

UNITED STATES DEPARTMENT OF EDUCATION

Case No. R-S/13-01 (Appeal from FH-2013-03-BEP)

DAVID ALTSTATT, SR.,

Claimant/Appellant, vs.

OKLAHOMA DEPARTMENT OF REHABILITATION SERVICES,

Respondent/Appellee.

ORDER

On November 6, 2015, this matter came on for hearing in Oklahoma City, Oklahoma before an arbitration panel consisting of R. Steven Haught, Gay A. Tudor and Christopher A. Wood pursuant to written notice and agreement of the parties. The Claimant/Appellant was represented by Kevin R. Donelson, and Respondent/Appellee was represented by Peter A. Nolan and Richard D. Olderbak. Witness Robert Brown was represented by Leif Swedlow. Counsel for the parties presented opening statements and then called witnesses to give sworn testimony.

FINDINGS OF FACT

1. In late 2012 Altstatt Services, L.L. C. and David Altstatt, Sr. ("Altstatt") submitted an application and a detailed Management Plan to the Oklahoma Department of Rehabilitative Services ("ODRS") Selection Committee in response to a published notice that ODRS was accepting applications for a Business Enterprise Program project at Fort Sill Military Base in Lawton, Oklahoma. (Claimant's Exhibits 18 and 19)
2. All applications for the job were required to have been submitted by December 12, 2012. (Claimant's Exhibit 18)

3. Altstatt has thirty-seven (37) years of food and vending service. (Claimant's Exhibit 34, Exhibit A, page 3)
4. When considering the applications for the Fort Sill job, the Selection Committee did not consider all of the criteria, specifically the monthly location reviews and annual evaluations. (Claimant's Exhibit 22, Cumulative Scoring Sheet) This fact is not disputed by ODRS. In fact, Mike Hamrick ("Hamrick") testified that ODRS did not comply with its own rules and regulations in this regard. (Testimony of Hamrick, Trial Transcript, 105:17-23) Hamrick testified that the location reviews and annual evaluations were not available at that time. (Testimony of Hamrick, Trial Transcript, 158:8-19) He further stated that no applicant had an annual evaluation for the previous 12 months. (Testimony of Hamrick, Trial Transcript 163:2-13)
5. On August 22, 2013, a hearing was conducted at the offices of ODRS, located at 3535 N.W. 58th Street, Suite 500, Oklahoma City, OK 73112. The Hearing Officer, Carla Dawn Haddox, (the "Hearing Officer") determined that because ODRS failed to consider a mandatory scoring factor when reviewing Altstatt's application, "the selection will be rendered null and void at this time." (Claimant's Exhibit 13)
6. On September 17, 2013, ODRS issued a Final Written Decision which rejected the Hearing Officer's determination that the selection process be considered null and void and ordered the Business Enterprise Program ("BEP") Operations Coordinator to use the monthly location reviews for all of the applicants that were available and to provide a score for the monthly location reviews and annual evaluations. ODRS further ordered the original Selection Committee to reconvene to consider this additional information. (Claimant's Exhibit 14) By that time, Hamrick, in consultation with some ECM members, licensed managers and staff (Testimony of Hamrick, Trial Transcript 159:10-17) had

developed a process for considering the annual evaluations (Testimony of Hamrick, Trial Transcript 164:18-165:1)

