAs was either admitted or offered.

The first OA provided was for Facility No. 1-738-S, located at Warlow SRRA, Agreement No. 26772. It was dated February 1, 2007. Standard practice appears to be the attachment of the applicable IA to the OA, marked as "Exhibit D". In this case, Exhibit D, at p. 11, is not the applicable IA, but rather a work Permit issued by CalTrans, on October 31, 1991, to DOR, for the replacement of the existing vending machines with new ones. Neither the OA or the Permit make any mention whatsoever of any party's obligation to provide/pay for electricity.

The second OA was for Facility No. 3-738-S[3] , also indicated to be for the Warlow SRRA, Agreement No. 29284, superseding Agreement No. 28961.[4] The date of this OA was March 1, 2014. As to the obligation for payment of all debts arising from the operation of the vending facility, the attachment of the IA, DOR 29202, and the inclusion of Exhibit K, this OA mirrored those mentioned above, in connection with Howie, Murphy, Crocker, and Evans.

Hood stated in his Declaration that he nets about $500 per month. DOR has done nothing to search out other vending facility opportunities for him. As a result of his requirement to pay utilities, he has had to borrow money on his credit cards and is planning to file bankruptcy.

Patche:

Patche testified that he had been operating the Gold Run SRRA vending facility since May, 2009. The Announcement for that facility informed him that he would need to provide storage on his own. For this, he has to rent off-site storage space, with a rental of $770 per month, together with an average of $800 per month for utilities at that space. In the Fall, 2012, he was required to pay an additional $200 per month per side, plus a deposit; this he paid until May, 2014, when a meters were installed. After that, he paid off the meter, paying directly to PG&S. The deposit he had paid to DOR was refunded to him after the meters were installed.

The documentary evidence, which is pertinent to Patche, consists of a Vending Facility Announcement (RX21), for Facility No. 3-1013-S, Gold Run SRRA, with a closing date of December 2, 2008; an OA (P30A), dated March 1, 2014; and his Declaration (p. 47).

The Announcement noted that the facility was currently closed for construction, estimated to open to the public in the spring of 2009. Also noted was the item that a vehicle and off-site storage would need to be provided by the Vendor. The Announcement was silent as to any requirement that the Vendor would have to pay for electricity.

The OA (Agreement Number 29253) that was admitted reflected that it superseded Agreement Number 29175, but, without explanation, the latter was not admitted or offered. At p. 7, of OA, Agreement Number 29253, it is provided that the Vendor was obligated to pay all debts arising from the operation of the vending facility. It includes Exhibit K, as to directions for making payments for electricity, in accord with all the Exhibits K, mentioned above, in connection with Howie, Murphy, Crocker, Evans and Hood. The attached IA was numbered as DOR Agreement

[3] The difference in the Facility Site Number was not explained.
[4] The difference in Agreement Number succession was not explained.

Number 29202, likewise in accord with all the same numbered IAs, mentioned above, in connection with Howie, Murphy, Crocker, Evans and Hood.

In his Declaration, Patche stated that he operated the SRRA since August, 2009. Since that date, he has paid rental and utilities for a storage space in the amount of $1,213 per month. Since October 2012, when he was required to pay for electricity for the facility itself, he paid $9,600[5] directly to DOR; and from May, 2014, through August, 2015, $6,629.64 to PG&E.

Green:

Petitioner Nnabuaku Green (Green) did not attend the hearing, so there is no testimony of his to consider. However, documentary evidence that pertains to Green's claims was admitted. This consists of an Announcement for Vending Facility No. 3-756-S, Turlock SRRA (RX23), OAs (PXs22 and 28), and his Declaration (PX44).

The Announcement had a closing date of September 1, 2010; it noted that the Vendor would have to establish a warehouse in close proximity to the site; and was silent as to any obligation on the Vendor for the payment of any utilities.

OA, Agreement Number 28088, was dated October 19, 2010. At p. 7, it reflected that the Vendor was to pay all debts arising from the operation of the vending facility. It also defined the monthly income of the Vendor to be the net proceeds of the business of the vending facility, less the set-aside fees. Attached, at p. 9, marked "Exhibit D", was an Encroachment Permit, from CalTrans, to DOR, dated September 14, 1991, for the installation of vending machines. The Permit is silent as to any provision for utilities and their cost. There was no IA attached to the OA.

A second OA, Agreement Number 29361, superseding Agreement Number 289166[6], dated March 1, 2014, reflected the Vendor's obligation to pay all debts arising from the operation of the vending facility (p. 8) and Exhibit K, identical to the OAs, of the same date, for Howie, Murphy, Crocker, Evans, Hood and Patche. The attached IA was DOR Agreement Number 29202, also identical to the IAs with the same DOR Agreement Number, mentioned above in connection with Howie, Murphy, Crocker, Evans, Hood and Patche.

In his Declaration, Green stated that the agreement he entered into for the operation of the Turlock SRRA did not have any provision requiring the payment of utilities. Exhibits attached to his Declaration reflect that in August, 2014; and April and May, 2015, he paid $200 each month to CalTrans for utilities. The Exhibits (Al-6) show further that he paid, for the same months, respectively, $1,773, $924, and $1,431, for a total of $4,128, for rent and utilities at his storage space. Exhibits B 1-4 show that he paid on October 1, 2014, the sum of $529.00, presumably for

[5] This amount does not reflect the amount he paid to DOR, as a deposit, but was refunded.

[6] No explanation was given as to why the superseded Agreement Number did not match the Agreement Number for the first OA; nor was any given as to why the name of this Facility was reflected to be the Christofferson SRRA, on the second OA, rather than the Turlock OA.

electricity at the Facility, to Turlock Irrigation District Water & Power (TIDW&P)[7]; on January 5, 2015, the sum of $482.75, to TIDW&P; and on August 19, 2015, the sum of$333.04, also to TIDW&P; for a total of$1,344.79. No explanation or documents was offered as to what the charges were for the intervening months.

Chairman Linker:

He testified that he as been a licensed blind vendor for 38 years and active on the CVPC for 16 years, holding several offices, including Chair. He wrote a letter on February 7, 2012, (PX36), to Director Xavier, on behalf of the CVPC, opposing any requirement for licensed blind vendors to pay for electricity to operate vending facilities at SRRAs. He requested that DOR take action to oppose CalTrans in assessing these costs against the Vendors and to postpone any consideration of signing a new IA for one or more years until the matter can be fully researched. He received no response to this letter. In August, 2012, he participated in, on behalf of the CVPC, a teleconference with Director Xavier and Manager Meyers, during which he was told that the Vendors would have to start paying for electricity.

Director Xavier:

Director Xavier testified that he had been the Director of DOR since February 2014; and prior, he had been the Deputy Director of the Specialized Services Division, of DOR. Before, and in 1998, he had been a licensed vendor himself.[8]

In the position of Deputy Director, he had been responsible, and provided policy and administrative oversight, for several programs which included services to the blind and visually, impaired, deaf and hard of hearing, the Orientation Center For The Blind, and the BEP. He explained that the BEP was established to provide individuals who are blind or visually impaired, who have been licensed, as participants in the BEP, on the basis of having successfully completing trainings, with opportunities to go to work, have gainful employment, to enjoy independence and equality, so that there might not be further need for public benefits. He explained further the process for licensed vendors to obtain these opportunities.

The decision to change the OAs, for the SRRA facilities, was made in 2012, while he was serving as Deputy Director. He did not believe that the change to require Vendors to pay for electricity was unusual. They had been paying in the past, since the beginning that SRRA facilities were made available to Vendors. He did not view the requirement to pay for electricity to be a limitation on the success of the vendor to make a living at the facility, it was merely another cost of doing business.

He was aware that the original OA for Evans provided that CalTrans was to pay for all utilities. Never before, had Cal Trans agreed to such a provision.

[7] Exhibit B2 appears to be an exact copy of Bl, and will, therefore, not be considered as another payment.
[8] While he was a vendor, he never paid for utilities; however, he never operated any facilities at SRRAs.

Sometime after April, 2010, be became aware that vendors were not paying utilities to Cal Trans and that Cal Trans was getting very upset because it was affecting the operations of the SRRAs. At some point, the legal teams got involved. At the time, DOR, BEP and Cal Trans were acting without benefit of an IA. Cal Trans threatened to terminate the facilities. He did not make the decision that DOR would make any reimbursements to CalTrans for electricity.

He called a meeting for January 30, 2012, for anyone who had an interest in the amount of money to be charged to the vendors for electricity. He did not recall if the decision to impose deposit requirements had already been made. However, he did not seek input from the CVPC on and of the issues of whether the vendors had to pay, how much the vendors had to pay and whether the vendors had to make a deposit, because he believed the payment of electricity is a statutory requirement, and therefore not within the discretion of DOR.

He denied ever being aware of any requirement to get an OA approved by the Rehabilitation Services Agency (RSA)[9], but admitted not doing so. He stated that DOR is not required to enter into indefinite term IAs on State property.

In 2003, Crocker had a fair hearing on the issue of a Vendor's obligation to pay for electricity and it was determined that CalTrans could charge the vendor for this, that electricity was included in the expenses of operating a facility. This was a decision by an Administrative Law Judge (ALJ) and he believes that no appeal was taken therefrom. The decision was based on the vendor's obligation to pay debts arising out of the operation of a vending facility and the obligation to comply with all statutes.

