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

In the Matter of

BILL SHEETS,
Complainant,

and

STATE OF CALIFORNIA,
DEPARTMENT OF REHABILITATION,
Respondent.

APPEARING FOR THE COMPLAINANT

Christine Boone, Esq.,

APPEARING FOR THE
RESPONDENT

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

Case No. R-S/13-08

TriPartite Panel: Sylvia Marks-Barnett, Chair; Susan Rockwood Gashel, Vendor Designee; John McCann, California Department of Rehabilitation Designee

Date: February 27, 2017

FINDINGS OF FACT AND DECISION

The parties, having failed to resolve this matter prior to these arbitration proceedings, designated Susan Rockwood Gashel, by the Complainant/Vendor, and John McCann, 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 §I 07, et seq. (RS Act).

PROCEDURAL BACKGROUND

The Complainant submitted a Complaint For Arbitration sometime in January or February, 2014, 1[1] claiming dissatisfaction with the Departmental adoption, on October 30, 2013, of the Proposed Decision, rendered after a full evidentiary hearing, which took place on October 24, 2013.

Pursuant to the statutory procedures contained in the RS Act, the undersigned was notified of her selection as Panel Chairperson, on September 1, 2016, to hear and decide the matter in dispute, along with the other panel members.

The hearing of this matter was held on December 8, 2016, in Hearing Rom E, at the State Personnel Board, located at 801 Capitol Mall, Sacramento, California. The hearing commenced at 9:38 a m, as scheduled, and concluded at 3: 13 pm

At the hearing, a transcriber was used, Gigi Lastra, Heritage Reporting Corporation, 1220 L Street, NW, Suite 206, Washington, DC 2005-4018; 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. Bill Sheets, Complainant and Licensed Blind Vendor (Sheets) was called by the Complainant. The

[1] there was no date indicated on the Complaint itself; however, at the hearing, the parties agreed to the dates mentioned above.

Respondent called Zachary Mundy, current Manager of the Respondent's Business Enterprise Program (Mundy). Both parties received the opportunity for cross-examination and rebuttal.

Both pa1ties submitted post-hearing briefs and reply briefs. The reply briefs were received by January 20, 2017, at which time the record was closed, whereby the Decision was to be rendered by February 20, 2017.

STATEMENT OF THE ISSUES

From the filings and the evidence, the issues that arose are whether the application of 9 CCR §7213.5 (Regulation) by the Respondent California Department of Rehabilitation (DOR), to Sheet's failure to operate a vending facility for more than two years, was arbitrary and capricious; whether said section is valid; and whether Sheets is entitled to compensatory damages and attorney fees.

PERTINENT REGULATORY PROVISIONS

9 CCR §7212.1 Vendor Training Program

(c) The training curriculum shall include, at a minimum:

(1) Classroom training including, but not limited to, subjects such as: federal law. federal regulations …; state law …; state regulations …; and applicable California Health and Safety Code requirements and certifications. This training shall include homework, tests, and evaluations, as determined by the Training Instructor.

(2) On-the-job Training at two or more BEP vending facilities.

(f) To successfully pass the training specified in subsection (c) herein, Client-Trainees shall be required to average 70 percent on all required tests developed by the BEP … A midterm test shall be given to Client-Trainees following the basic classroom training component …

9 CCR §7213.5 Eligibility of a Licensee to Apply for a BEP Vending Facility

(a) To be eligible to apply for a Business Enterprise Program for the Blind (BEP) vending facility, … a licensee shall comply with the following requirements to ensure that he or she maintains the qualifications to operate a BEP vending facility:

(1) If the licensee has not operated a BEP vending facility … from two to four years from the date of licensure or from the last day the licensee operated a vending facility, … the licensee must either:

(A) Enroll in and complete the BEP Vendor Training Program described in Section 721 2.l of these regulations, except that an individual who was a former vendor will not be required to complete the on-the-job training specified in Section 7212. l (c)(2) of these regulations; or

(B) Challenge the requirement to take the BEP Vendor Training Program by taking and scoring 70 percent or higher on an examination given by the BEP Training Instructor, comparable to the midterm test specified in Section 7212.l (f) of these regulations.

(2) If the licensee has not operated a BEP vending facility, including an interim vending facility, for more than four years from the … the last day the licensee operated a vending facility as a vendor, … the licensee must complete all components of the Vendor Training Program described in Section 7212.1 of these regulations.

(b) A licensee who fails to take the appropriate action specified herein shall not be eligible to apply for a BEP vending facility.

FACTS

The parties agreed, as reflected in Exhibit 9, to stipulate to the following facts:

1. The Randolph-Sheppard program was established by the federal government to provide employment and economic opportunities for blind persons and to increase self-sufficiency.

2. DOR is the state licensing agency designated to carry out the Randolph-Sheppard program on both state and federal property. DOR's Business Enterprise Program (BEP) is responsible for licensing blind individuals to operate vending facilities.

