

**UNITED STATES DEPARTMENT OF EDUCATION
REHABILITATION SERVICES ADMINISTRATION**

Case No. R-S/15-14

Phyliss Davis, Petitioner,

And

**Business Enterprise Program,
Georgia Vocational Rehabilitation Agency, Respondent.**

**Before the Arbitration Panel: Gail R. Smith, Esquire (Chairperson), Dr. Lillie Pickett,
Peter Nolan, Esquire**

APPEARANCES:

For Petitioner:

Phyliss Davis, *Pro Se*

For Respondent:

Elizabeth de Janes, General Counsel, GVRA

Michael Huening, Esquire

ARBITRATION DECISION

PROCEDURAL BACKGROUND OF THE ARBITRATION

This arbitration arose over a dispute between Phyliss Davis (the “Petitioner”) and the Business Enterprise Program of the Georgia Vocational Rehabilitation Agency (“GVRA”). In 2012, GVRA merged two Business Enterprise Program (“BEP”) vending facilities. The Petitioner operated one of the two facilities under a Temporary Vending Facility Agreement. The GVRA transferred the licensed blind vendor who operated the other vending facility on a permanent basis, to operate the newly consolidated facility. The Petitioner contends that GVRA violated the Randolph-Sheppard Act, 20 U.S.C. §§ 107 *et seq.* (“R-S Act”) and regulations, and state law by merging the two vending facilities and terminating the Petitioner’s Temporary Vending Facility Agreement. The Petitioner also contends that GVRA should have posted and announced the vacancy of operator of the merged facility, and utilized the bidding process to select the operator. The Petitioner contends that GVRA’s failure to do so violated the Randolph-Sheppard Act and federal regulations, and state law.

The arbitration was held pursuant to the Randolph-Sheppard Act, 20 U.S.C. §§ 107d-1 and 107d-2, after the Petitioner filed a complaint dated May 30, 2015, with the Rehabilitation Services Administration of the U.S. Department of Education (“DOE”). The Petitioner requested that an arbitration panel be convened pursuant to the R-S Act, 20 U.S.C. §§ 107d-1(a) and 107d-2, and the implementing regulations at 34 C.F.R. § 395.13.

DOE authorized the convening of an arbitration panel to hear and render a decision on the issues raised in the complaint. A letter dated September 8, 2015 (“Convening Letter”) from the Commissioner of the Office of Special Education and Rehabilitative Services, Rehabilitation Services Administration (“RSA”) stated:

“The central issue is whether the SLA’s process for terminating Ms. Davis’ vending facility violated the Randolph-Sheppard Act, implementing regulations and state rules and regulations.”

A hearing was held on April 25-26, 2017, at GVRA’s Vocational Rehabilitation office in Marietta, Georgia. At the hearing, Petitioner appeared *pro se*. Elizabeth de Janes, General Counsel for GVRA, and Michael Huening, Esquire, represented the Respondent. During the hearing, the parties were each afforded a full opportunity to present testimony, documents and other evidence, to examine and cross-examine witnesses, and to object to documents and other evidence offered by the other party.

The Petitioner's witnesses were the Petitioner and Stanley Turman. The Respondent's witnesses were Rajaunnda Gandy, current Chief Strategy and Innovation Officer for GVRA and Director of BEP from 2003 to 2016, and Teresa Eggleston, current Director of Support Services for GVRA and former Program Manager of BEP.

The witnesses were sworn. A transcript of the hearing was taken by a court reporter.¹ Joint Exhibits 1-10, Respondent's Exhibits 1-5 and Petitioner's Exhibits 1, 3 and 4 were offered and entered into evidence.² The evidentiary record was closed at the conclusion of the hearing on April 26, 2017. The parties elected to file post-hearing briefs and reply briefs subsequent to the hearing.

QUESTION TO BE RESOLVED

The issue to be decided in this case is: Whether the state licensing agency's process for terminating the Petitioner's vending facility violated the Randolph-Sheppard Act, implementing regulations and state rules and regulations? If so, what is the appropriate remedy?