He became aware of a letter from CalTrans to Manager Meyer (RX18), dated June 14, 2011, whereby BEP was informed that installation of vending machines at a SRRA, which is not the subject of this matter, would not be authorized because the existing IA expired in 2008, and that no new facilities would be approved until a new IA was in place. This, coupled with the ALJ decision, was the basis upon which he agreed to reinstitute electricity payment to CalTrans, the obligation for which he reasoned could be passed on to the vendors. He decided to impose an additional obligation on the vendors to make a three months deposit for this debt, because since the primary obligation in the IA rested with DOR, if the vendor failed to pay, it would then fall to DOR to pay, which would take funds away from other programs.

CalTrans initially wanted to be reimbursed at the rate of $500 per month per site, but after negotiations and discussion, in 2012, he recommended a return to the pre-2008 amount of $200 per month per site, at least as an interim resolution, and CalTrans agreed. This resulted in the a six-month IA, from September I, 2012, through February 28, 2012 (RXlS), for existing SRRAs. In July, 2012, he met with the Vendors, informed them of the status of the negotiations and asked them to pay $200 per month per site to DOR, for pass through to CalTrans. He met again with them, in August, to let them know that such payments would be required to begin in

[9] The agency arm of the U.S. Department of Education that administers the regulations implementing the RS Act.

September. He also told them that they would be required to sign new OAs, to include the new IA requirements.

He stated that he did consider going to arbitration over CaTrans' threat to discontinue priority of vendors for vending facilities if their electricity costs were not paid, but did not act on that. His decision to not go to arbitration was because the provision in the SHC was, in his opinion, clear and the obligation of Vendors to pay for electricity at SRRAs had been the practice over a long time. He was not aware of any State agency, other than Ca!Trans, which required licensed blind vendors to pay for electrical.

The language, "The Contractor agrees: ... (t)o provide at its own cost and expense for the BEP's use the space and all utilities used for the vending facility ... " (Articles of Agreement, #DR-482, dated December 3, 1998, concerning Crocker, PX20, at p. 11), was stock language, until 2008, when the Agreement expired. A requirement to pay for electrical was not imposed on the Vendors until 2012. He was also not aware of any legal authority to require that Vendors pay deposits for electrical; however, he was likewise not aware of any that prohibited such a requirement. Further, he understood that the language, "CalTrans will: ... (design and construct so that) (e)ach installation includes the construction of a structure to house vending machines and storage ... " (IA, #21887, dated July 1, 1998, concerning Evans, PX21, at p. 12) to mean that Ca!Trans was responsible, under said IA, to provide adequate storage at the SRRA, rent free. He added that, typically, leaving aside cafeterias, the !As to operate vending facilities are for an indefinite period; however, he was not aware of any prohibition or requirement in the laws or regulations for this.

Manager Meyer:

She currently works for the DOR in the Information Technology division, but previously, *i.e.* from June 23, 2008, to November 14, 2013, held the position of BEP Manager. While in that position, she authored a letter to Murphy, dated December 24, 2009 (PX31), wherein she told Murphy that the 1A with Cal Trans that required DOR to collect funds for utility payments from Vendors operating SRRAs expired July, 2008. At that time, she did not renew the IA because she did not believe that DOR should be the collection department for another agency, and because no other State agency charged BEP vendors for utilities. With this in mind, Manager Meyer told Murphy that DOR would not be accepting any further payments from him for utilities and that any payments he had made to DOR after July 2008 would be refunded to him.

However, her further research had revealed that the only agency that charged for electricity was CalTrans. Nonetheless, ultimately, BEP agreed with CalTrans to require Vendors to pay for electricity directly to the utility company once CalTrans has meters placed on the facility.

She stated at the hearing that at the time she wrote this letter, she did not understand the contract and had not been in discussions with Cal Trans. The only discussions she had were with the previous Deputy Director (not Director Xavier) and the Chief of Accounting, whereby they made a joint determination as was reflected in the letter.

On September 13, 2011, she responded to a string of emails from Louie LaCompte, of CalTrans (PX33), in which she told Mr. LaCompte that even though she had been working on an agreement with CalTrans, there had been no resolution. Her position was that BEP cannot run utilities due to its legal restrictions (without enumerating them), and that the practice during the last three years while she had been the Manager, that for all nine of the SRRAs operated within that time frame, CalTrans has provided electricity at no cost. Her expectation was that this practice would continue.

She did not recall receiving any requests for payment plans due to financial hardship as to payment of the charges for utilities and/or deposits.

Manager Shira:

Manager Shira testified that his position, which began in 2011, was DOR Staff Service Manager I, a BEP consultant, overseeing the Northern California field office for all of the locations. The Vendors were required to sign new OAs in 2012, because the conditions had changed, *i.e.,* the new IA required a fee to be paid for the utilities. All Vendors are required to operated the vending facilities in accordance with the terms and conditions of the IA.

He had no knowledge of any conversations with CalTrans to provide adequate storage of 1,000 sq. ft. for any of the SRRAs. Based on his experience, he believed that if DOR insisted that CalTrans provide an adequate amount of storage at SRRAs, CalTrans would probably not comply.

Deputy Director Gomez:

She was appointed as Deputy Director, Specialized Services Division, October, 2014. Prior, and since October, 2012, she was the Assistant Deputy Director, Specialized Services Division. The BEP is under her oversight.

DOR did not consider charging utilities to vendors at SRRAs to be a major decision that required active participation by the CVPC, because of the provisions in the SHC for the Vendors to reimburse Cal Trans for the costs of utilities. She was not in her position when there were meetings with the CVPC and/or the Vendors concerning this issue, so she did not know what the nature was of any interactions between DOR and the CVPC and/or Vendors. She had the same answer as to the provisions of adequate storage space.

Chronology:

11/4/95 At its meeting, the CVPC endorsed the monthly utility fee and the reimbursement arrangement between DOR and CalTrans (Stipulated Fact)

1998 IA provided that Ca!Trans would provide electricity, but DOR would reimburse Cal Trans for its costs, at the rate of $200 per month per SRRA site. (PX2 l, p. 11)

2/1/01 Crocker OA, re Erreca SRRA, provides vendor shall pay all debts arising from operation of vending facility (PX20)

3/10/03 Crocker files grievance for full evidentiary hearing.

7/22/03 Director's Final Decision re Crocker OA, *in dicta,* found that electricity is a debt associated with the operation of the facility (RX14)

7/1/05 IA provided DOR was to reimburse Cal Trans for utilities, at the rate of $200 per month per SRRA site (RX17).

6/23/08 Manager Meyer became BEP Manager

6/30/08 IA expired (RX! 8).

July, 2008 Crocker received letter from Meyer that vendors were no longer obligated to pay for utilities and they would be receiving a refund for what had been paid in 2008 (PX42).

12/24/09 Manager Meyer wrote to Murphy that DOR will not be any longer accepting utility payments from him, that any payments already made by him to DOR from July, 2008, to the present will be reimbursed, and when CalTrans place meters at the vending locations, he is to pay off the meter to the utility company (PX31).

4/11/11 Final Task 5 Report Strategic Recommendations/Safety Roadside Rest Area Master Plan, prepared for CalTrans, providing: ... (if) CalTrans (is) required to engage a partner who would be ... a blind operator for the ... vending facilities, (t)his would present such a significant obstacle that it is like to preclude a partnership with any existing private enterprise (emphasis provided) ... If blind vendors are to have priority ... under any of the types of public/private arrangements described in this report, it would make such partnerships very difficult, if not impossible, to implement... (PX40).

6/14/11 Letter to Manager Meyer, from Cal Trans, telling her that no new facilities will be approved until a new IA is in place. (RX18)

8/1/11 Email from Manager Meyer, to CalTrans Office of Landscape Architecture Coordination and Planning, stating that she did not believe that neither BEP nor the Vendors were required to pay for utilities at the SRRAs, even though this had happened in the past. (PX33, p. 3-4)

9/13/11 Email to Cal Trans Louis LaCompte from Manager Meyer, responding to his forwarding of email from Cal Trans Office of Landscape Architecture Coordination and Planning, stating position that the cost of the utilities to operate BEP's vending machines are part of the cost of operating vending machines, and shall, therefore, be paid for by BEP. Because of the long delay in updating the IA, Cal Trans plans to provide notice to DOR that the electrical service for vending machines will be turned off and the machines must be removed if there is not an agreement by August 4, 2011. Manager Meyer wrote that she had been trying to work on an agreement with CalTrans, that she believed BEP had legal restrictions prohibiting running

utilities, that in the past three years CalTrans has been providing electricity at no cost and she had anticipated that this would continue. (PX33, p 1-2)

End, 2011 Conversations began about the Vendors paying for utilities. (Director Xavier's testimony)

Jan., 2012 Conversation began about setting the rates for utilities. Negotiations began. (Director Xavier's testimony)

1/30/12 DOR/CalTrans Meeting, called by Director Xavier and Deputy Director of CalTrans. Vendors in attendance. The Vendors were told that they were going to have to pay for utilities at the vending facilities. They were asked for comments concerning the amounts to be paid and options for payment. (PX35 and PX34).