3. Sheets completed the BEP Vendor Training Program in March, 2010.

4. Sheets was issued a Vending Facility License on March 12, 2010.

5. Sheets operated a vending facility, located in Sacramento, California, from May 25, 2010, to April 29, 2011.

6. Sheets' last day of operation of a vending facility was April 29, 2011.

7. Between April 29, 2011, and May 24, 2013, Sheets submitted three applications to operate vending facilities, which had been advertised as available by DOR.

8. On May 28, 2013, Mundy, contacted Sheets and informed him that he was not eligible to apply for a vending facility since it had been more than two years since he had operated a facility.

9. On June 24, 2013, Complainant requested a full evidentiary hearing.

10. On October 14, 2013, the full evidentiary hearing was held in Sacramento, California.

11. On October 30, 2013, the Director of DOR adopted the Proposed Decision. The Decision held that "appellant (Sheets) is ineligible to apply for a vending facility pursuant to the Regulation. Therefore, his Vending Facility Application should be denied."

12. Sheets filed a complaint for arbitration with the US Department of Education (DOE).

13. In June, 2014, DOE convened an arbitration panel.

14. As of the date of the hearing herein, i.e. January 8, 201 7, Sheets has not operated another vending facility.

From the stipulations and 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 Rehabilitation Services Administration (RSA) 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.

Sheets:

In addition to the stipulated facts, Sheets testified that the after he was licensed, he operated a snack bar and cafeteria facility in the Water Resources Board. He found this to not be profitable, so he left after a year of operation, in April, 2011. There was no dispute that he had tried to make this a success, using his training and past experience. Following his departure, he bid, unsuccessfully, on a US Department of Defense facility. Then, in 2012, he bid on the Aliso Creek Vending facility, which was also unsuccessful. This was followed by another bid in May, 2013. Soon after it was submitted, he received a phone call from Mundy, who told him that, inasmuch as he had not operated a facility within two years, he was not eligible to submit a bid.

Sheets was operating under the impression that DOR require that he submit bids at least every two years. He was not aware what **DOR** rule this was - it might have just been something that he learned from **DOR** or gleaned from the other vendors. Also, in his Complaint (Respondent's Exhibit 2), he alleged that the Administrative Law Judge, which provided Sheets with his full evidentiary hearing, erred when it failed to recognize that it had been less than four years since he had operated a vending facility and failed to give him the benefit of the four year period. He alleged further that the time frame for inactivity is four years according to what he learned in the training program.

However, at the hearing herein, he stated that what he learned in the training program was that between two and four years, a vendor could take a test and pass it, and if so, he heard, that the license would be unblocked. In contrast, after four years of no operations, then the vendor would have to take the training over again. Sheets claimed that he did not know of this Regulation until 2013, when he heard about it from Mundy. He did not recall ever hearing about it prior to then, specifically, not during the vendor training of 2010.

As to his understanding about being required to submit bids at least every two years, he added that the requirement would be satisfied merely upon the submission of a bid, and not upon being successful with the bid and entering into operation of the facility.

Mundy:

In addition to the stipulated facts, Mundy testified that in May, 2013, he circulated a location announcement for a vending opportunity at the California Correctional Institute, in Tahachapi. Sheets applied for this, but was not interviewed because within the same faxed application, he included a resignation as well, withdrawing from the selection process. He called Sheets about this to make sure that it was intended and not an accident. In answer to Mundy's question about what his intentions were, Sheets told him that he did not, that he was just playing the game, that he knew that in order to stay eligible to apply for locations, he had to bid on one every month or so.

Mundy testified further that there was no BEP rule such as stated by Sheets, and, had never been. There is a rule that in order to be eligible to apply, a vendor has to have operated a facility within two years. Pursuant to this rule, Sheets was not eligible to apply because when he submitted his application for Tahachapi "and from the date the announcement was released" he had not operated a facility within a two year period of time, citing the

Regulation.[2] This Section, at (a)(l)(A), provided that such a lapsed vendor must enroll in and complete the BEP Vendor Training that he had taken upon applying for licensure, minus the required to complete the on-the-job training component or, at (a)(l)(B) challenge the required to take the BEP Vendor Training Program by taking and scoring 70%, or higher, on an examination comparable to the midterm test given after the completion of the basic classroom training component of the entry level training given in the Vendor Training Program. Its purpose is to refresh the Vendor on changes in the retail food code, labor laws, tax laws, safety and sanitation laws, etc.

[2] This Regulation provides, al (a)(l), if the licensee has not operated a BEP vending facility … from two to four years from … the last day the licensee operated a vending facility, … The section is silent as to any mention that the length of the lapsed time period is to be calculated from the date the announcement is released.