7. Following the Final Written Decision the same Panel was reconvened to select a Licensed Blind Vendor. (Claimant's Exhibit 14)
8. One of the members of the Panel was Charles Pride ("Pride"), who Hamrick had testified was biased against Altstatt. (Testimony of Altstatt, Trial Transcript, 61:12- 62:18 and testimony of Hamrick, Trial Transcript, 102:17-25) Pride denied that he told Hamrick that he was biased against Cantu, Altstatt's teaming partner for the Fort Sill job. He did say that he told Hamrick that there concerns about the relationship between Cantu and Mr. Swanson, who was the Licensed Blind Vendor at Fort Sill at one time. (Testimony of Pride, Trial Transcript, 186:19-22; 187:1-25)
9. Mr. Hamrick later changed his testimony referred to above after conferring with Pride, Mr. Nolan and Mr. Olderbak. (Testimony of Hamrick, Trial Transcript, 103:1- 15)
10. If Pride's scoring is removed from the selection process, Altstatt was the party with the most points. (Claimant's Exhibit 22)
11. Pride and Danny Robison ("Robison") were the only two members of the Panel that were employed by ODRS, and their boss was Dr. Michael Jones. (Testimony of Altstatt, Trial Transcript, 40:19-25)
12. Hamrick, Pride and Robison all reported to Dr. Michael Jones ("Jones"). Jones reported to the Executive Director of ODRS. (Testimony of Hamrick, Trial Transcript, 108:1-4)
13. According to the Cumulative Scoring Sheet, Pride and Robison marked Altstatt lower than the other two members of the Panel, who were licensed blind vendors. (Claimant's Exhibit 22)

14. Jones was a member of the National Federation for the Blind and had a strong relationship with Blackstone Consulting, who became the teaming partner with Robert Brown ("Brown"). (Testimony of Altstatt, (Trial Transcript 38:19-25, 39:1-7)
15. Altstatt testified that Pride told Altstatt that he would not select Cantu Services, Inc. ("Cantu") if he were Altstatt. (Testimony of Altstatt, Trial Transcript 26:19-25 and 27:1-3) Pride further indicated that if Altstatt selected Cantu, there was a possibility that he would not be selected to manage the Fort Sill facility. (Testimony of Altstatt, Trial Transcript, 62:12-21)
16. Pride testified that he was friends with Brown, who was awarded the interim manager contract, and that they had gone out to eat from time to time and had spent time together at a casino. (Testimony of Pride, Trial Transcript 189:22-25, 190:1-25, and 191:1-4)
17. Rhonda Hutson ("Hutson"), Chair of the Elected Committee of Managers (ECM), was the person that Hamrick was charged with working with to administer the program for the licensed blind vendors. (Testimony of Hamrick, Trial Transcript 125:20-126:5) Hutson was an official part of the BEP, and Hamrick was required by law to consult with her with respect to the selection process. (Testimony of Hamrick, Trial Transcript 127:16-23)
18. Hamrick sought the advice of Hutson, and Hutson advised that she could not approve of Hamrick's recommendation to permit Brown to immediately relinquish his satellite location in order to operate another (Fort Sill) when another applicant (Altstatt) was not operating a satellite location. Her position was consistent with the Satellite Policy, 12:25:4-61(b). She also objected to the appointment of Brown over Altstatt because it was inconsistent with a recent application of the Satellite Policy. (Claimant's Exhibit 43) Hamrick disregarded what she said. (Testimony of Hamrick, Trial Transcript, 128:20-21.

19. The Addendum to ODRS's BEP Placement Announcement for the Fort Sill job provides: "The following are deemed as eligibility criteria specific to this announcement...Not to have had any delinquency on taxes for the past 3 years." (Claimant's Exhibit 19)
20. At the time that he applied to be the licensed blind vendor at Fort Sill, Brown owed taxes and had tax liens. (Testimony of Brown, Trial Transcript, 137:9-13)
21. Brown had two Federal Tax Liens that were filed against his property in Rogers County, Oklahoma within the three years preceding the application due date for the Fort Sill BEP job (December 6, 2012). (Claimant's Exhibit 20, Federal Tax Lien #11- 27; Claimant's Exhibit 21, Federal Tax Lien #12-84. Federal Tax Lien #12-84 was filed against Brown's property in Rogers County on November 13, 2012, and is in the amount of \$6,481.96. Federal Tax Lien #11-27 was filed against Brown's property in Rogers County on February 28, 2011, and is in the amount of \$15,117.95.
22. Brown testified that he entered into a payment plan or installment agreement with the Internal Revenue Service to pay the taxes and penalties that he owed on a monthly basis. He said that all of the back taxes and penalties have now been paid but they had not been paid before the selection process for the Fort Sill contract. (Testimony of Brown, Trial Transcript, 134:21-25, 135:1-1-9,14-25 and 136:1-11)
23. Hamrick testified that ODRS distributed the BEP and Addendum. (Testimony of Hamrick, Trial Transcript 117:25-118:6) Hamrick said that he did not check to see whether applicants had outstanding tax liens but is now aware that Brown did have such liens filed against him. (Testimony of Hamrick, Trial Transcript 118:18-119:11)
24. Brown testified that he contacted Jones and advised him of his "tax situation". (Testimony of Brown, Trial Transcript, 136:12-16)