2/7/12 Letter from Chairman Linker, to Director Xavier, telling him of CVPC's opposition to requirements that Vendors pay for electrical costs at SRRAs, and that a formal motion had been passed and forwarded to the BEP Manager, to that effect. (PX36)

July, 2012 Several meetings between DOR and the Vendors to discuss the issues. DOR informed Vendors, gave them forms to make payments directly to CalTrans, and told them the rate would be $200 per month per site. (Director Xavier's testimony)

Aug., 2012 Vendors were updated on the progress of negotiations and were told that payments for utilities would be beginning in September. (Director Xavier's testimony)

8/20/12 Draft agreements emailed to Vendors and discussed with them (PX37)

9/1/12 DOR and CalTrans entered into an interim six-month IA, for the period from September 1, 2012, through February 28, 2013. This provided that Vendors were required to resume paying $200 per month per site to DOR to reimburse CalTrans in the same amount for the costs of utilities, pay a refundable three-month deposit in the amount of $600 per site to DOR and if/when a separate electric meter was installed at the SRRA site, the Vendors were to start paying off the meter immediately and directly to the utility company. (Stipulated Fact; RX15)

10/26/12 Letter from Manager Meyer to Vendors, telling the Vendors of the general provisions of Exhibit K, to their new OAs, the general terms of the new IA, and instructing them to submit the deposit, along with the utility payment of $200 per site, for September and October. Further, she invited any of the Vendors who were unable to make these payment to submit a written request for an extension, along with the new OA, within four days to the BEP Consultant. She warned that if the new OA, fees and deposit were not submitted by October 30, 2012, DOR could seek its remedies, including termination of the OA (P37).

1/22-23/13 Full evidentiary hearing for Vendors complaining of having to pay for electricity and not having adequate storage. (Complainants' Complaint, p 4).

2/12/13 DOR Director adopted proposed decision of Hearing Officer upholding the actions of DOR. (Complainants' Complaint, p. 4).

2/15/13 Letter from Murphy, on behalf of Complainants, to Director Xavier, advising that the SRRA Vendors who had not yet signed new OAs would do so, under protest, pending federal arbitration. Further, he asked DOR to work with each Vendor who was unable to pay the utility payments and the deposits to establish a payment plan (Complainants' Complaint, p. 4)

2/19/13 Letter from Director Xavier to Murphy, that his requests would be taken under advisement. (Complainants' Complaint, p. 4)

3/1/13 Complainants filed complaint for arbitration. (Complainants' Complaint, p. 30).

9/27 /13 Email from Colegrove, Attorney for DOR, to Crocker, acknowledging his full payment for past due utilities and utility deposit.

DISCUSSION

The contentions of the Complainants are:

1. Making available only time-limited OAs to the Vendors was not authorized under the law.

2. Requiring Vendors to pay for electricity, as well as make a deposit for this, was not authorized under the law.

3. Requiring Vendors to pay for electricity constitutes a limitation on the operation of a vending facility, which is prohibited under the law.

4. Not providing adequate storage space at the vending facilities was contrary to law.

5. Not obtaining approval from the RSA of the amended OAs was contrary to law.

6. Failing to engage in active participation with the CVPC before entering into IAs with Cal Trans that required the Vendors pay for electricity for their facilities was contrary to law.

7. The amended OAs are unenforceable as they were obtained through procedural and substantive unconsionability.

8. DOR's actions have been, and continue to be, ongoing and are therefore not subject to any statute of limitations.

9. DOR engaged in retaliatory actions against some of the Complainants for opposing the amended OAs.

10. Complainants are entitled to compensatory damages.

11. Complainants are entitled to attorney fees for the bringing of this action.

DOR contended that:

1. DOR complied with the law.

2. The standard of proof that rests with the Complainants is to have evidence which overcomes the presumption that DOR's administrators performed their duties properly and in good faith.

3. Complainants are required, by law, to pay for utilities pursuant to the SHC, §220.5(d), and CCR, Title 9, Div. 3, Ch. 6, §7220(p), and, by contract, pursuant to their amended OAs and the current IA.

4. SHC, §220.5 is not pre-empted by Federal law.

5. DOR was within its rights to require Vendors to pay a utility deposit.

6. DOR was required, by law, to amend the OAs, to conform to the applicable IA.

7. DO R's decision to enter into a revised IA, and to amend the OAs pursuant thereto, was not the kind of decision that would require the active participation of the CVPC.

8. DOR is not required to enter into indefinite permits for vending facilities on State property.

9. The issue of any requirement of DOR to pay for the cost of off-site storage is not properly before this arbitration.

10. DOR is not required to pay for the cost of off-site storage.

11. Damages has not been proved with sufficient certainty, as required by Cal. Civil Code §3301.

12. Any damages that would be awarded cannot be awarded prior to the date of filing of the Amended Complaint for this arbitration.

13. The issue of any retaliation by DOR against any of the Complainants is not properly before this arbitration.

14. There is no cause of action for retaliation under the RS Act.

The parties are to be commended for presenting a well-prepared case in a zealous, as well as collegial fashion, all of which was of great assistance to and is appreciated by the Panel. The advocates have each ably argued the soundness of their various positions and have represented the parties well.

Analysis of Procedural Issues

I. Standard Of Proof

There is no issue as to the Complainants having the burden of proof in this matter. However, DOR claims that the standard of proof for the Complainants is that they must overcome a presumption that DOR's administrators performed their duties properly and in good faith. In support of its position, DOR relied on United States Postal Service v Gregory, 534 U.S. 1, 10, (2001). Inasmuch as this case deals with a complaint about a Merit System Protection Board ruling on an employment discipline matter, it is inapplicable to the case at hand. DOR relied further on Sunday Lake Iron Co. v Township of Wakefield, 247 U.S. 350, 353 (1918), which was an appeal of a property tax assessment based on a violation of the 14th Amendment. The defense was that the assessment was made in error. It was under the facts of that case, that the Court held that when a 14th Amendment violation is claimed, there is a presumption that the state officers have acted in good faith. The Complainants have made no 14th Amendment claim, whereby this latter case is not applicable as well.

On the other hand, Complainants argue that the Administrative Procedure Act, 20 U.S.C. §107d-2(a) applies to this case and requires only that they need show that DOR's actions are unsupported by substantial evidence, relying on Dickinson v Zurko, 527 U.S. 150, 152 (1999), and Premo v Martin, 119 F.3rd 764 (1997). A reading of the authorities cited in support of that position make clear that while there is a standard, in part, for substantial evidence, there must be a showing that there is substantial evidence that the actions in question are arbitrary and capricious. See Consolidated Edison Co. v NLRB, 305 us 197,229 (1938).

II. Whether the Issue of Payment for Off-Site Storage is Properly before the Panel DOR claims that the Panel has no authority to issue a decision on the issue because the Complainants have not ever filed for a full evidentiary hearing on the issue. The issues of the Complainants having to pay for off-site storage and seeking compensation therefor was raised in Complainants' Motion For Leave to File Amended Complaint. At the beginning of the hearing, pursuant to DOR agreeing to the granting of this Motion, the hearing proceeded and evidence was produced in support of, and in opposition, to this issue. To now determine that the issue was not properly before the Panel would be to have all the time and effort that the Panel and the Complainants spent on this task, as well as the costs of the Court Reporter to transcribe that evidence, be considered to be wasted time and effort. This the Panel will not do.

III. Whether the Issue of Retaliation is Properly Before the Panel DOR is correct: the issue of retaliation was not part of a request for a full evidentiary hearing, it was not raised during the full evidentiary hearing, nor was it raised in the Complaint, the Motion for Leave to Amend, the Pre-Arbitration Brief or Opening Statement of the Complainants. It is argued by the Complainants that the claim for retaliation should be considered and ruled on by the Panel. Johnson v City of Shelby, Miss., 135 S.Ct. 346,347 (2014) is cited as support. Although the Supreme Court did write that a tribunal "should freely give leave to amend when justice so requires", the Court made clear that its decision pertained to amending the legal theory of the pleading, not to amending the recitation of facts that would give rise to the legal theory. In the

case below, the Plaintiffs had filed a claim for relief from actions taken by the City Alderman in discharging them. The cause of action sounded in a civil rights action, but the Plaintiff had neglected to state, in their complaint, that the action was being brought pursuant to 42 USC §1983. It was based on these facts that the Supreme Court concluded that their action should not have been dismissed.

In the case before the Panel, although the evidence of the Complainants, if uncontroverted, would be probative of retaliation, DOR did not have any chance to prepare its evidence, which may very well have disproved the claim. Further, 34 CFR 395.3(11)(vii) provides that the SLA will submit to an arbitration panel those grievances of any vendor unresolved after a full evidentiary hearing. There has been no full evidentiary hearing on this issue. Accordingly, the Panel cannot consider the issue of retaliation.

IV. Whether the Issue of Indefinite OAs is Properly Before the Panel

A reading of the Complainants' Complaint and Amended Complaint (to which DOR did not object), at p 7, respectively, reveals that this issue was raised therein. Therefore, it is properly before the Panel and will be considered.

Analysis Of The Merits

V. Whether DOR's Action to Provide only Time-Limited OAs Was Authorized under the Law.

DOR presented OAs to the Vendors, dated October 1, 2012, to be effective for the term indicated in the underlying IA, which was for six months.[10] These were superseded by another OA, dated March 1, 2013, also to be effective for the term indicated in the underlying IA, which was for three years. Complainants claim that they are entitled to OAs with an indefinite term. They support this claim by relying on §19625 of the CA Wei.&Insti. Code. This Section provides, in part that the RS Act, and its implementing Regulations, shall serve as minimum standards for the operation of the BEP. They argue, since a Regulation, found at 34 CFR 395.35(b), provides that "the permit shall be issued for an indefinite period of time"; and another, found at 34 CFR 395.7(b), provides that the SLA "shall provide for the issuance of licenses for an indefinite period ... "; therefore, it stands to reason that the OA should also be for an indefinite period.