Mundy stated that while a Vendor is in operation of a facility, he might become aware of such changes by virtue of membership in Employment Development Department (EDD)[3] programs, which would send him updates, or he could attend the BEP annual training conference, which might offer speakers on some of the changes, or from his consultant in conjunction with a location review, but there is no mandatory training. However, if the consultant finds that any deficiency in application of the laws is serious enough, then the

Vendor could be shut down, but most often, the Vendor would be placed on a corrective action plan. Nonetheless, when a Vendor enters into an operating agreement for a facility, as part of that agreement, the Vendor is required to remain up to date and stay current with all pertinent laws and regulations. He noted that even though there might not be speakers on all of the changes in the law at the annual training conference, there is always a segment on food safety training. Furthermore, although, as stated above, there is no mandatory training for operating Vendors, BEP does keep records of attendees at the annual training conferences; however, this information is not tracked. It was his testimony that in addition to all of the foregoing, whenever he, himself became aware of any changes to the applicable laws, from the emails he gets from EDD, from the National Merchants Association, from the California State Board of Equalization, he sends those out to the Vendors.

According to Mundy, Sheets attended the 2010 annual training conference held October 8 through 10. The agenda for that conference (Respondent's Exhibit 3), reflects that there was a presentation on new regulations. [4]

It was Mundy's testimony that the BEP process for adopting regulations begins with collaborative work with the Rules Subcommittee, of the California Vendor Policy Committee (CVPC), to identify which regulations need to be changed or which new ones need to be promulgated. When there is agreement at that level, the matter is submitted to the DOR

[3] The Employment Development Department is not a part of DOR; rather it is a department of the State of California. Its function is to enhance California's economic growth and prosperity by collaboratively delivering valuable and innovative services to employers, workers, and job seekers.

[4] The agenda did not specify, by Code number, which regulations were included in the presentation.

Legal Department, which assists with language. Once that is completed, the Legal Department returns them to DOR for further collaboration with the CVPC Rules Subcommittee. If agreement is secured, then the Rules Subcommittee sends them to the CVPC for a vote. If that vote is in the affirmative, the regulation comes back to DOR, which will issue a Notice of Proposed Rulemaking. This is released by DOR to the public, including all Vendors, and presents all the wording for all the regulations changes proposed Mundy admitted that he was not involved in this process for the changes that were made to the Regulation.

He testified further that Respondent's Exhibit 4, dated February 29, 2008, is such a Notice, and includes a reference, at p. 6, to changes to the Regulation. At p. 3, of said Exhibit, it reflects that this process was followed. The public hearing on these changes was set for April 29, 2008. The witness was not aware of when these particular changes came into effect; however, he stated that August, 2010, is when they were implemented.

The California governmental entity that has approval authority over state regulations is the Office of Administrative Law. Mundy identified Respondent's Exhibit 7, as the approving document. It references the section in question and reflects an approval date of September 22, 2009, with implementation set for October 22, 2009.

It was Mundy's testimony that all BEP regulations must be approved by the RSA, which was done in this case. See Respondent's Exhibit 8. Without specifying which regulations were being considered, the date of such approval was June 2, 2010.

Mundy identified Complainant's Exhibit A as a letter written by Deb Meyer, previous Program Manager, dated July 30, 2010, providing a complete copy of the new regulations, mentioning that one of them was the section in questions, which she identified a referencing "requirements for a licensee to apply for a vending facility, suggesting that these be reviewed before the upcoming annual conference training, set for October 8-10, 2010, which would include a training on the new regulations. It was also stated that these new regulations would be effective September 15, 2010. There was a previous letter, Complainant's Exhibit H, also authored by Deb Meyer, dated June 30, 2010, which was very similar to the latter one, with the material exception that the effective date for the new regulations was stated to be August 16,

2010. This discrepancy notwithstanding, it was Mundy's belief that the effective date for the new regulations was August 16, 2010.

It was Mundy's testimony that if a Vendor is not operating a facility, there would be no basis upon which to revoke or suspend his license. Sheets' license was neither suspended or terminated. Instead, Sheets had become ineligible to bid for an announced location by reason of his non-operation of a facility for more than two years. He remained eligible for Departmental post-employment services, he remained eligible to file an appeal against the Department, he remained eligible to attend training conferences, and to participate in the process, reflected in the regulations, to regain his eligibility to bid for announced locations once again.

Chronology:

02/29/08	Notice of Proposed Rulemaking, concerning the regulation in questions, is issued and published
04/29/08	Public hearings were held pursuant to the Notice, referred to above
09/22/09	California Office of Administrative Law approved the regulation in question
03/20/10	Sheets completes the BEP Vendor Training Program
03/12/10	Sheets is issued a Vending Facility License
05/25/10	Sheets operates a vending facility
06/02/10	The RSA approves packages of new regulations, but does not specify that the regulation in question is included
06/30/10	Former Program Manager, Deb Meyer, sends new regulations, including the one in question, to all licensed Vendors, announces that a training on them will be part of the next annual training conference, to be held Oct 8, 2010, and suggests that the new regulations be reviewed before the conference; she also indicated that the effective date of the new regulations would be August 16, 2010
07/3010	Deb Meyer sent a similar letter, but extending the effective date for the new regulations to September 15, 2010

