

BEFORE AN ARBITRATION PANEL CONVENED BY THE SECRETARY OF EDUCATION

IN THE MATTER OF:

CASE NO. R-S/13-02

MARYLAND STATE DEPARTMENT OF EDUCATION, Complainant

v.

UNITED STATES GENERAL SERVICES ADMINISTRATION, Agency

Arbitration Panel:

Karen Andres, Chair

Kevin Funk, Member

Dana Murray, Member

Appearances:

For Maryland State Department of Education

Elliott L Schoen, Esq., Assistant Attorney General

For the General Services Administration

Manuel Oasin, Esq., Senior Assistant Regional Counsel

Place of Arbitration: via pleadings and teleconferences

Date of Arbitration: September 10, 2015

Date of Award: December 30, 2015

I. INTRODUCTION

The Randolph-Sheppard Act (the "Act") and regulation 34 C.F.R. Sec. 395.35(e) expands government employment for blind people and controls the issue of paying for relocation costs for blind vendors.

This matter is before the arbitration panel on a grievance filed by the State licensing Agency, the Maryland State Department of Education ("MSDE" or "SLA") in which it challenges the decision of the General Services Administration ("GSA") to not reimburse the SLA for moving expenses for a blind vending facility from the Social Security Metro West building to the Wabash building.

The arbitration panel consists of Kevin Funk, Dana Murray, and Karen Andres, who served as chair.

Elliott Schoen, Assistant Attorney General, represented MDSE.

Manuel Oasin, Assistant Regional Counsel, represented GSA.

II. PROCEDURAL MATTERS

The MSDE and the GSA agreed that there was no need for a hearing on the grievance. Instead, the parties agreed to submit the case for decision based on Motions for Summary Judgment ("MSJ").

On May 29, 2015, GSA filed a Motion to Dismiss on the grounds that the matter in question is not arbitrable under the Act. MSDE responded on June 7, 2015. The panel met via teleconference on June 8, 2015 to consider the Motion. That Motion was denied unanimously on June 8, 2015.

The MSJs were filed by MSDE and GSA on June 11, 2015. No responses were filed.

Oral argument was conducted on the motions via teleconference on September 10, 2015.

III. ISSUE

At Oral Argument, the parties agreed that the issue for determination is as follows:

Whether GSA violated the Randolph Sheppard Act and its implementing regulations when it failed to pay for the relocation of the SLA's blind vending facility for Social Security from the closed GSA Metro West facility to the new GSA facility in the Wabash building? If so, what is the appropriate remedy?

IV. POSITIONS OF THE PARTIES

A. Maryland State Department of Education

The SLA operated a blind vending facility in GSA's Metro West building beginning in 1980. In 2009, the SLA was informed by GSA that it was closing its facility at Metro West and relocating the tenant there, the Social Security Administration, to GSA's facility on Wabash Avenue. GSA informed the SLA that it would provide space for the blind vending facility at Wabash. The SLA worked with GSA from 2009 into 2013 on the relocation process. The SLA informed GSA of GSA's obligation to pay for the move of the vending facility under the Randolph-Sheppard Act and its regulations because GSA had initiated this move. Several months into 2013, GSA informed the SLA that its position was that it did not have to pay for the move. The SLA hired and paid a moving company to move its vending equipment into the Wabash building. Despite numerous requests, GSA refused to reimburse the SLA for the costs of moving. This complaint for arbitration was filed with the Department of Education on September 30, 2013.

B. General Services Administration

GSA contends that its reading of the Randolph-Sheppard regulations does not obligate it to pay the expenses for the move. It contends that GSA only has to pay for relocations within the same building. The move to Wabash was relocation to another building under a new permit. Therefore GSA is not obligated to pay for the costs of this move. It also contends that the statute and regulations require that the SLA provide the vending equipment and initial stock to

the vendor. Therefore, it was the SLA's obligation to move the vending equipment and stock to Wabash. It also asserts that since the invoice was sent to the SLA at its headquarters in Baltimore, there is no evidence that the invoice was for the moving of the vending equipment from Metro West to Wabash. Finally, it argues that requiring the GSA to pay for the move sets a bad precedent for future moves.

V. FINDINGS OF FACT

The following Findings of Fact are determined to be relevant to this matter {There were no issues of material fact, and it is appropriate to decide the case on the MSJs.):

The Randolph-Sheppard Act ("Act") and regulation 34 C.F.R. Sec. 395.35(e) seeks to expand the economic and employment opportunities of blind people. It states as follows:

- (e) The permit shall further provide that installation, modification, relocation, removal, and renovation of vending facilities shall be subject to the prior approval and supervision of the on-site official responsible for the federal property of the property managing department, agency, or instrumentality, and the State licensing agency; that costs of relocations initiated by the State licensing agency shall be paid by the State licensing agency; and that costs of relocations initiated by the department, agency, or instrumentality shall be borne by such department, agency, or instrumentality.