This requires a leap in logic that the Panel is not willing to make. First of all, there is a difference between a permit and an OA. The permit is an agreement entered into between the contracting agency[11], in this case, CalTrans, and the SLA, in this case, DOR. Secondly, there is a difference between Federal property and State property. The Section relied upon, 34 CFR 395.35(b), is one of the Sections under the title, Subpart C- Federal Property Management, and clearly relates only to the operation of a vending facility on Federal property, not State properties, such as are involved in the Complaint and Amended Complaint before this Panel. Moreover, §19625, of the

[10] These OAs were actually amendments to OAs for already established vending machine facilities.
[11] The term 11host agency" is, at times, a substitute for the term "contracting agency."

CA Wei.& Insti. Code, while adopting the RS Act, and its Regulations, as minimum standards for the operation of the BEP, also includes language, in (b) thereof, as follows:

> This article, as it applies to federal property, is intended to conform to that act and is to be of no force or effect if, ... any provision of this article or any regulation adopted under this article is in conflict with that act. Nothing in this subdivision shall be construed to impose limitations on the operation of vending facilities on state property, ... or to allow only those activities specifically enumerated in the Randolph-Sheppard Act. (Emphasis added)

DOR's action providing OAs for time-limited terms was authorized under the law. Accordingly, there was no evidence that this particular action of DOR was arbitrary or capricious.

VI. Whether DO R's Action to Require Vendors to Pay for Electricity, Together with a Deposit for Electricity, was Authorized under the Law.

Complainants claim that none of the OAs they signed in connection with the establishment of their facility and the commencement of the operation of a SRRA required that the Vendor pay for electricity. This was established by the evidence as to Murphy, Evans, Hood and Green. It should be noted that for Murphy and Evans, the IAs provided that DOR would reimburse Cal Trans for electricity, at the rate of $200 per month per site.

However, for Howie, Crocker and Patche, their initial OAs required that they pay for electricity, at the rate of $200 per month per site. Additionally, while Cracker's initial OA required that he pay for electricity, the Articles of Agreement/Permit contained the agreement that Ca!Trans was to provide, at its own cost, all utilities used for the vending facility. Further, it should be noted that Patche's Announcement was silent as to the Vendor paying for electricity. Thus, in general, it can be said that the proof was that some of the initial OAs signed by the Complainants provided that the Vendor would pay for the electricity and some would not.

On the other hand, what is factually controlling, as to this claim, is that one of the stipulated facts was "No. 2. From 1995 through 2008, California SRRA vendors paid $200 per month per site to the DOR, with DOR reimbursing Ca!Trans for the costs of utilities to operate the vending machines at the SRRAs, pursuant to the terms of an IA, between DOR and CalTrans." In fact, another of the stipulated facts provides, "No. 3. At its November 4, 1995, meeting, the CVPC, ... endorsed the monthly utility fee and the reimbursement arrangement between DOR and CalTrans." Complainants are bound by these stipulations.

In 2008, the IA, as to the SRRA vending machine facilities, between DOR and CalTrans expired. At that time, Manager Meyer determined that Vendors should no longer be required to pay for electricity at the SRRAs nor should DOR any longer be the collection conduit for those payments to be reimbursed to CalTrans. Moreover, CalTrans was silent as to contesting this determination. This was even the case with one facility at a SRRA that had unassigned vending

machines.[12] Then, in 2011, CalTrans began to demand a return to the previous arrangement for reimbursement. After negotiation, the issue of reimbursement morphed into amended Permits, IAs and OAs, starting with September 2, 2012.

DOR argues that, pursuant to the amended OAs, Vendors are obligated to pay for electrical service at the SRRAs as stated in Cal. Streets and Highways Code (SHC), §220.5(d). A reading of the entire Section reveals that CalTrans shall authorize the placement of vending machines in SRRAs and shall give preference to BEP vendors, in accordance with §19625 of the CA Wel.& Insti. Code, and pursuant to the RS Act; CalTrans may determine which SRRAs are suitable for inclusion in the vending machine program; CalTrans shall determine the costs for any maintenance, operations, design review, or other activities related to the vending machines; and shall be reimbursed for those costs from the revenues derived from the operation of the machines. The subject Sections of both codes were provisions that were enacted by the California Legislature, rather than regulations promulgated by either or both agencies.

While §220.5 thereof does provide that CalTrans shall be reimbursed for the costs of operations of the vending machines, it does not specifically enumerate electrical service as one of the costs, nor does it specify from whom the reimbursement will be sought. There was no evidence presented that either the RS Act or § 19625 of the CA Wei.& Insti. Code supplied answers to these missing parts nor did they address the issue of payment for utilities at all.

Nonetheless, CalTrans interpreted §220.5 to include electrical costs as one of those which should be reimbursed and that the Vendors should be responsible for that reimbursement. Because CalTrans was not a party to this Arbitration, the Panel has no jurisdiction to review that interpretation. However, DOR's adoption of that interpretation, under the circumstances of this matter, is a party to this Arbitration and is reviewable by this Panel.

DOR relies on Chevron, USA, Inc. v Natural Resources Defense Council, Inc., 467 US 837 (1984), in support of its position that since the language of §220.5 is clear, then the agency decision is entitled to deference. It is noteworthy, however, that in an earlier case, Skidmore v Swift, 323 U.S. 134 (1944), the Court stated in this regard that, even where the statutory (or regulatory) language is unambiguous, an analysis should take into account whether the agency's interpretation is based on permissible rules of construction, i.e. did it consider proper factors, such as the thoroughness evident in its consideration, the validity of its reasoning, and its consistency with earlier and later pronouncements. Even though this case was decided before the Administrative Procedure Act became effective in 1946, it was not overruled by, nor has it been abandoned by, cases decided after Chevron. For instance, in Gonzales v. Oregon, 546 U.S. 243 (2006), the matter involved the Court's review of an "Interpretive Rule issued by the Attorney General" that "determines that using controlled substances to assist suicide is not a legitimate medical practice and that dispensing or prescribing them for this purpose is unlawful under Controlled Substances Act. The Court there did summarily decide that the statute was ambiguous based on the following analysis: ... All would agree, we should think, that the statutory phrase "legitimate medical purpose" is a generality, susceptible to more precise

[12] This facility was not assigned to a blind vendor; rather it was assigned to a commercial interest.

definition and open to varying constructions, and thus ambiguous in the relevant sense." Having found ambiguity, the Court engaged in the further analysis as to whether it considered the proper factors as mentioned above.[13]

DOR claims that §220.5 explicitly provides that CalTrans must be reimbursed for the cost of operations from the revenues of the vending machines. From this, it extrapolates that the electricity utilized by each vending machine is a cost of operation. The statutory phrase "cost of operations" is susceptible to a more precise definition, given that the standard OA places on the Vendor the obligation of specified debts, such as providing, at the Vendor's costs, *inter alia,* workers' compensation insurance, public liability insurance, fire insurance, all necessary licenses, permits and food handler cards. The current standard OA places on the Vendor the additional obligation of being responsible for the payment of all debts which arise from the operation of the facility, without specifying what the "all" is. Does that mean that the Vendor could also be liable for the water service, gas, sewage, replacement of light bulbs, the construction of the vending facility, etc." From the contractual phrase of" all debts which arise from the operation of the facility", DOR interprets this to mean, without any factual justification, that "all debts" includes the liability for electricity. Lastly, DOR interprets "revenues of the vending machines" to mean the income the Vendor obtains from the vending machines. Might not the "revenue" be that which DOR receives from a nonblind vendor, or from Federal funding? Thus, DOR reasons that since §220.5 requires that the costs of operations of the vending machines must be reimbursed to Cal Trans from vending machine revenues, which DOR interprets to include the costs of electrical service, and since the standard OA requires that the Vendor pay all debts which arise, etc., which DOR interprets to include the costs of electrical service, the Vendor is bound by law and by contract to pay for electrical service.

DOR claims that it is buttressed in its position because of a Final Decision (RX14), in a full evidentiary hearing, requested by Crocker, to the effect that electricity was one of the debts that is associated with the operation of the vending machine facility and Crocker was obliged to pay the same. However, it must be noted that the transmittal letter for the Final Decision (p. 1, or RX14) reflects that the Decision was one that was made and signed by the Director, in modification of the proposed decision rendered by the Administrative Law Judge. Of much greater impact was that Crocker's appeal was denied, not on the merits of his claim, but on the basis that his request for the full evidentiary hearing had not been timely made. Immediately after coming to that conclusion, the author (either the Administrative Law Judge or the Director) went on, gratuitously and at great length, to review the matter on its merits and ultimately holding that, as mentioned above, electricity is one of the debts that is associated with the operation of the vending machine facility. Once the appeal was denied on the basis of untimeliness, there was no jurisdiction to go further into the merits, with the result that the remainder of the "decision" is considered to be *dicta* and not binding in any way. Accordingly, DOR's reliance on this Final Decision is misplaced.

[13] Reconciling Chevron, Mead, & Review of Agency Discretion, Michael P. Healy, Geo. Mason L.Rev, vol 19: 1 (2011)

The compelling conclusion is that §220.5, as interpreted by DOR, is ambiguous. Moreover, the reasoning it followed to impose a requirement on the Vendor to pay for electrical service is faulty for it is based on a double misinterpretation - in the first instance, when interpreting §220.5; and secondly, when it misinterpreted its own standard OA.