25. Brown did not notify Fort Sill that he owed taxes to the United States Government. (Testimony of Brown, Trial Transcript, 139:5-8)
26. D.R. Harris ("Harris"), a certified public accountant who has testified as a damages expert in prior court proceedings, calculated Altstatt's damages at \$2,561,461.00 for the fiscal year 2013 and \$2,192,086 for the fiscal year 2014. (Testimony of Harris, Trial Transcript, 94:4-13) He also testified that the contracts are typically for a five-year period and that he would expect the damages to remain relatively constant. (Testimony of Harris, Trial Transcript 94:19-25 95:1) Harris relied on the financial statements of a prior licensed blind vendor named Swanson. (Testimony of Harris, Trial Transcript 95:17-25 and 96:1-4) Harris testified that if Altstatt had only operated the contract for October, November and December of 2013, then the amount of damages would have been three-twelfths of the full year. (Testimony of Harris, Trial Transcript, 96:5-10) He assumed that the split of revenues between Brown and his teaming partner was the same as the split between Swanson and Cantu. (Testimony of Harris, Trial Transcript 97:17-25) Swanson was the licensed blind vendor prior to Brown. (Testimony of D.R. Harris, Trial Transcript, 98:17-19) No evidence was offered regarding the income earned by Brown under his contract at Fort Sill.
27. Counsel for ODRS objected to the testimony of Harris on the grounds that he was not provided with documents to support the testimony of the witness. Counsel for Altstatt responded that he listed Harris as an expert who would testify about damages and that they provided an expert witness report to counsel for ODRS. The Arbitration Panel deferred ruling on the objection and allowed Harris to testify provisionally.
28. Altstatt's Exhibits were admitted into evidence as follows: Claimant's Exhibits 2, 6, 13, 14, 18, 19, 21, 22, 31, 34, and 43. ODRS's Exhibits were admitted into evidence as follows: Respondent's Exhibits 1 and 2.

CONCLUSIONS OF LAW

1. Altstatt's Complaint and Request for Arbitration was filed pursuant to Okla. Admin. Code Section 612.25-4-75, the Randolph-Sheppard Act ("RSA"), 20 U.S.C. Sections 107d-1 and 107d-2, and 34 C.F.R. Section 395.13.
2. The RSA gives priority to state-licensed blind vendors to operate vending facilities on federal property. 20 U.S.C. Section 107(b). That priority is determined generally by the terms of the RSA but specifically by regulations proscribed by the Secretary of the Department of Education ("DOE"), with the DOE being charged with primary rule-making authority. *Kentucky v. United States*, 62 Fed. Cl. 445,454 (2004) aff'd sub nom *Kentucky Educ. Cabinet, Dept for the Blind v. United States*, 424 F.3d 1222 (Fed Cir. 2005).
3. Altstatt, as the party seeking to overturn the two orders that form the subject of this appeal, has the burden of proof. *Young v. State, Department of Community Affairs*, 567 So.2d 2 (Fla. 3rd DCA 1990). Altstatt met the burden of proof.
4. The Okla. Admin. Code Section 612:25-4-59(j) sets forth mandatory factors that must be considered by the Selection Committee when reviewing applications for the Fort Sill job. ODRS failed to follow the law with regard to the selection of the Licensed Blind Vendor at the Fort Sill job due to its admitted failure to utilize the mandatory factors for selection.
5. When an agency acts in a manner that violates its own rules, that conduct is legally void, as well as arbitrary and capricious. *Jackson v. Scott*, 2000 OK CIV APP 139, 18 P.3d 369,372. See also, *Cherokee Nation of Okla. V. Norton*, 389 F.3d 1074,1087 (10th Cir. 2004) It is undisputed that all selection factors were not considered. Therefore, ODRS was in violation of the rules, and the Hearing Officer correctly ruled that the selection of Robert Brown was null and void.

