

UNITED STATES DEPARTMENT OF EDUCATION

OFFICE OF SPECIAL EDUCATION AND REHABILITATION SERVICES

ARBITRATION PANEL

Case No. R-S/13-04

In the Matter of the Arbitration of:

Sheila Stelmach, Petitioner

And

Michigan Bureau of Services for Blind Persons, Respondent

APPEARANCES

For the Petitioner:

Jeffrey Armstrong, Representative

Sheila (Stelmach) Armstrong, Petitioner

For the Respondent:

Christopher Braverman, Esq., Assistant Attorney General

Emily McDonough, Esq., Assistant Attorney General

James Hull, Assistant Business Enterprise Program Manager

PANEL MEMBERS

Kathryn A. VanDagens

Greg Keathley

James Karpen

FACTS

On October 26, 2010, Petitioner, Sheila Stelmach (now Armstrong) filed a complaint with the State Licensing Agency then known as the Michigan Commission for the Blind¹ (“MCB,” or “the Respondent”) pertaining to the highway location #39 (Grayling, Frederick, Gaylord, and Vanderbilt). Petitioner asserted that she had been awarded an incorrect number of Operator Selection Points and requested an immediate stop on the transfer of the location to another operator until her points were corrected.

Petitioner has been in the MCB Business Enterprise Program (“BEP”) since 2005. In 2007, Petitioner interviewed to provide food service for the Alpena Combat Readiness Training Center (“Alpena CRTC”). After she was awarded this location, she was required to participate in mandatory annual training as a condition of working on the military base. Petitioner completed all mandatory training requirements for 2007, 2008, 2009, and 2010.

James Hull, MCB Assistant Business Enterprise Program Manager, testified that operators receive points for both mandatory and voluntary trainings. The MCB automatically awards points to operators who attend training workshops that all operators are required to attend. However, if an operator attends additional trainings, referred to by Hull as voluntary trainings, the operator may request points for them from the Elected Operators Committee (“EOC”). Hull testified that the EOC, not the MCB, was responsible for approving the voluntary points that Petitioner sought.

Petitioner sent correspondence in 2006, 2007, 2008, and 2009 regarding voluntary training to BEP/EOC and followed instructions for timely submission of documentation to EOC for point determinations. In addition, in February 2008, Petitioner completed internet computer training through BEP’s Vocational Rehabilitation Services in Kalamazoo, which she believed fit the criteria for designation as “upward mobility training” under BEP Rule 44(3)(a) and requested Operator Selection Points for the course. She attended a seminar in October 2008 presented by the Unemployment Insurance Agency. In July or August 2010, Petitioner informed the BEP of additional training she was mandated to attend by the Alpena CRTC facility.

During this same time, Petitioner experienced significant eyesight loss and requested that her point accumulation reports be provided to her in audio CD or cassette format. When she attended the BEP’s annual mandatory workshop in April 2010, she was not provided with the report in one of her requested formats.

¹ In 2012, the Commission for the Blind was abolished and the Michigan Bureau of Services for Blind Persons was created in its place. For clarity, the agency will be referred to as the MCB throughout this opinion.

In BEP's Operator System Selection report for Petitioner covering the period from 9/1/2009 to 8/1/2010, Petitioner is shown to have accumulated 19.98 points, including seniority points and points for attendance at BEP's annual workshops, but there are no attendance points for the 2009 or 2010 workshops. On this report, there are no EOC points for voluntary or upward mobility training. Petitioner first received this report in October 2010.

In the fall of 2010, Petitioner learned that the operator of Highway Location #39 would be retiring. Bids were opened on October 5, 2010, and Petitioner submitted a bid on October 8, 2010. On October 13, 2010, BEP awarded Highway Location #39 to another bidder based on total operator point accumulations. Petitioner was not aware until after her bid was submitted that the EOC report did not credit her for all the training points she believed she was entitled to. As noted, she filed a complaint on October 26, 2010, and suggested that a temporary operator be assigned while her complaint was being resolved. Petitioner believed she had accumulated 53.98 points, rather than the 19.98 points indicated in the BEP's report. The EOC met on November 12, 2010, to consider Petitioner's request to award her the additional points. A motion made to award Petitioner a minimum of four points a year for 2007, 2008, 2009, and 2010 was defeated.