Further, the interpretation made by DOR is inconsistent with its prior practices, in the following respects:

1) in spite of the fact that, in 1995, the CVPC endorsed the practice of utility reimbursement, in some IAs that DOR agreed to, all the costs for electrical service at an SRRA were to be borne by CalTrans;

2) in other IAs, DOR agreed to reimburse CalTrans for the costs for electrical service;

3) for some vending machine facilities, the Announcements were silent as to the Vendor having to pay for electrical service;

4) in some IAs, CalTrans agreed to pay for the costs of electrical service, when the OA, covering the facility, required the Vendor to pay;

5) in 2008, the BEP Manager wrote to the Vendors, telling them that she would not be signing a new contract with CalTrans, that she did not believe that CalTrans was entitled to seek reimbursement for electricity from the Vendors, that DOR would be refunding any payments they had made, for 2008, for electrical service; and

6) None of the vending machine facilities, on State property, of all other State agencies, including CalTrans, other that its SRRAs, required payment for electrical service from the Vendors.

Thus, based on all the foregoing, there was substantial evidence that the provision in the amended OAs, requiring the Vendors to pay for electrical service, under the circumstances of this case, was arbitrary and capricious. If DOR believes that CalTrans was entitled to be reimbursed, it could have undertaken such payments; however, it was improper to shift any obligation that it believes it has, in this regard, to the Vendors.

DOR argues further that the fact that in August, 2015, the Governor signed legislation to amend §220.5, providing that CalTrans shall not be reimbursed for utility costs incurred by Vendors and shall itself pay those costs using State funds, establishes that this would not have been necessary if the non-amended version did not require SRRA Vendors to pay these costs in the first place. The Panel's interpretation ofthis statutory action is that it was enacted to clear up the ambiguity, the mistaken interpretation and the unequal application, as identified in this Decision.

DOR additionally relies on CCR, Title 9, Div. 3, Ch. 6, §7220(p), Operation of a Vending Facility, which provides:

> "The vendor shall be solely responsible for the payment of all rent or utility charges in accordance with the terms and conditions of the vendor operating agreement or permit or contract."

Because this provision appears in the regulations which govern the BEP, there should be no question that §7220(p) applies to BEP Vendors. However, by the expressed terms of this Section, the obligation to pay all rent or utility charges does not spring to life until there are viable terms and conditions in the governing OA or permit or IA. As concluded above, the governing OA's inclusion of the obligation to pay for electrical service, and deposits therefor, were not well-founded and was, thereby, of no effect to support a §7220(p) obligation.

Lastly, as to this issue, the Complainants argue, with regard to any contractual obligation on the Vendors to pay for electrical service, that the amended OAs are unconscionable and thus null and void. This argument was not made until the Complainants submitted their Reply Brief, which give DOR no chance to respond with witness testimony, documentary evidence or closing argument. For this reason, this claim will not be considered by the Panel.

VII. Whether DOR's Action to Not Provide Adequate Storage Space at the Vending Facilities was Authorized under the Law

The RS Act requires, at 20 U.S.C. 107(d)(l) that no department or agency of the United States shall undertake to occupy any building unless it is determined by the Secretary (of Education) that such building includes a satisfactory site for the operation of a vending facility by a blind person. It defines "satisfactory site" as an area to have sufficient space and such other facilities as may be prescribed by the Secretary's regulations. In 34 CFR 395.1(q)(1), the term is defined as meaning an area fully accessible to vending facility patrons having a minimum of 250 sq. ft available for the vending and storage of articles necessary for the operation of a vending facility. The CA Wei.& Insti. Code, at 19627(h) provides that the term "satisfactory site" means an area determined by the director to have sufficient space and any other facilities as the director shall by regulation prescribe. In CCR, Title 9, Div 3, Ch. 6, §7211(43), Operation of a Vending Facility, the term is defined as that which meets the requirement for a satisfactory site, as defined in 34 CFR 395.l(q).

Accordingly, what is required is that the site have a minimum of250 sq. ft. available for vending and storage. While some of the Complainants testified as to the square footage of the provided storage space was, none of the evidence established what the total square footage was provided for any of the Complainants for both vending and storage so that a determination could be made as to whether what was provided was under the minimum.

The Complainants argue that the need they had to pay for their own off-site storage amounted to a limitation on the operation of a vending facility which is prohibited under the law. In support, they cite 20 U.S.C. § 107(b). Unfortunately, nothing in that section pertains in any way

to the proposition asserted by Complainants. A search of the Federal regulations found, at 34 CFR 395.30, does contain pertinent language; however, the language was not supportive of Complainants' claim, inasmuch as the prohibition mentioned therein is directed to Federal departments and agencies not placing any limitation on the location or operation of a vending facility there is a justified finding that the location or operation would adversely affect the interests of the United States.

The California statutory companion is found in CA Wei.& Insti. Code §19627(c), which is titled, Vending Machine Income, Distribution, Director's Duties, Use of Income, State or Federal Property, provides, in pertinent part:

> " ... Any limitation on the placement or operation of a vending machine based on a finding by a state department or agency that the placement or operation would adversely affect the interests of the state shall be fully justified in writing to the director. The director shall determine whether the limitation is justified, and if dissatisfied with the justification, may submit the matter for arbitration ... "

Title 9, Div. 3, Ch. 6, §7216(c) and (e), is the California regulatory counterpart. Its relevant provisions are:

> "(c) ... The Department shall consult with the CVPC when evaluating whether a vending facility is feasible .... In determining feasibility of a vending facility the Director shall consider ... (2) the size, in square feet, of the area ... owned...by the contracting agency; ... (4) whether the establishment of a vending facility would adversely affect the interest of the state; (5) the likelihood the vending facility will produce adequate income ... for a blind vendor ... "

> "(e) Any decision that the placement or operation of a vending facility is not feasible, or that placement or operation would adversely affect the interests of the state shall be in writing, and shall be made available to the CVPC ... "

The CA. Wei. & Insti. Code sub-Section, being placed within a Section, the title of which indicates that it is addressing Vendor income from vending machine facilities, and the DOR/BEP regulation, expressly addressing Vendor income, make clear that the purpose of those laws and regulation are to protect the placement or operation of a vending facility from anything that would interfere with the Vendor realizing an adequate income. The mechanism to be used for such protection is justification, in writing, submitted to the Director and the CVPC. The evidence was that this was not done in this case.

However, the DOR/BEP regulation, at §721 l(a)(2) defines adequate net income, to be a minimum projected net income of $3,300 per month and states that the vending facility can be formed by combining two or more sites in order to realize this amount. With this in mind, a written justification would have to be made if the projected net income for the facility would be less than $3,300 per month. There was no evidence presented that the projected net income

for any of the facilities, here in question, was less than $3,300 per month. Therefore, there is no proof that requiring Vendors to pay for off-site storage was such a limitation of the operations of their facilities that a written justification would be required.

VIII. Whether DOR's Action to Not Obtain Approval of the Amended OAs from the Rehabilitation Services Administration was Authorized under the Law

Having found above that the action of DOR, in its amended OAs, requiring the Vendors to pay for electrical service, under the circumstances of this case, was arbitrary and capricious, this issue is moot.

IX. Whether DO R's Action to not engage in active participation with the CVPC, when Entering into IAs with CalTrans, requiring Vendors to Pay for Electricity for the SRRA Facilities was Authorized under the Law

Having found above that the action of DOR, in its amended OAs, requiring the Vendors to pay for electrical service, under the circumstances of this case, was arbitrary and capricious, this issue is also moot.

X. Whether Complainants are Entitled to Compensatory Damages

DOR argues that RS Act Arbitration Panels do not have the authority to award compensatory damages. In support of this claim, DOR relies on Wisconsin Dept. of Workforce Development, Div. of Vocational Rehabilitation v US Dept. of Education, 667 F. Supp 2d. 1007 (WD Wis, 2009). In this case, the District Court held that the Wisconsin SLA did not waive its 11th Amend. Sovereign Immunity to money damage awards, merely by agreeing to the requirements of participating in the RS Act program. The District Court notes, rightfully so, that while the RS Act is explicit in its requirement of the SLA that blind vendors have a pathway to file grievances for any instances of dissatisfaction, and then to be able to request an arbitration if the grievance is not resolved of to their satisfaction, the RS Act, as to vendor-triggered arbitration is silent as to what remedies would be available.[14] Yet, the District Court held that the Wisconsin SLA did waive its immunity as to injunctive relief, presumably satisfied to make a distinction between compensatory damages and equitable damages because "We may not enlarge the waiver beyond what the language of the statute requires" and "States should not be held subject to damage award that could expose them to potentially significant financial liability without being fully and clearly informed of this possibility."

The District Court considered a decision from the 9th Cir., but rejected it as being not persuasive. In Premo v Martin, 119 F.3rd 764 (1997), the Circuit Court held that the claim of the

[14] The RS Act also provides arbitration panels to be convened at the request of the SLA for noncompliance by Federal departments and agencies. In this regard, if a grievance goes to arbitration, the panel is authorized to make findings whether the acts or practices of any Federal department, agency or instrumentality are in violations with the terms of the RS Act. If there is a finding of any such violations, then it is left to the head of any such Federal entity to cause such acts or practices to be terminated and take any other action as may be necessary to carry out the panel decision.

Appellant, DOR, that the 11th "Amendment deprives Randolph-Sheppard arbitration panels of the authority to award compensatory relief is wholly unsupported." It concluded:

> "(T)he Eleventh Amendment does not apply to Randolph-Sheppard arbitration proceedings and thus does not limit the authority of arbitration panels convened under the Act to award compensatory relief. In addition, we believe that the overwhelming implication of the Act is that participating states have waived their sovereign immunity to suit in federal court for the enforcement of such awards."