6. Utilizing the same Selection Committee again after it had violated its own rules deprived Altstatt of due process and was fundamentally unfair, especially in view of the fact that one of the committee members (Pride) was personal friends with Brown and was known to socialize with him.
7. ODRS claims that it had no responsibility for insuring that applicants satisfied the criteria set forth in its BEP Placement Announcement and Addendum and that it assumed that the U.S. Army would handle that task. (The Addendum was specifically mentioned on page 2 of the BEP Placement Announcement and constituted one unified document.) This claim, which was made without any factual or legal basis, was offered as an excuse for failing to screen applicants for tax delinquencies. Not only did ODRS send out the BEP Placement Announcement and Addendum (which did not include any disclaimer saying that ODRS has delegated its responsibilities to the U.S. Army) but its employee Jones was advised by Brown of the tax delinquencies. In short, ODRS had actual knowledge of Brown's tax issues despite its failure to check for tax delinquencies.
8. The Addendum to the BEP Placement Announcement set forth eligibility criteria including, "Not to have had any delinquency on taxes for the past three years..." Brown's own testimony established that he did not satisfy this requirement. Therefore, his selection by ODRS was in violation of the terms of the BEP Placement Announcement, and his appointment was invalid.
9. ODRS argued that Brown was not delinquent in paying taxes because he had entered into a Repayment Agreement with the Internal Revenue Service, citing 48 C.F.R. 9.406- 2(b)(l)(V)(A). The evidence presented by ODRS did not show that there was an installment agreement in place at the time that the selection of Brown was made. Further, the language in the Addendum did not track the language of the Code of Federal regulations or cite it by reference. Brown was not eligible by the clear meaning of the words set forth in the Addendum.

10. The objection to the testimony of Harris is overruled. The witness was listed as required by the Scheduling Order, and the subject of his testimony (damages suffered by Claimant) was set forth in the List of Witnesses.
11. After reviewing the legal briefs submitted by the parties, it is determined that damages can be awarded. However, the testimony by Harris regarding revenues earned by Swanson is not persuasive and it is determined that the proper measure of damages would be the revenues earned by Brown.
12. Subsequent to the evidentiary hearing Altstatt submitted the following briefs to the Arbitration Panel: David Altstatt, Sr.'s Findings of Fact and Conclusions of Law, David Altstatt, Sr.'s Appendix of Select Cases on Damages, and David Altstatt, Sr.'s Response in Opposition to Respondent's Post Trial Closing Argument and Brief. Subsequent to the evidentiary hearing ODRS submitted the following briefs to the Arbitration Panel: Respondent's Post Trial Closing Argument and Brief.

RELIEF GRANTED

1. Brown shall be removed as Licensed Blind Vendor at the Fort Sill job and replaced by Altstatt within 60 days of the date of this Order.
2. Damages are awarded to Altstatt in an amount equal to Brown's net revenue share during the time that he served as the Interim and Permanent Licensed Blind Vendor at the Fort Sill job along with interest at the legal rate.
3. The Arbitration Panel will retain jurisdiction for the sole purpose of awarding attorney's fees to Altstatt. Counsel for Altstatt shall submit information as to the amount of attorney's fee sought and the basis for such an award, including all information required to be submitted to a court for such purpose. Said submission shall be made within 15 days of the date of this Order ODRS shall

have 15 days thereafter to respond in writing to the requested attorney's fee award. The Arbitration panel will render an attorney's fee award within 30 days of receipt of ODRS's response.

IT IS SO ORDERED.

Dated the 18th day of January, 2016.

Robert Steven Haught

Gay A. Tudor *

Christopher A. Wood

*Arbitrator Tudor dissents from Conclusion of Law #6 but joins in the remainder of the Order.