10/8/10	BEP held its Annual Training Conference, which Sheets attended, where trainings on new regulations were part of the program
04/29/11	Sheets discontinues his operation of the vending facility
2011	Sheets bids unsuccessfully on a US Department of Defense facility
2012	Sheets bids unsuccessfully on the Aliso Creek vending facility
05/2013	Sheets submits a bid, and a withdrawal of the bid, for a vending facility at a California Correctional Institute, located in Tahachapi
05/28/13	Mundy informed Sheets that he was no longer eligible to bid for facilities, since it had been more than two years since he last operated a facility
06/24/13	Sheets request a full evidentiary hearing.
10/14/13	The full evidentiary hearing was held
10/30/13	The DOR Director adopted the Proposed Decision resulting from the full evidentiary hearing, which denied Sheets' claims and held that Sheets was ineligible to apply for a facility.
----------	Sheets filed a Complaint for arbitration
06/2014	DOE convened an arbitration panel

DISCUSSION

The contentions of the Complainant are:

1. The Regulation does not further the purposes of the RS Act or Section 19625, of the CA Welfare & Institutions Code.

2. The Regulation is ambiguous, arbitrary and capricious

3. Respondent failed to establish adequate procedures to ensure that the Regulation was explained to Sheets.

4. Respondent failed to provide the Regulation to Sheets in his preferred mode of communication.

5. Respondent failed to demonstrate that training was given on the Regulation at the Annual Training Conference.

6. DOR's determination that Sheets was ineligible to bid for a facility constituted a constructive termination of Sheets' license.

7. Sheets is entitled to compensatory damages, for the loss of business opportunity resulting from the actions of Respondent, together with attorney fees for the bringing of this action.

The Respondent DOR contends that:

1. This Panel lacks the authority to review the validity of the Regulation.

2. The burden of proof that rests with Sheets is to demonstrate, by substantial evidence, that DOR acted arbitrarily and capriciously.

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 the Issues

I. Whether the Regulation furthers the Purpose of the RS Act as well as of Section 19625 of the Ca1ifornia Welfare & Institutions Code.

There is no issue as to the Complainant having the burden of proof in this matter. However, there is an issue as to what must be proven in order to satisfy this burden. The Complainant urges that the Regulation does nothing to further the purposes of the RS Act and the California Welfare & Institutions Code (WIC), Section 19625. He points to both the Federal statute, and WIC, as having a goal of "providing blind persons with remunerative employment, enlarging the economic opportunities of the blind, and stimulating the blind to greater efforts in striving to make themselves self-supporting", whereby blind persons licensed under the Act "shall be authorized to operate vending facilities on any Federal property … or on other State designated property;" and argues that not only does the Regulation do nothing to further these purposes, but actually defeats the purpose. In support, the Complainant relies on Starbucks Corporation v. AMCOR Packaging Distribution,

"United States District Court E.D. California (June 23, 2016)". Although the Complainant failed to provide where this case was reported, an on-line search revealed that it was not a published decision, but that on June 24, 2016, the United States District Court, for the Eastern District of California, a Memorandum and Order, signed by the Judge in the case, granted a partial summary judgment, holding that disclaimers noted on invoices could not be held to be binding on Starbucks inasmuch as they were neither bargained for nor assented to. Aside from the fact that this Memorandum and Order has absolutely no precedential value, the undersigned is at a loss as to how this breach of contract case could have any relevance to whether or not the Regulation was at cross-purposes to the RS Act and to WIC, and, therefore, it could not stand as being persuasive in any way.

The Complainant also relies on Yamaha Corp. of America v State Bd. Of Equalization, 19 Cal.4th 1, 78 CaLRptr.2d 1, 960 P 2d I (1998), to support its position that the standard of review for the matter at hand is a determination of whether "the regulation is 'reasonably necessary to effectuate the purpose of the statute..., However, a reading of this case reveals that this standard of review is singularly reserved for reviewing the legality of a regulation, as

distinct and different from a review of the interpretation of a regulation. As to the latter, the Yamaha Court made clear that the standard for review is whether the interpretation of the regulation is "arbitrary, capricious or without reasonable or rational basis."

DOR claims that this Arbitration Panel has no authority to review the validity of a regulation. In support, DOR provides references to California law, the California Administrative Procedure Act, found at California Government Code, Section 11340, et seq., which sets up the process by which a regulation gets approved, and by which it can be challenged, expressly leaving the latter function in the hands of the Governor of California and the California Superior Courts. That Act is silent as to including an arbitration panel, convened under the RS Act, as one of the forums which can respond to such a challenge.

The Complainant presented neither evidence nor authority to support its position that the Panel is a proper forum to review the validity of the Regulation. Accordingly, the undersigned finds that this Panel has no authority to review the validity of the Regulation.

II. Whether DOR's Determination that Complainant was Ineligible to Bid for a Facility Constituted a Constructive Termination of Sheets' License

This argument of Complainant is a further challenge to the validity of the Regulation. In view of the conclusion reached above, the Panel has no authority to consider whether the application of the Regulation to Complainant constitutes a constructive termination of his license.