The Circuit Court affirmed the decision below enforcing the arbitration panel's award for damages, injunctive relief and attorney's fees. Given that this Panel is sitting in California, which is one of the States that comprise the 9th Circuit Court of Appeals, and finding that the 9th Circuit Court is more persuasive and carries more precedential weight than the Wisconsin Dept. of Workforce Development case, the conclusion is that the Complainants are entitled to compensatory damages and attorney fees.

XI. Whether DO R's Actions Herein Have Been, and Continue to Be of a Continuing Nature, Whereby They are not Subject to Any Statute Of Limitations

The Complainants contend that DO R's requirements that Vendors pay for electrical service on their SRRAs in the OAs, dated Sep. 2, 1012, *et seq.,* were wrongs of a continuing nature, where no statute of limitations is applicable to these violations. In support, they rely on Almond v Boyles, 612 F.Supp 223 (ED NC, 1985). In this case, the action was brought by blind vendors against the State Dept. of Human Resources (DHR) for deducting, as contributions to the State retirement system, both the "employer" and "employee" contributions from vending stand proceeds. When the State legislature, in 1983, enacted legislation which discontinued a prior practice of having the licensed vendors participate in the State retirement system, it included a provision that the licensed vendor, withdrawing from the system, would be allowed to received only a refund of the employee contributions. The vendors brought suit five and half months later in the District Court, which found that the State officials had wrongfully required to pay both the "employer" and "employee" contributions to the retirement system. The vendors sought, as relief, compensation for all the money they were required to contribute to the system.

The DHR's position was that the vendors recovery should be limited to contributions they made within three years of the date of filing the action, pursuant to North Carolina's statute of limitations. The District Court disagreed, found that the nature of the wrongful deductions was in the nature of a continuing wrong, and ordered that the vendors were entitled to the relief requested. On appeal, the 4th Circuit, at 792 F.2d 451 (1986), the District Court's ruling as to this issue was affirmed.

In the case before this Panel, DOR argues that the Complainants filed, in October 2012, "their complaint... to express their dissatisfaction with the reinstitution of the utility payment."[15] Its position is that damages cannot be awarded prior to this date. In their Amended Complaint, at p. 30, the Vendors here seek that they be "reimbursed any amounts paid by them for electricity at SRRAs ... " Although the Amended Complaint, which was filed without objection by DOR, has the effect of overriding the language in the Complaint, at p. 30, that the Vendors were seeking reimbursement "of any amounts paid by them for electricity after September I, 2012", the testimony and Declarations of the Complainants are all couched in a starting date of September I, 2012, or later:

1. Howie - $200 per month, since October, 2012;

2. Hood - he did not attend the hearing, but his Declaration reflects that he has paid for electricity, at his Warlow SRRA, without any indication as to the amount[16];

3. Green - he also did not attend the hearing, but in his Declaration, he states that he has operated the Turlock SRRA (SB/NB) since October, 2010, and has paid, off the meter, $1,873.78, from August 2014, through May, 2015. His Notice of Intent To Terminate Vendor's Operating Agreement issued by DOR reflects that from September 12, 2012, through July, 2013, he owed $2,200 for electrical service, plus $600 for the utility deposit. Testimony was that this Notice had been settled, but the terms were not provided. Accordingly, the Panel has no knowledge of what he has paid beyond the $1,873.78 mentioned above;

4. Patche - in his testimony and Declaration, he states that he has operated the Gold Run SRRA (WB/EB) since August, 2009, and has paid, directly to DOR, since October, 2012, $9,600 for electricity, until May, 2014, when he began paying off the meter, to PG&E, $6,629.64, through August, 2015;

5. Evans - his Declaration and his testimony reflects that he has operated the Coalinga-Avenal SRRA since 2007, and has, since, September 1, 2012, paid $3,600.00;

6. Crocker - his Declaration and his testimony reflect that he has operated the Erreca SRRA since February, 2001. He had paid for electricity since that date until 2008; however, he previously sought relief for such payments which was denied on the basis that those claims were time barred. Since April, 2013, through November, 2014, he has paid $8,800

[15] While there was an indication in the Complaint and Amended Complaint that the full evidentiary hearing, which is the predecessor for this hearing, was held on January 22 and 23, 2013, and while it has to be assumed that DOR, by this language, is referring to the date on which the request for a full evidentiary hearing was made, there is no evidence in the record as to when these Complainants actually did this.

[16] Exhibit K, to the OA, dated March 1, 2014, reflects that he is obligated to pay $200 per month, at least as of that date. Additionally, there was testimony and documentary evidence that a October 26, 2012, letter from Manager Meyer to Vendors, telling the Vendors of the general provisions of Exhibit K, to their new OAs, the general terms of the new IA, and instructing them to submit the deposit, along with the utility payment of $200 per site, for September and October, 2012, (PX37). Hood also stated in his Declaration that he has operated this SRRA since 1994.

directly to DOR. From December 2014, through August, 2015, he began paying off the meter to PG&E, the sum of $7,169, for a total of$15,969.

7. Murphy - in his Declaration and during his testimony, he stated that he operated, since October, 2009, the Camp Roberts SRRA and the Shandon SRRA. From July, 2012, through July, 2013, he paid directly to DOR $3,000. In August, 2013, he began to pay off the meter to PG&E in the amount of$51,478.82, for a total of $54,478.82.

Accordingly, the evidence, aside from that of Crocker, consists of claims for payments made for electricity provided after September 1, 2012. That is the date from which the Vendors were required to pay for electrical service. This is the date when the action of DOR bore the fruit of consequential, compensable loss for the Vendors. Although, this is one month sooner than the date argued for by DOR, the DOR letter from Manager Meyer, dated October 26, 2012, instructs the Vendors to submit payments to CalTrans, for electrical services starting in September of that year.

The Complainants' claim that the requirement to pay was in the nature of a continuing wrong, whereby their claims are not subject to any statute of limitations as to their request for relief, may or may not have merit as a legal argument, but, under the circumstances of this case, it need not be addressed, since the evidence does not support the position that the Complainants suffered loss from the wrongful actions of DOR prior to September 1, 2012.

FINDINGS OF FACT

1. At all times relevant herein, Complainants were Vendors, having been selected to operate various SRRAs, in the State of California.

2. At all times relevant herein, the State of California, DOR, having been designated by the US Dept. of Education as an SLA, under the RS Act, has agreed to participate in that Act and be subject to its provisions.

3. Licensed blind vendors have operated vending facilities at SRRAs, in California, since the 1970's.

4. From 1995 through 2008, California SRRA vendors paid $200 per month per site to the DOR, with DOR reimbursing Ca!Trans for the costs of utilities to operate the vending machines at the SRRAs, pursuant to the terms of an IA, between DOR and CalTrans.

5. Such a reimbursement arrangement had been endorsed by the CVPC, in 1995.

6. Vendors on all other State property, whether under the control of CalTrans or any other State agency, are not required to pay for utilities.

7. In 2008, the IA between DOR and CalTrans expired. At that time, Manager Meyer determined that blind vendors would no longer be required to make payments to DOR

for reimbursement to Cal Trans, at the rate of $200 per month per site, for the cost of electricity to operate the vending machines at the SRRAs.

8. In 2011, Cal Trans began to demand that the costs of electricity for the operation of vending machines be reimbursed and made its agreement to any further continuation or establishment of facilities at SRRAs conditional upon agreement to resume of those payments.

9. DOR adopted CalTrans' interpretation of SHC §220.5, without any identification of what the specific costs would be, and without any specification as by whom the reimbursement should be made, that this Section required that Ca!Trans' costs for operation of the vending machines was to be reimbursed by the Vendors.

10. DOR interpreted its own regulations which govern the BEP, 9 CCR, Div. 3, Ch. 6, §7220(p), to the effect that the Vendor shall be solely responsible for the payment of all rent or utility charges in accordance with the terms and conditions of the OA or Permit or IA, to support inclusion in its OAs, and IAs with CalTrans, a term making the Vendor liable for payment of all debts of the facility operations, specifying reimbursement payments for electrical service to CalTrans, with evidence of not having engaged in thorough deliberation and consultation with the Rehabilitation Service Administration (RSA)[17], with evidence of relying on *dicta* in a previous full evidentiary hearing Director-issued decision, with evidence of inconsistent earlier practices, and with evidence of non-uniform application.

11. After negotiation, and effective September I, 2012, DOR and CalTrans entered into an interim six-month IA, for the period September 1, 2012, through February 28, 2013, which provided, in relevant part, that Vendors who were operating vending facilities at SRRAs were required to: (1) pay $200 per month to DOR to reimburse CalTrans in the same amount for the cost of utilities, (2) pay a refundable three-month deposit in the amount of $600, per facility, to DOR, and (3) ifi'when a separate electric meter was installed at the SRRA site, the vendors were to begin paying the utility company directly.

12. On October 26, 2012, the Vendors were informed that the aforementioned terms would be amended into their OAs and were instructed to comply in four days by paying for the months of September and October 2012, together with a deposit, or DOR could seek Termination of their OAs.

13. Complainants have made payments for electrical service as mentioned hereinabove:

CONCLUSIONS OF LAW

1. This matter, complaining of an agency decision, pursuant to the terms of the Randolph-Sheppard Act, is be governed by the Administrative Procedure Act, in which the

[17] The RSA administers the RS Act for the US Dept. of Education

standard for review is that there must be substantial evidence that the agency decision was arbitrary and capricious.