In addition, regulation 20 U.S.C. 107(b) states as follows:

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

- (1) to cooperate with the Secretary in carrying out the purpose of this chapter;
- (2) to provide for each licensed blind person such vending facility equipment, and adequate initial stock of suitable articles to be vended therefrom, as may be necessary: Provided, however, That such equipment and stock may be owned by the licensing agency for use

of the blind, or by the blind individual to whom the license is issued: And provided further, That if ownership of such equipment is vested in the blind licensee, (A) the State licensing agency shall retain a first option to repurchase such equipment and (B) in the event such individual dies or for any other reason ceases to be a licensee or transfers to another vending facility, ownership of such equipment shall become vested in the State licensing agency (for transfer to a successor licensee) subject to an obligation on the part of the State licensing agency to pay to such individual (or to his estate) the fair value of his interest therein as later determined in accordance with regulations of the State licensing agency and after opportunity for a fair hearing...

Beginning in 1980, the SLA operated a blind vendor facility in GSA's Metro West Building at 300 North Greene Street in Baltimore, Maryland. The SLA provided equipment and initial stock for the vending facility.

In 2009, GSA informed the SLA that it was closing the Metro West facility and relocating the tenant, the Social Security Administration, to another building at 6100 Wabash Avenue in Baltimore. The GSA provided space for the blind vendor at the Wabash building under a new permit.

In 2013, the GSA informed the SLA that it did not intend to pay for the move of the blind vending equipment.

GSA asserted that the Act covered only moves within the original building.

In a letter dated July 30, 2009, the GSA referred to the move to the Wabash building as "relocation."

Although it disagreed with GSA's assertion that the Act covered only moves within the building (and with the GSA's refusal to pay for the move of the blind vending equipment), the SLA hired and paid for a moving company to move the blind vendor's vending equipment to the Wabash building. The cost incurred was \$3,100.00.

Under the Act, the normal, ordinary meaning of "relocate" prevails. That is, "relocate" applies to a move within a building or to a new building. The GSA was responsible for the costs of relocating the blind vendor because the GSA had initiated the move. A new permit because of an address change does not change to meaning of "relocation".

It is highly unlikely that the GSA would be asked to cover costs of a move to another state or even to another city.

VI. DISCUSSION AND OPINION

A. Summary Judgment

Summary judgment is appropriate where it is determined that given the substantive, legal and evidentiary standards applicable to the case, there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law. *Anderson v. Liberty Lobby*, 477 U.S. 242 (1996). Both SLA and GSA agree that there are no genuine issues of material fact and that the case can be decided based on the motions and evidence.

B. Question Presented:

Did the General Services Administration violate the Randolph-Sheppard Act and its implementing regulations when it failed to pay for the relocation of a blind vending facility from one building to another? For reasons set forth below, the majority of the panel concludes that the Act was violated.

The resolution of this question is the interpretation of the regulations implementing the Randolph-Sheppard Act. 34 C.F. R. § 395.35(e). That pertinent regulation provides:

(e) The permit shall further provide that installation, modification, relocation, removal, and renovation of vending facilities shall be subject to the prior approval and supervision of the on-site official responsible for the Federal property of the property managing department, agency, or instrumentality, and the State licensing agency; that costs of relocations initiated by the State

licensing agency shall be paid by the State licensing agency; and that costs of relocations initiated by the department, agency, or instrumentality shall be borne by such department, agency, or instrumentality. (emphasis added).

The SLA argues that the normal, ordinary meaning of "relocate" includes both a move within a facility and from one facility to another. Under case law, terms can be assumed to have their ordinary, established meaning for which it is appropriate to consult dictionaries. Mississippi Dept. of Rehabilitation Services v. U.S., 61U.S. Fed. Cl. 20, 26 (2004). And the words should be given the commonly understood meaning that gives effect to the statute as written. Jones v. State, 336 Md. 255, 261 (1994).