An Administrative Review was held on November 17, 2010, with reviewer Elizabeth White. An Administrative Review Report was issued on November 22, 2010, in which the reviewer concluded that BEP had failed to accurately total and communicate Petitioner's point accumulation and made four recommendations. While EOC staff acknowledged that Petitioner followed procedures for obtaining voluntary training point approval, it also conceded that it failed to properly maintain records, failed to consider documents timely submitted, and failed to communicate training point decisions to BEP.

After the Administrative review, BEP told Petitioner that it would not retroactively award points or revoke its award of location #39 to another operator. Petitioner requested an evidentiary hearing before an Administrative Law Judge, which was held on April 12, 2011. The issue addressed by the Administrative Law Judge was, "Were the proper amount of points awarded to Ms. Stelmach under the BEP Operator Selection Points System in order for her to bid on Highway Location #39 (Grayling, Fredrick, Gaylord and Vanderbilt)?" The ALJ determined that the answer to the question was "No" and on May 10, 2011, issued the following recommended decision:

To remedy the unfair bidding opportunity Ms. Stelmach was subject to in October 2010, I recommend that the Commission order the following:

1. EOC must review all training documentation submitted by Ms. Stelmach between 2006 and October 2010. If EOC determines that any or all of these

training segments qualifies for voluntary training points, the totals should be clearly communicated to BEP and Ms. Stelmach.

2. BEP shall issue a corrected Operator System Selection Report to Ms. Stelmach reflecting all EOC sanctioned voluntary training points she is entitled to and accurate totals for BEP's mandatory annual workshop attendance and upward mobility training. This report should be in the audio/CD format previously requested by Ms. Stelmach.
3. If the accurate point totals for Ms. Stelmach as of October 5, 2010 indicate that she had the highest point accumulation for purposes of the Location #39 bid determination, Ms. Stelmach should be given priority for the next available facility/location that she qualifies to operate as long as she is in compliance with all pertinent rules and policies at the time the facility/location becomes available.

Afterward, Petitioner wrote to the members of the MCB board again requesting that she be awarded Location #39, as had been done with other operators who had prevailed in grievances.

Hull explained that the MCB did not have the authority or obligation to award the points that Petitioner sought. On May 17, 2011, the EOC met again and considered Petitioner's request to be awarded additional points. The EOC voted to give Petitioner an additional 11 points, and she received a report reflecting the new total, giving her a total of more than 32 points. Hull said that the EOC did not award the points Petitioner sought until the bid for Location #39 had closed. The MCB board issued its Final Decision on October 7, 2011, in which it adopted the ALJ Recommendation in its entirety, by a vote of two to one.

Thereafter, Petitioner filed this complaint against the MCB, which is the state licensing agency ("SLA") designated to administer the Randolph-Shepard Act. Petitioner requested that a federal arbitration panel be convened as she was unable to resolve her complaint with the MCB. A pre-arbitration telephone conference was held on August 4, 2015, and full evidentiary hearing was convened on September 30, 2015, at which witnesses were called to testify under oath and 30 documentary exhibits were entered into the record. Both parties filed post-hearing briefs.

PETITIONER'S POSITION

The Petitioner contends that the MCB has refused from the beginning to comply with any of the recommendations made during the administrative review of her complaint. The Petitioner contends that the MCB's overdue attempt to repair the system regarding the awarding of points comes too late to help her.

The Petitioner contends that she complied with all procedures for obtaining approval of her voluntary points, but the EOC failed to properly maintain records, consider documents that were timely submitted, and failed to communicate its decision regarding training points to BEP.

The Petitioner contends that she has fought for five years to get that which is rightfully hers and the MCB has ignored its governing rules and policies. The Petitioner points out that the rules do not distinguish between voluntary and mandatory points in the manner testified to by Hull. The Petitioner contends the ALJ found that Petitioner was not given a fair opportunity in the October 2010 bidding process for location #39.

Petitioner asks that she be made whole, by awarding to her location #39, her lost income, and all the training points she was promised.

THE RESPONDENT'S POSITION

The Respondent contends that any training that is not required of all operators in the BEP is "voluntary." The Respondent contends that all the training for which Petitioner sought points was voluntary because no other operators were required to take it. The Respondent contends that the EOC determines which voluntary training that operators take will be awarded points in the point system. The Respondent contends that the EOC initially denied Petitioner's request to be awarded points for her voluntary training.