2. When one of the parties, DOR, does not object to the granting of the Complainants' Motion To Amend Complaint, all new claims in the Motion To Amend will be considered.

3. Issues that have not been raised at the full evidentiary hearing below will not be considered.

4. Issues that have not been raised until they are mentioned in the Complainants' Reply Brief, will not be considered.

5. Making an OA, for the operation of a vending facility, when the vending facility is located on State property, for a defined period of time is not contrary to the Regulations implementing the RS Act, and is, therefore, lacking of substantial evidence that this action was arbitrary or capricious.

6. DOR's adoption of CalTrans' interpretation of SHC §220.5 without any identification of what the specific costs would be, and without any specification as to by whom the reimbursement should be made, was substantial evidence that said adoption was arbitrary and capricious.

7. DOR interpreted its own regulations which govern the BEP, 9 CCR, Div. 3, Ch. 6, § 7220(p), to the effect that the Vendor shall be solely responsible for the payment of all rent or utility charges in accordance with the terms and conditions of the OA or Permit or IA, to support inclusion in its OAs, and IAs with Cal Trans, a term making the Vendor liable for payment of all debts of the facility operations, specifying reimbursement payments for electrical service to Cal Trans, devoid of any evidence of thorough deliberation and consultation with the Rehabilitation Service Administration (RSA)[18], of valid reasoning, of consistency of earlier practices, and of uniform application was substantial evidence that said interpretations was arbitrary and capricious.

8. The Eleventh Amendment does not apply to proceedings before Randolph-Sheppard arbitrations panels, whereby the Complainants are entitled to compensatory relief for payments they made for electrical service, and to attorney fees.

9. Where the majority of the evidence is that the losses suffered by the Vendors as a consequence of the actions/decisions of DOR described herein commenced on or after September 1, 2012, there was no substantial evidence showing that said actions/decisions were in the nature of a continuing wrong, not subject to any statute of limitations.

[18] The RSA administers the RS Act for the US Dept. of Education.

AWARD

With regard to the merits of the Complaint, Complainants had the burden of proof. The Complainants met its burden of proof by showing substantial evidence that DOR's actions, as indicated above, were arbitrary and capricious, in violation of the RS Act, and regulations issued thereunder, and in violation of the CA Wei.& Insti. Code, and its regulations issued for the administration of the BEP, when it required Vendors to pay for electricity used to operate the vending machine facilities and when it required Vendors to pay a deposit for electrical service.

Based on the foregoing, the compelling conclusion is that relief requested in the Complaint and Amended Complaint, should be, and hereby is, granted.

Remedy

1. All provisions in the current OAs, between DOR and the Complainants, that direct and require the Complainants to pay for electrical service at the SRRA vending facilities, to DOR, Cal Trans or a utility provider, shall be set aside, held for naught and be unenforceable.

2. All provisions in the current IA, between DOR and Cal Trans, that direct and require the Complainants to pay for electrical service at the SRRA vending facilities, to DOR, CalTrans or a utility provider, shall be unenforceable against the Complainants.

3. Any and all payments made by the Complainants, from and after September 1, 2012, through the date of payment, as set forth herein, for electrical service provided to their vending machine facilities, to either DOR, CalTrans or to a utility provider, are to be paid to them, by DOR, as and for compensatory damages, within 30 days from the date of this Decision, in the following particulars:

    b). To Complainant Hood, under the principle of fundamental fairness, the sum which is submitted for payments he made from and after September l, 2012, which can consist of his records, or those which can be produced by DOR, within 30 days from the date of this Decision;

    c). To Complainant Green, the sum of$1,873.78, together with documented payments made for electrical service after September l, 2015, to the date of payment;

    d). To Complainant Patche, the sum of $6,629.64, together with documented payments made for electrical service after September 1, 2015, to the date of payment;

    e). To Complainant Evans, the sum of$3,600.00, together with documented payments made for electrical service after September 1, 2015, to the date of payment;

    f). To Complainant Crocker, the sum of$15,969.00, together with documented payments made for electrical service after September 1, 2015, lo the date of payment;

g). To Complainant Murphy, the sum of$54,478.82, together with documented payments made for electrical service after September I, 2015, lo the date of payment.

4. Attorney fees, in an amount based on a 1·easonable rate, for a reasonable number of hours, necessary for the bringing of the Complaint herein.

5. The Panel will retain jurisdiction over the above remedy for 45 days from the date of this Decision to ensure compliance. ·In this regard, the parties are encouraged to exhaust all means of resolution, leading to settlement by agreement, where there are any disputes as to the implementation of this Award.

Dated this 18th day of January, 2016.

Sylvia Marks-Barnett
Chairperson

I concur with the Findings of Fact, Conclusions of Law, Award, and Remedy in the above Decision of the Chairperson, with the exception of Conclusion of Law No. 5, from which I dissent.

As explained in my Opinion, I would also hold that Operating Agreements must be for indefinite periods of time, that the state is responsible for providing adequate storage space for the operation of each vending facility, free of charge, and that the Department must reimburse each Complainant for the costs he has incurred in renting storage space.

Dated this 4th day of February, 2016.

Andrew D. Freeman
BROWN, GOLDSTEIN & LEVY, LLP
Complainants' Designee

BEFORE THE UNITED STATES DEPARTMENT OF EDUCATION, REHABILITATION SERVICES ADMINISTRATION RANDOLPH-SHEPPARD ACT ARBITRATION Case No. R-S/12-10

In the Matter of

JOE MURPHY, GARY CROCKER, TOM EVANS, NNABUAKU GREEN, RODGER HOOD, PAUL PATCHE, AND JAMES HOWIE, Complainants,

V.

STATE OF CALIFORNIA, DEPARTMENT OF REHABILITATION, Respondent.

TriPartite Panel:

Sylvia Marks-Barnett, Chair;

Andrew D. Freeman, Vendors' Designee;

Claire Le Flore, California Department of Rehabilitation's Designee

Date: February 4, 2016

Opinion Concurring in Part and Dissenting in Part

While I concur in most of the Chair's Decision. I respectfully dissent from (1) Section V , of the Decision (Whether DOR's Action to Provide Only Time-Limited OAs was Authorized Under the Law) and from the corresponding Conclusion of Law No. 5 on page 42 of the Decision, and from (2) Section VII (Whether DO R's Action to Not Provide Adequate Storage Space at the Vending Facilities was Authorized Under Law). In all other respects, I join in the Decision's Findings of Fact, Conclusions of Law, Award, and Remedy.

I. Operating Agreements Must be Issued for an Indefinite Time Period.

The Randolph-Sheppard Act and its implementing regulations require that every permit for the operation ofa particular vending facility "shall be issued for an indefinite period of time." 34 C.F.R. § 395.35(b). *See also* 20 U.S.C. § 107a(b) ("each such license shall be issued for an indefinite period"). The regulations further provide that the permit may be terminated only for non-compliance with agreed-upon terms. 34 C.F.R. § 395.3S(b). California's Mini Randolph-Sheppard Act explicitly adopts the federal Act and regulations as "minimum standards for the operation of the Business Enterprises Program for the Blind." Cal. Welf. & Inst. Code§ 19625. California thus adopted the federal requirement that permits be for an indefinite time period, subject to termination only for non-compliance with legitimate, agreed-upon terms. Notably, the original Operating Agreements issued to the complainant vendors did not have end dates.

I would therefore hold that all Operating Agreements must be for an unlimited time period (subject to termination for non-compliance by the vendor) and that the Department of Rehabilitation violated Welfare & Institution Code § 19625 when it required the vendors to sign time-limited Operating Agreements.

II. Vending Facilities Must Include Sufficient Storage Space.

California's Mini-Randolph-Sheppard Act requires that all properties occupied by a state agency (including Cal Trans) must "include[] a satisfactory site or sites for the location and operation of a vending facility by a blind person." Cal. Welf. & Inst. Code§ l 9627(f). *See also* 9 CCR§ 721 l(a)(43) ("'Site' means an area that meets the requirements for a satisfactory site, as defined in 34 CFR section 395.l(q), and the requirements for a feasible site, consistent with Welfare and Institutions Code section 19627(a)(2) .... "). A satisfactory site "for the location and operation of a vending facility" requires sufficient space for all reasonable aspects of that operation - including storage necessary for that operation.

The Department itself recognized that more storage space than was available at the roadside rest areas was required for the operation of those facilities. For example, the Announcement for Vending Facility #1-815-S (RX20) noted that the operation would require an off-site warehouse, estimated to cost $1,000 a month. Each of the vendors testified that he was required to rent off-site storage space in order to operate his facility, and the Department did not dispute the necessity or appropriateness of the space that each of them rented.

Because the State was required to provide each vendor with sufficient space for the operation of his vending facility, I would hold that each vendor is entitled to be reimbursed for all documents costs of renting such storage space and that the Department (either itself, or by negotiation with CalTrans) is hereafter responsible for providing such storage space, free of charge to the vendors.

III. Conclusion

With the exception of Conclusion of Law No. 5, I join in the Decision's Findings of Fact, Conclusions of Law, Award, and Remedy.

I would also go further than the Decision and hold that Operating Agreements must be for indefinite periods of time, that the state is responsible for providing adequate storage space for the operation of each vending facility, free of charge, and that the Department must reimburse each Complainant for the costs he has incurred in renting storage space.