III. III. Whether the Application of the Regulation to Complainant was Ambiguous, Arbitrary and Capricious.

DOR urges that the standard of proof required as to this issue is substantial evidence as to whether application of the Regulation to Complainant was ambiguous, arbitrary and capricious. In support, DOR relies on Consolidated Edison Co. v NLRB, 305 U.S. 197,229 (1938), and Dickinson v Zurko, 527 U.S. 150, 152 (1999). Neither of these cases are helpful inasmuch as both arise out of an appeal from findings of fact made by an agency, rather than an interpretation of a regulation made by an agency. In regard to the latter, the Yamaha case cited by Complainant

is more instructive. As stated above, when the review centers around the interpretation of an agency regulation, the review "is confined to the question of whether the … [interpretation of the regulation] is arbitrary, capricious or without reasonable or rational basis" and "whether there are the presence or absence of factors that support the merit of the interpretation."

In this case, the Complainant was issued a vending facility license on March 12, 2010. On May 25, 2010, he began operation of a vending facility. In October, Sheets attended a BEP Annual Training Program. On April 29, 2011, he left off operating the vending facility, for lack of profit. Thereafter, he submitted bids on two other vending facilities, but was not successful. On May 24, 2013, Sheets submitted a third bid, but his documentation included a withdrawal of that bid. Four days later, Sheets was notified by Mundy that, pursuant to the Regulation, he was not eligible to bid any further, without undertaking the basic classroom training component of the BEP Vendor Training Program or obtaining a grade of 70% or higher on a "challenge" test. It is this decision that Sheets complains was implemented against him, by virtue of the Regulation, in an arbitrary and capricious manner.

One basis for this claim is that he didn't receive proper training on the Regulation, that, in fact, he was not made aware of it at all. On the one hand, Complainant argued that he didn't recall the Regulation being discussed at the Annual Training Conference in 2010 and maintained that the first he knew of it was when Mundy, on May 28, 2013, told him of his ineligibility. However, he testified that his understanding was that there was a requirement to bid on a location every year or two, even if you didn't want the location. He was not sure how he obtained this understanding - it could have been through other vendors or through the department. To the contrary, he admitted alleging in his Complaint that "the timeframe for inactivity is four years according to what he learned in the training program." Moreover, at the hearing, he explained that he was not sure in what training program he heard about the four-year time frame; he didn't think he was trained about this Regulation, but "wouldn't stake my life on it."

Mundy testified at length about the process of BEP rulemaking, beginning with collaboration between DOR and the Rules Subcommittee, of the CVPC, including approval by the CVPC, the public, and, ultimately, the RSA. He identified correspondence from his predecessor, providing the new regulations to all licensed blind vendors, with information about

an upcoming Annual Training Conference, which would include a training on the new regulations, and announced the effective date of the new regulations to be sometime in the summer of 2010. It is noteworthy that this letter contained a very brief synopsis of the new provisions, which specifically made reference to the Regulation. Although Mundy was not involved in either the process or the training mentioned herein, inasmuch as this preceded in time his entry into the position of BEP Manager, he found records that Complainant had attended this training.

Substantial evidence is that amount and/or quality of evidence that leads the trier of fact to conclude that the evidence presented is more probable than not. Because of the inconsistencies in Complainant's testimony about any lack of training concerning the Regulation, the compelling conclusion is that Complaint did receive training on the Regulation. Whether or not he may not have retrained the information that was presented to him is immaterial. Therefore, Complainant has failed to meet his burden of demonstrating by substantial evidence that the Regulation was applied to him in an arbitrary or capricious manner sufficient to overcome the evidence of DOR.

Complainant also alleged that DOR failed to provide a copy of the Regulation to Sheets in Sheets' preferred mode of communication. No evidence was presented at the hearing to support this allegation, other than what could be assumed from Complainant's inconsistent testimony about not having received any training on the Regulation.

On the other hand, Mundy testified that while he did not know specifically what had happened in this case, the practice of the BEP was to always send communications to the vendors in their preferred mode of communication. Further, Mundy, as stated above, testified that the BEP records reflected that Complainant had attended the training. Based on the foregoing, the only conclusion that can be reached is that given that Complainant attended the training, he must have received the letter advising him of the Annual Training Conference in a mode of communication that was capable of being utilized by him. Therefore, on this issue, Complainant has failed to provide substantial evidence that DOR applied the Regulation to him in an arbitrary and capricious manner by failed to provide him a copy of the Regulation in the Complainant's preferred mode of communication.

In this case, there was ample evidence that Complainant fell squarely within the provisions of the express language of the Regulation. The factor of Complainant's failure to operate a vending facility for more than two years unquestionably supports the merit of DOR's interpretation of the Regulation that it was applicable to Complainant. On the other hand, Complainant produced no evidence to the contrary; nor did he produce any evidence that the Regulation was implemented for him, but not for others similarly situated.