The SLA cites Webster's Dictionary, Black's Law Dictionary, Dictionary. com and S.I. Hayakawa¹ all in support of its assertion that "relocation" means a move to a new location, whether within a building or to a new building. It also cites Howe v. Bolger, 1984 WL 1131 (E.D. Wis. July 20, 1984), to support this meaning in a Randolph-Sheppard case in federal court. In Howe, the court issued a temporary restraining order requiring the Postmaster General of the United States to suspend the bidding process for vending facilities at the new post office in Green Bay. The Postmaster General was also restrained from soliciting bids, contracting for vending services at the new post office or terminating the blind vendor's permit to operate the business. The court allowed Howe to operate the vending facility in the new post office while the arbitration was ongoing even without a new permit, and to move the vending facility at his expense during the arbitration process. The court advised Howe that if he applied to the court for confirmation of an arbitration award in his favor, he would be permitted to ask the court to require the Postmaster General to pay the costs of his relocation to the new location of the main United States Post Office pursuant to 34 C.F.R. § 395.35. The court's language makes it clear that if Howe prevailed in the arbitration and the case returned to the court, the Federal agency would be responsible for the costs of his relocation to a new building. The court stated:

¹ S.I. Hayakawa, Choose the Right Word: A Modern Guide to Synonyms (Perennial library1968)

It is further ordered that at such time as the plaintiff shall apply to this court for confirmation of an arbitration award in his favor, the plaintiff shall be permitted to ask this court to require defendant Bolger to pay the costs of plaintiff's relocation to the new location of the main U.S. Post Office in Green Bay, Wisconsin pursuant to 34 C.F.R. §395.35

The SLA also cites guidance from the Department of Education that agrees that the move initiated by GSA from Metro West to Wabash is a relocation for which the Federal agency should incur the cost. See, Memo from Dan Frye, Attachment 12 to MSDE's Motion. A federal agency is entitled to deference in its interpretation of its own regulations. *Kentucky v. United States*, 62 Fed. Cl. 445, 455 (2004), *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945) (The agency's construction of the regulation controls if the meaning of the words used is in doubt). And in a letter to the SLA, the GSA referred to the move from the Metro West building to the Wabash building as "relocation". See, letter of July 30, 2009 from Teresa Williams to Bart Peebles, Attachment 1 to MSDE's Motion for summary Judgment.

Finally, the SLA cites GSA's own regulations to support its assertion that "relocation" applies to relocation both within a building and to another building. GSA defines "relocation" at 41C.F.R. §102- 85.35:

GSA-initiated move means any relocation action in GSA-controlled space that (1) is involuntary to the customer agency and if required to be effective prior to the expiration of an effective OA, or in the case of leased space, prior to the expiration of the lease;...(emphasis added)

GSA argues that the move of the vending equipment was the obligation of the SLA under §107b (2) of the Randolph-Sheppard Act. But that provision requires the SLA supply necessary vending equipment and initial stock of suitable articles. The SLA provided such equipment and initial stock many years before as it has had a vending facility at Metro West since 1980. This was simply a move of that equipment and stock that had already been provided.

GSA argues that it did not initiate the move to Wabash and that the SLA initiated the move by hiring a commercial mover. It cites the invoice to the SLA at its address. But there can be no question that the SLA had to move if it wanted to continue to have a vending facility at the new location and was invited to do so by GSA. And there is testimony not only that the equipment and stock was moved to Wabash, but that the SLA did not even request that it be reimbursed for the man-hours that it expended on the move. It only wishes to be reimbursed for the actual costs of the commercial mover. See, Declaration of Bart Peebles, attached to MSDE's Motion for Summary Judgment.

GSA argues that because there is a new permit, this is not relocation but a new facility.

However, in fact, the entire operations of the Metro West facility were moved to Wabash. The fact that there is a new permit because of the address change does not mean that this was not a relocation. And the language concerning who is to pay for relocations is required by statute to be in every permit.

GSA argues, for the first time at oral argument, that "relocation" must be interpreted as only within a building because of the wording of §395.35(e). It cites the first phrase of the regulation:

The permit shall further provide that installation, modification, relocation, removal, and renovation of vending facilities shall be subject to the prior approval and supervision of the on- site official responsible for the Federal property...

It asserts that, because "relocation" is included with installation removal and renovation, relocation must only apply to movement within a facility as installation removal and renovation could only apply to a facility within a building. It cites the rule of construction of *noscitur a sociis* to support this theory. Per Black's Law Dictionary, that rule states that the intended meaning of an ambiguous word depends upon the context in which it is used. We believe that the rule of construction suggested by the GSA is not applicable in this case.

First, "relocation" is not ambiguous. As cited above, it means a move to a new place, wherever that place might be. Since the term at issue is not ambiguous, *noscitur a sociis* does not apply.

Even if *noscitur a sociis* did apply, GSA misinterprets its application. Section 395.9S(e) contains two clauses separated by a semi-colon. The first clause that applies to the installation, relocation modification or removal of vending facilities concerns who shall approve such actions. The second clause concerns simply who shall pay for a relocation without reference to any other actions:

"...and that costs of relocations initiated by the department, agency, or instrumentality shall be borne by such department, agency, or instrumentality."