The Respondent acknowledges that the EOC awarded 11 points to Petitioner for voluntary training in May 2011, but contends that this was seven months after the bid was awarded to the current operator of location #39.

The Respondent contends that Petitioner is not entitled to any relief with respect to the awarding of location #39. At the time the bid was approved, Petitioner did not have more approved points than the operator who was awarded the location. Further, the Respondent contends that the Michigan Court of Appeals ruled that the MCB has no authority to award monetary damages under the Blind and Visually Disabled Persons Act.²

DISCUSSION AND FINDINGS

The Panel has reviewed the record in its entirety, including the transcript of the hearing and the documentary evidence submitted by the parties. The primary issue presented to this panel is "whether the SLA's noncompliance with the ALJ's decision violated the Randolph-Shepard Act, implementing regulations and state rules and regulations." Although Petitioner has been awarded the additional operator points she sought from the EOC, she still has not been

² *Fellows v Mich Comm'n for the Blind*, 305 Mich App 289; 854 NW2d 482 (2014).

awarded the location #39 as she desired. The Panel finds, as have others before us who reviewed this process, that Petitioner did everything she could to be awarded the points she sought for training and the EOC failed to maintain accurate records or award her points in a timely manner. The MCB argues that it was not responsible for the EOC's errors, but Petitioner certainly was not responsible. She accurately and timely submitted her training records but was not given credit when she should have been. Further, due to low eyesight, she requested that her points' summary be provided by audio CD or cassette, but her request was ignored. Accordingly, she had no way to know until it was too late that the EOC was failing to timely consider and grant her requests for training points.

The ALJ recommended that Petitioner be granted a priority bid and the MCB board adopted the ALJ Recommendation in its entirety. The ALJ felt that the record was insufficient to conclude that Petitioner would have won the bid in 2010, so Petitioner was awarded only a priority bid for another location. Once the EOC retroactively awarded Petitioner the appropriate training points, it is clear that on October 13, 2010, when the bid was awarded, she had earned more training points than the operator who was awarded location #39. However, to date, Petitioner is not the operator at location #39. The Panel finds that the MCB has failed to comply with the ALJ recommended decision, which found that Petitioner was wrongfully denied the location she sought. It has never explained why the operator was not temporarily placed in location #39 while Petitioner's grievance was considered, as has occurred with other locations.

Had the EOC awarded the points when Petitioner earned and requested them, there would have been no question that she should have been awarded the location she sought. No adequate explanation has been offered as to why the EOC failed to do so, as it has now retroactively awarded the points Petitioner earned in 2007, 2008, 2009, and 2010. The MCB is responsible for ensuring that the EOC accurately administers the programs for which it has been granted authority and the MCB retains ultimate responsibility for the bidding process. Petitioner has been an excellent operator in the program, including receiving awards for Operator of the Year and Operator Excellence. Yet, the relief that Petitioner sought still eludes her and she is still harmed by the MCB's failure to place her in location #39.

The Panel has determined that the only way to make Petitioner whole is to grant the specific relief that she seeks. Although the ALJ recommended and the Board agreed that she should be given a priority bid on another location, there is not another location that can provide her with equivalent income without significant expense. Petitioner must be immediately placed as the operator of Highway Location #39, as no other location is comparable.

Petitioner also requests that she be awarded compensation for the income she has lost since her unsuccessful bid on location #39. Petitioner bid out of the Alpena CRTS facility and into

another facility during the intervening years, and another operator has been operating location #39 in the meanwhile. As a result, the Panel has determined that this compensation is too speculative to award, as the difference between what Petitioner earned and what she would have earned as operator of location #39 cannot be determined with any accuracy, given the number of variables involved.

AWARD

For all the foregoing reasons, The Panel finds that the MCB's noncompliance with the ALJ's award violates the Randolph-Shepard Act, implementing regulations and state rules and regulations and GRANTS Petitioner's grievance. In order to make Petitioner whole, relief beyond that recommended by the ALJ is appropriate. In addition to the relief recommended by the ALJ, Respondent must award Highway Location #39 to Petitioner. All other relief sought by Petitioner that is not expressly awarded herein is DENIED.

Kathryn A. VanDagens, Chair

James Karpen, for Respondent

Gregory Keathley, for Petitioner

DATED: December 16, 2015