The undersigned is mindful that the nature of the expressed purposes of the RS Act is to assist blind persons in becoming individuals with actualized capacity to be income earning and productive, and be assisted in maintaining that status. Therefore, while the Regulation is designed to foster the maintenance component, it is not difficult to imagine how easy it would be to misuse the Regulation in a manner that would set up the blind person for failure in the BEP. Needless to say the priority in both DOR's policies, practices and culture should be to avoid such an outcome. Nonetheless, to return to the matter at hand, and, based on all the foregoing, the compelling conclusion is that, the Complainant did not demonstrate that DOR's application of the Regulation to him was arbitrary, capricious or without rational basis, by substantial evidence. Therefore, the Complainant has failed to meet his burden of proof

IV. Whether Complainant is Entitled to Compensatory Damages and Attorney Fees

The Complainant sought, in his Complaint, attorney fees, but the Complaint was silent as to compensatory damages. Complainant made no attempt to amend his Complaint before the hearing in this matter. The first time any information as to the nature and amount of damages the Complainant was seeking was in his Closing Brief. This did not amount to sworn testimony and was not available for cross-examination.

This alone is sufficient basis upon which to deny this claim. However, the stronger reason is that Complainant failed to meet his burden of proof on all issues, whereby compensatory damages and attorney fees cannot be awarded.

FINDINGS OF FACT

1. At all times pertinent hereto, Complainant was a licensed blind vendor, having been licensed, on March 12, 2010, to operate vending facilities, within the BEP, of the State of California.

2. At all times pertinent hereto, the State of California, DOR, has been designated by the US Dept. of Education as an SLA, under the RS Act, to issue such licenses

3. Complainant operated a vending facility from May 25, 2010, to April 29, 2011.

4. Complainant resigned from his vending facility on April 29, 2011.

5. Complainant bid on two facilities after that date, but was not successful in that bidding; thereafter, Complainant bid on a third facility, but immediately withdrew from the bidding process.

6. On May 28, 2013, Complainant was informed that DOR had applied the Regulation to his status, whereby he had become ineligible to bid on any other facilities because it had been more than two years since he had last operated a vending facility within the BEP.

7. Complainant was provided, in his preferred mode of communication, a copy of the Regulation, together with information that the effective date of the Regulation was to be August] 6, 2010, as well as an announcement that there would a BEP Annual Training Conference, which would include a training on the Regulation, on October 8-10, 2010.

8. Complainant attended the BEP Annual Training Conference October 8-10, 2010, at which a training was offered on the Regulation.

CONCLUSIONS OF LAW

1. This matter, complaining of a DOR decision, consisting of the application of 9 CCR §7213.5 to Complainant, pursuant to the terms of the RSA, has been presented to an arbitration panel, which is limited in its review to whether or not a DOR decision or interpretation of a duly

enacted regulation is based on an interpretation that is neither arbitrary, capricious or without rational basis.

2. Where the review is undertaken by an RSA arbitration panel, said panel has no authority, absent express grant by the laws of the State of the SLA to review the validity of any regulations called into question.

3. The burden of proof in this matter rests on the Complainant.

4. The standard of proof in this matter is for Complainant to demonstrate, by substantial evidence that DOR, when it applied the Regulation to Complainant and determined that his status, under his license, was that he was ineligible to bid on any facility, until he satisfied the Regulation's retraining requirement, DOR was acting in an arbitrary, capricious or unreasonable manner.

5. Determining that Complainant was no longer eligible to bid on vending facilities until he satisfied the retraining requirements of the Regulation, based on Complainant's failure to operate a vending facility for more than two years, was neither arbitrary, capricious or unreasonable.

6. Not having sustained his burden of proof, Complainant is entitled neither to compensatory damages or attorney fees.

AWARD

With regard to the merits of the Complaint, Complainant had the burden of proof, but failed to meet it. Based on the foregoing, the compelling conclusion is that the relief requested in the Complaint should be, and hereby is, denied.

Dated this 27th day of February, 2017.

SYLVIA MARKS-BARNETT
Chairperson

I concur with the above Decision of the Chairperson.

X I dissent from the above Decision of the Chairperson. See attached.

Dated this 20th day of February, 2017

SUSAN ROCKWOOD GASHEL
Complainant's Designee

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

BILL SHEETS,
Complainant,

Case No. R-S/12-10

vs.

CALIFORNIA DEPARTMENT OF REHABILITATION
Respondent

DISSENT OF SUSAN ROCKWOOD GASHEL

Using a recently enacted, confusing, difficult to understand rule to place unnecessary barriers to employment, the California Department of Rehabilitation (DOR) failed in its duty to "assure that the maximum vocational potential of each blind vendor is achieved" when it refused to allow Bill Sheets to apply for a vending facility. See 34 C.F.R. § 395.3(a)(2). The blind vending program is a vocational rehabilitation program, designed to put qualified blind licensees to work. In Mr. Sheets case, DOR failed to do so, and the panel should have so ruled.