February 4, 2016

Andrew D. Freeman
Complainants' Designee
[ ] I concur with the above Decision of the Chairperson.

[X] I dissent from the above Decision of the Chairperson.

Dated this 3rd day of February, 2016.

Claire Priestly LeFlore
Attorney at Law
Respondent's Designee

See attached Statement of Dissent

BEFORE THE UNITED STATES DEPARTMENT OF EDUCATION, REHABILITATION SERVICES ADMINISTRATION RANDOLPH-SHEPPARD ACT ARBITRATION

Case No. R-S/12-10

In the Matter of

JOE MURPHY, GARY CROCKER, TOM EVANS, NNABUAKU GREEN, RODGER HOOD, PAUL PATCHE, AND JAMES HOWIE,) Complainants,

And

STATE OF CALIFORNIA, DEPARTMENT OF REHABILITATION, Respondent.

TriPartite Panel:

Sylvia Marks-Barnett, Chair;

Andrew Freeman, Vendors Designee;

Claire Le Flore, California Department of Rehabilitation Designee

Date: February 3, 2016

STATEMENT OF DISSENT FROM THE DECISION OF THE CHAIRPERSON

I disagree with the legal conclusions of the Chairperson set forth in numbered paragraphs 6 and 7 found on page 42 of Decision in the above-referenced case, and consequently also disagree with the remedies set forth at pages 43-44 of the Decision. The reasons for my dissent are set forth below:

I. The Department of Rehabilitation's Interpretation of California Streets & Highways Code Section 220.5 Was Consistent with the Plain Meaning of the Statute and Reasonable.

The Chairperson concluded at page 42 of the Decision that:

> "6. DOR's adoption of CalTrans' interpretation of SHC §220.5 without any identification of what the specific costs would be, and without any specification as to by whom the reimbursement should be made, was substantial evidence that said adoption was arbitrary and capricious."

The Chairperson's discussion of how she arrived at this conclusion can be found at pages 28 through 34 of the Decision, and focusses on whether the Department of Rehabilitation

(hereafter DOR) was arbitrary and capricious in adopting the California Department of Transportation's (hereafter Caltrans') interpretation of California Streets & Highway Code section 220.5, subdivision (d), which provides:

> "(d) The department shall determine the costs for any maintenance, operations, design review, or other activities related to the vending machines and shall be reimbursed for those costs from the revenues derived from the operation of the machines." ('department' refers to Caltrans in this statute.)

Caltrans and DOR relied on this statute in requiring Vendors operating under the Business Enterprises Program for the Blind (hereafter 'BEP') to pay electric utility costs at Safety Roadside Rest Areas (hereafter SRRAs). The evidence in the record indicates the requirement for Vendors to pay electric utility costs was imposed consistently from the inception of the BEP program in the 1970's until 2008. (Stip, 111 and 2; Resp. Ex. 14, p.4; TR., Vol I, p. 127, II. 13-18; TR., Vol. I, p; 139, II. 19-25.) In 2008, Debra Meyer, Manager of the BEP at the time, decided that the requirement should no longer be implemented. (Stip, 15.) It is unclear from the record whether Manager Meyer was authorized to make this determination for DOR. (TR., Vol. II, p. 253, II. 2-7.) Her determination coincided with the expiration of the Interagency Agreement {IA) between DOR and Caltrans for operations of the BEP program at SRRAs. (Stip. 15.) The BEP program for SRRAs operated without an IA between DOR and Caltrans from 2008 until 2012. (Stip, 16.) During this time period DOR and Caltrans entered into negotiations for a new IA, and those negotiations included a discussion regarding whether the requirement for the Vendors to pay for electricity was statutorily mandated to be included in the new IA and enforced against the Vendors. (Stip, 116 and 7.) DOR and Caltrans determined that it was statutorily mandated to be imposed, and it is this determination that the Chairperson's Decision concludes is arbitrary and capricious. I disagree.

The first step in analyzing whether an agency's interpretation of a statute is reasonable is to determine whether the statutory language is clear and unambiguous. *(Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.* (1984) 67 U.S. 837, 842.) Courts generally assume that the words of a statute mean what an "ordinary" or "reasonable" person would understand them to mean. (William N. Eskridge, Jr., Philip P. Frickey, & Elizabeth Garrett, *Cases and Materials on Legislation: Statutes and the Creation of Public Policy* (3d. ed. 2001), atpg. 819, note 1.) If the words of a statute are clear and unambiguous, the court need not inquire any further into the meaning of the statute. *(Desert Palace, Inc. v. Costa* (2003) 539 U.S. 90, 99.)

A common understanding of the phrase" ... costs for any maintenance, operations, design review, or other activities related to the vending machines .. ," would clearly include electricity costs since vending machines will not function and cannot be operated without electricity. The Chairperson's contorted legal analysis that "costs" are not specifically defined in the statute is

not convincing in the face of the plain and ordinary meaning of the term. "Costs of operations" is not an ambiguous term susceptible to misinterpretation, as concluded in the Decision. Electricity is clearly a required cost of operating electrically operated vending machines.

The fact that DOR did not consistently and correctly implement this statutory provision during the period from 2008 through 2012 does not mean that the statute is unclear or ambiguous. The Decision speculates that the statute may not require costs of operations to be paid from the revenues collected by the Vendors from the vending machines because that "revenue" could come from Federal funding, and references this speculation to support its conclusion that the statute is ambiguous. (Decision, pg. 31.) There is no support for this speculation in the record, and it is directly contrary to the plain meaning of the language in the statute which provides: "[t]he department . . . shall be reimbursed for those costs from the revenues derived from the operation of the machines." *(Cal. Sts* & *Hwys. Code* §220.S(d).) To require DOR to pay the utility costs from funding sources other than revenue from the vending machines could also impact other valuable DORprograms. The Decision also points out that the vending machine facilities at SRRAs are the only BEP program facilities that are required to pay utility costs. This has been the case since the inception of the SRRA program, which has different statutory authorizations than other vending machine facilities, is not relevant to the case at hand, and does not contribute to an argument that the statute is ambiguous.

In conclusion, I disagree with the Chairperson's conclusion that the plain meaning of the statute is ambiguous. I believe it is clear and interpreted correctly by DOR.

Even if the plain meaning of the statute were ambiguous, however, I believe, based on the evidence as a whole, that the agencies' interpretation of the statute to require the Vendors to pay electrical utility costs is reasonable, and clearly not arbitrary and capricious. As stated in *Chevron,* supra, at page 844: "a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of the agency." The reasonableness of DOR's interpretation is further supported by the fact that Vendors have paid for the cost of electrical utilities for the overwhelming majority of the time since the program began in the early 1970s (Hearing Transcript, October 5, 2015,.p. 127, II. 16-19.), and the fact that the California Vendors Policy Committee endorsed the practice in 1995. (Stip. ,i,[1-3; Resp. Ex. 14, p.4; TR., Vol. I, p. 127, II. 13-18; TR., Vol. I, p. 139, II. 19-25; TR. Vol. I, p. 234, II. 7-14.).

II. DOR's Interpretation of Section 722Q(b) of its Regulations Governing the BEP is Reasonable.

The Chairperson concluded at page 42 of the Decision that:

> "7. DOR interpreted its own regulations which govern the BEP, 9 CCR, Div. 3, Ch. 6, §7220(p), to the effect that the Vendor shall be solely responsible for the payment of all rent or utility charges in accordance with the terms and conditions of the OA or Permit or IA, to support inclusion in its OAs, and IAs with CalTrans, a term making the Vendor liable for payment of all debts of the facility operations, specifying reimbursement payments for electrical service to CalTrans, devoid of any evidence of thorough deliberation and consultation with the Rehabilitation Service Administration (RSA), of valid reasoning, of consistency of earlier practices, and of uniform application was substantial evidence that said interpretations was arbitrary and capricious."

The regulation at issue provides that: "[t]he vendor shall be solely responsible for the payment of all rent or utility charges in accordance with the terms and conditions of the vendor operating agreement or permit or contract."· (Cal. Code Regs. Tit. 9, §7220(p).) DOR interpreted this provision, consistently with California Streets and Highways Code section 220.5, to require that Vendors be responsible for paying utility costs from the revenues they received from their vending machine operations. This interpretation is consistent with the plain meaning of the regulation and Streets & Highways Code section 220.5(d), and is reasonable in accordance with the discussion in section I above. Accordingly, I disagree with the Chairperson's conclusion that the regulation is ambiguous and DOR acted in an arbitrary and capricious manner in adopting this interpretation of the regulation.

III. None of the Remedies Enumerated in the Decision Should be Imposed on DOR.

Because DOR's interpretation of California Streets and Highways Code section 220.5 and Title 9, section 7220(p) of the California Code of Regulations are reasonable and correct, DOR should not be required to cease enforcing agreement provisions requiring Complainants to pay electrical utility costs until January **1,** 2016[19], or to pay any compensatory damages. In addition, because Complainants should not prevail in this action and have not identified any authority that would allow the imposition of attorney's fees, DOR should not be required to pay attorney's fees in any amount to Complainants.

Dated this 3rd day of February, 2016

CLAIRE PRIESTLEY LEFLORE, Esq.
Respondent's Designee

[19] Cal. Sts. & Hwy. Code§ 220.S(d) was amended, effective January 1, 2016, to specifically require Caltrans to pay utilities for vending facilities being operated at SRRAs under the BEP. Accordingly, Vendors should not be required to pay any utilities after that date.