There is no ambiguity in the second clause of the regulation. As stated above, words should be given the commonly understood meaning that gives effect to the statute as written. *Jones v. State*, 336 Md. 255, 261 (1994). The statute was written for the benefit of the blind vending program. Requiring the blind vendor to pay for a move initiated by the federal agency would not give effect to the statute as written.

Finally, one panel member inquired whether as a policy matter a federal agency would be faced with an onerous burden if, for example, it were to move a facility from Maryland to California.

However, in such a case, the federal agency would have to terminate the permit in Maryland and work with the SLA in California to obtain a new permit and install a new vendor in the new facility. A Maryland vendor would not be moved to California. And even within state, it is highly unlikely that a blind vendor in Baltimore would pull up stakes and move to a new facility in Western Maryland. The blind vendor would more likely apply to the SLA for a permit for a facility near where he/she already lives. Having GSA pay for this modest move, considering the overall cost of moving the Social Security Administration, does not seem onerous to the majority of this panel.

AWARD

The majority of the panel imposes the following remedy:

The General Services Administration shall reimburse the Maryland State Department of Education the moving costs of \$3,100.00 within 30 days of the receipt of this opinion and award. The panel shall retain jurisdiction to ensure completion of the award.

KAREN ANDRES

DANA H. MURRAY

STATEMENT OF PANEL MEMBER FUNK

DISSENTING OPINION

I dissent from the other members of this panel. For the reasons outlined below, I hold that the SLA is responsible for the costs associated with moving from the Metro West Building to the new location at 6100 Wabash Avenue.

The issue for this Case whether the Randolph-Sheppard regulations requires the SLA or GSA to pay for the costs associated with moving the equipment and items from one building to another building under a new permit. Out inquiry must start with the plain language of the applicable regulations to decide this issue.

Under 20 U.S.C. 107(b), the state licensing agency is responsible for providing for each licensed blind person the vending facility equipment and adequate initial stock of suitable articles. This regulation requires the state licensing agency to ensure the vendor has the necessary equipment and articles whenever a new permit Issued. As explained further below, there Is no exception in these regulations that requires the property managing agency to pay for these setup costs for a new permitted location when there was a previous permit at a different building.

There is a regulation under 34 U.S.C. 395.35(e) mandating that the costs of relocations initiated by the department, agency, or instrumentality shall be borne by such department, agency, or instrumentality. However, the title of 34 U.S.C. 395.35 is terms of permit. A permit is site specific and does not transfer to new building. A new permit must be issued by the property managing agency when moving to a new building. By naming this section terms of permit> the contents of this section only govern the terms of an existing permit.

In addition, there is no mention within 34 U.S.C. 395.35(e) of moving to a new building. If the terms of permit section was intended to cover moving to a new location for a new permit, one would expect the regulations would have provided additional guidance regarding how far away the new building can be for moving 'costs to be covered or whether a certain percentage of the

existing tenants need to be going to the new location to qualify for moving costs. None of this guidance is provided in this section or elsewhere in the regulations. Without providing more detailed guidance for how relocations to a new building for a new permit would operate, there is no reason to interpret this 34 U.S.C. 395.35(e) as covering such relocations.

The title of 34 U.S.C. 395.35 and the plain language of the applicable regulations support the interpretation that relocations from one permitted building to another permitted building are not covered by 34 U.S.C. 395.35(e). 34 U.S.C. 395.35(e) only governs whether the state licensing agency or property managing agency is responsible for moving equipment under the terms of an existing permit. When the move involves a new permit being issued for a new building, 20 U.S.C. 107(b) would require the state licensing agency to pay for any costs in relocating the equipment.

The SLA has argued that these regulations should be interpreted differently. However, the authorities provided by the SLA do not provide sufficient reason to deviate from the plain language of the regulations. The federal district court's injunction decision in *Howe v. Bolger*, 1984 WL 1131 (E.D. Wis. July 20, 1984) was based on unique facts not present in this case and is not controlling authority for this case. The dictionary definitions of "initiate" and "relocate" must be considered in the context of how they are used in the regulation. When considered in context, they support the literal interpretation that 20 U.S.C. 107(b) would require the state licensing agency to pay for any costs in relocating the equipment involving a new permit for a new building. In addition, the informal guidance from the U.S. Department of Education does not justify a contrary interpretation to the literal meaning of the regulations. As a result, there is no sufficient authority to justify deviating from the plain language of the regulations to interpret "relocations" to mean relocating items from one permitted building to another permitted building.

In this case, the vendor moved to a new building at 6100 Wabash Avenue and applied for a new permit. After reviewing the permit, GSA granted the permit allowing the SLA to place a vending facility at this location. Therefore, 20 U.S.C. 107(b) mandates that the SLA must pay for the

costs associated with moving the vending facility from the Metro West Building to a new permitted location at 6100 Wabash Avenue.

Kevin Funk