A. DOR's Termination/Suspension of Mr. Sheets License to Operate a Vending Facility was Without Cause

DOR constructively suspended and/or terminated Bill Sheets license to operate a vending facility, without cause. This is not permitted by the federal regulation at 34 C.F.R. § 395.7(b). It also contravenes the statute at 20 U.S.C. § 107a(b):

> Each such [blind vendor] license shall be issued for an indefinite period but may be terminated by the State licensing agency if it is satisfied that the facility is not

> being operated in accordance with the rules and regulations prescribed by such licensing agency.

DOR enacted a regulation, 7213.5, that prohibits a licensed blind vendor from applying for a vending facility under certain circumstances. By not allowing an unemployed licensed blind vendor to apply for a vending facility, DOR is preventing that individual from obtaining employment. This contravenes the purposes of the federal Randolph-Sheppard Act (R-S Act):

> For the purposes of providing blind persons with remunerative employment, enlarging the economic opportunities of the blind, and stimulating the blind to greater efforts in striving to make themselves self-supporting, blind persons licensed under the provisions of this chapter shall be authorized to operate vending facilities on any Federal property.

20 U.S.C. § 107 (West). It also contravenes the purposes of Cal. Welf. & Inst Code § 19625 (setting out the same language with respect with state property), as well as contravenes the California legislature's stated intent that the Randolph-Sheppard Act (R-S Act) "and the federal regulations for the administration … shall serve as minimum standards for the operation" of the vending facility program. i.d.

The federal statute, at 20 U.S.C § 107a(b), and the federal regulation, at 34 C.F.R. § 395.?(b), prohibit a state licensing agency from terminating and/or suspending a vendor's license without a full evidentiary hearing, and only when a "vending facility is not being operated in accordance with its rules and regulations, the terms and conditions of the permit, and the terms and conditions of the agreement with the vendor."

There were no allegations that Mr. Sheets, who had resigned from an unprofitable vending facility, [1] had ever operated contrary to any rules, regulations, or terms and

[1] DOR has a duty to "support and encourage all participants in the Business Enterprise Program to be as successful at becoming self-supporting as possible." Cal. Welf. & Inst. Code § 19625.5. Yet, DOR was quick to exclude Mr. Sheets from the program.

conditions of any agreement. Nevertheless, Mr. Sheets is prevented from applying for other vending facilities. This represents a constructive termination (at a minimum, a suspension) of his vending license. Mr. Sheets' license is invalid, and of no use to him if he cannot operate a vending facility. If he cannot even apply to operate a vending facility, DOR has effectively terminated (or at a minimum, suspended) his license.

B. The Federal Adjudication Path and the Authority of the R-S Act Arbitration Panel

The R-S Act provides that a blind licensee may request a full evidentiary hearing from the state licensing agency (SLA) administering the R-S Act program if the licensee is "dissatisfied with any action arising from the operation or administration of the vending facility program." 20 U.S.C. §107d-1(a). If the blind licensee remains dissatisfied with "any action taken or decision rendered as a result of such hearing," he may file a complaint with the Secretary of Education. Id. The Secretary of Education then convenes a panel to arbitrate the dispute. Id. The decision of the panel is final and binding except that it is "subject to appeal and review as a final agency action for purposes of chapter 7 of such Title 5" (the Administrative Procedure Act). 20 U.S.C. §§ 107d-1(a), 107d-2(a). This has been referred to as the "federal adjudication path." Tamashiro v. Dep't of Human Serv., 146 P.3d 103, 108 (2006)

The Panel mistakenly concludes that it has "no authority to consider whether the application of the Regulation to Complainant constitutes a constructive termination of his license." In fact, arbitration panels have broad authority under the R-S Act:

> the relationship between the blind vendor and the state, like conventional employment relationships, is essentially contractual. The terms of the contract are standardized by virtue of the agreement between the participating states and the United States. Thus, since 1974 each blind vendor enjoys the benefit of the arbitration undertaking specified in 20 U.S.C. § 107b(6). Since contract arbitration was in 1974 a legal concept with a well-settled content, there is no ambiguity in Senator Randolph's choice of the term. Moreover there is not one iota of legislative history suggesting that, insofar as it dealt with the relief which

> arbitrators could award, the term was understood by any member of Congress to have any meaning other than the conventional one.

Delaware Dep't of Health & Soc. Servs., Div. for Visually Impaired v. U.S. Dep't of Educ., 772 F.2d 1123, 1136 (3d Cir. 1985). The Court explained that the decision of an arbitration panel is reviewable, under the same terms as any federal administrative hearing decision, and then makes it clear that (except for the unique judicial review provision) the term "arbitration" has the same meaning as is used in "its conventional usage in other contexts such as the Federal Arbitration Act." Id.at 1130.

In Simula, Inc. v. Autoliv, Inc., 175 F.3d 716, 720-21 (9th Cir. 1999), the Ninth Circuit extensively discussed the breadth of an arbitration clause stating " all disputes arising in connection with this Agreement shall be settled ... by three arbitrators." Here, the statutory language is similarly broad "any action arising from the administration or operation of the vending facility program." The court extensively reviewed the case law, noting that it must interpreted liberally, expansively, as embracing every dispute between the parties. Id. Accordingly, there is no legal reason for this panel to limit its authority as advocated by DOR.

If the majority is correct that it cannot review a regulation for legality, then a blind vendor is left with no remedy where the State enacts a regulation that is preempted by Federal law. That is not what Congress intended when it enacted the arbitration provision, as evidenced by the legislative history quoted by the Third Circuit:

> Moreover, blind vendors have attempted to bring their grievances to the judicial system for resolution. In the case *Viii/son v. Blount,* for example, the U.S. District Court for the District of Kansas [309 F.Supp. 263 (1968)] held that the plaintiff blind vendor had no standing to challenge the legal basis of the decision of the Postmaster General to remove vending machines from a postal facility. The court was upheld on appeal [422 F.2d 866 (1970)], and the U.S. Supreme Court denied certiorari [400 U.S. 865, 91 S.Ct. 102, 27 L.Ed.2d 104 (1970)]. It is the expectation of the Committee that the arbitration and review procedures adopted

> in S. 2581 will provide the means by which aggrieved vendors and State agencies may obtain a final and satisfactory resolution of disputes.

Delaware Dep't of Health & Soc. Servs., Div. for Visually Impaired v. U.S. Dep't of Educ., 772 F.2d 1123, 1131, fn. 5 (3d Cir. 1985). Moreover, it is well established that the judicial review provisions of the R-S Act is the ***only*** means that a blind vendor has to challenge state licensing agency action. Smith v. Rhode Island State Serv. for the Blind & Visually Handicapped, 581 F. Supp. 566 (D.R.!. 1984); McNabb v. US. Dep't of Ed., 862 F .2d 681 (8th Cir. 1988); Del Dep't of Health & Soc. Servs. v. US. Dep't of Educ., 772 F.2d 1123 (3rd Cir. 1985); Fillinger v. The Cleveland Soc'y for the Blind, 587 F.2d 336 (6th Cir. 1978). The majority's conclusion that it lacks authority to interpret a regulation would mean that a blind vendor would have only a limited right to review of SLA action. That conclusion does not accord with Congress' grant of broad authority to the blind licensee to file grievances:

> Any blind licensee who is dissatisfied with ***any action arising from the operation or administration of the vending facility program*** may submit to a State licensing agency a request for a full evidentiary hearing, which shall be provided by such agency in accordance with section 107b(6) of this title. If such blind licensee is dissatisfied with any action taken or decision rendered as a result of such hearing, he may file a complaint with the Secretary who shall convene a panel to arbitrate the dispute pursuant to section 107d-2 of this title, and the decision of such panel shall be final and binding on the parties except as otherwise provided in this chapter.
>
> 20 U.S.C. § 107d-1(a) (emphasis added).

An arbitration panel is convened by the authority of the Secretary of Education. It is the Department of Education that has the authority to interpret the R-S Act. That authority has been passed down to this arbitration panel. Determining whether the state regulation is preempted by the federal regulation is the panel's responsibility.

C. The Regulation at Issue is Preempted by the Federal Regulation

With that background, we now turn to a federal adjudication path case where the First Circuit addressed an appeal of an R-S Act arbitration decision. There, the State of New Hampshire had enacted a state law that conflicted with a federal law. Here, we have a case where DOR has enacted a state regulation that conflicts with a federal statute and a federal regulation.

The First Circuit stated that while New Hampshire may enact a state statute for carrying out a federal law, "to the extent that those state laws directly conflict with the requirements of federal law, the Supremacy Clause requires that they be given no effect." New Hampshire v. Ramsey, 366 F.3d 1, 30 (1st Cir. 2004), citing Cipollone v. Liggett Group, Inc., 505 U.S. 504, 516 (1992), U.S. Const. art. VI, cl. 2, Pac. Gas & Elec. Co. v. State Energy Res. Conservati on & Dev. Comm'n, 761 U.S. 190 (1983).

While the DOR's regulations are entitled to deference, [2] this panel is required to rule that the regulation in question is preempted by the federal regulation, as it is "manifestly contrary" to 20 U.S.C. § 107a(b) and 34 C.F.R. § 395.7(b). Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 844, 104 S. Ct. 2778, 2782, 81 L. Ed. 2d 694 (1984).

Dated February 20, 2016.

Susan Rockwood Gashel

[2] While DOR maintains that the federal Department of Education approved the regulation in question, there is no evidence that the particular regulation at issue was approved by the Department of Education. Only generalized evidence was presented and the majority should not have concluded from that evidence that approval took place, especially given the fact that DOR is depriving Mr. Sheets of the ability to use his license, without cause.

X I concur with the above Decision of the Chairperson.

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

Dated this 17th day of February, 2017.

JOHN MCCANN
Respondent's Designee