FINDINGS OF FACT

The R-S Act is administered by the Rehabilitation Services Administration ("RSA") which is a federal agency under the U.S. Department of Education, Office of Special Education and Rehabilitative Services. (R-S Act, 20 U.S.C. § 107a) (Tr. 30) The Randolph-Sheppard program is administered in each state by a state licensing agency. (R-S Act, 20 U.S.C. § 107a) DOE designated GVRA as the state licensing agency to operate the Business Enterprise Program in Georgia. The Business Enterprise Program of Georgia ("BEP") is a division within GVRA. Under the R-S Act, GVRA provides opportunities to legally blind vendors to operate vending facilities in Georgia. (Tr. 172) GVRA selects the locations and types of vending facilities, and furnishes equipment, initial stock and operating capital for the vending facilities. (R-S Act, 20 U.S.C. § 107a) GVRA also provides the training necessary to be licensed in the program, and selects the individuals to operate the various vending facilities. (R-S Act, 20 U.S.C. §§ 107a (b) (c) and 107d-4)

Under Federal law, the state licensing agency has authority to manage the program and facilities in the best interest of the program and to provide a sustainable income for the vendors in its program. (R-S Act, 20 U.S.C. §§ 107a and 107b) The R-S Act and federal regulations require that each state's BEP issue regulations and policies regarding governance of the program that are approved by the RSA. (R-S Act, 20 U.S.C. § 107b (5), 34 C.F.R. § 395.4) GVRA, as the state

¹ References to the transcript are indicated by "Tr."

² Joint exhibits, the Petitioner's exhibits and the Respondent's exhibits are referred to respectively as "J. Ex.," "P. Ex." and "R. Ex."

licensing agency, issued “BEP Rules and Regulations and Policies and Procedures” (“Rules and Regulations”) which were approved by the RSA. (J. Ex. 2) (Tr. 30-32, 98)

GVRA’s Committee of Blind Vendors

Although the state licensing agency administers the program, the R-S Act requires that each state establish an elected committee of blind vendors to participate with the state licensing agency in policy and program decisions. (R-S Act, 20 U.S.C. § 107b-1, 34 C.F.R. § 395.3(4)) The committee of blind vendors participates in the development and administration of a transfer and promotion system for blind licensees approved by the RSA. (Tr. 30-32).

Georgia’s Committee of Blind Vendors (“CBV”) consists of eight members who represent all the vendors in the state. (Tr. 162) The members are elected by, and represent the vendors in their regions. (Tr. 162)

The CBV meets on a quarterly basis. The purpose of the meetings is to allow the blind vendors an opportunity to participate in the state licensing agency’s decisions. (Tr. 38) According to Ms. Gandy, the BEP always discusses with the CBV, any proposed changes to BEP’s policies and programs.

A quarterly meeting of GVRA’s CBV was held on July 20 and July 21, 2011. During the meeting, Franklin Hulsey, chairman of CBV’s finance committee, proposed on the CBV’s behalf, that BEP should not “bid out” as a “standalone” any vending facility that does not produce an annual income to a vendor of at least \$20,000.00. (“Committee of Blind Vendors Meeting Minutes,” R. Ex. 1) The CBV proposed that BEP either “attach” a facility that generates annually an income of less than \$20,000, to another facility or close the facility.³

GVRA adopted the CBV’s proposal but reserved the right to use its discretion either to bid out a facility as an attachment and/or to close the facility. Ms. Gandy testified that BEP retained its right to use its discretion when implementing the new policy because BEP was responsible for, and concerned about the best interest of the entire program. (Tr. 131-132) GVRA’s response to the CBV’s proposal, as reflected in the CBV minutes, was:

“(t)he SLA will use its discretion regarding the CBV’s proposal to bid out facilities that generate less than \$20,000 net income as an attachment. The SLA will use its discretion when considering closing locations.” (R. Ex. 1)

³ A “standalone” vending facility provides a minimum annual income of \$20,000 for an operator. An “attachment” is a vending location that is unable to “stand alone” and produces an income that is less than minimum wage. An “attachment” is usually attached to a facility that makes more than \$20,000 per year for an operator. A “merger” is the combination of two locations that are not sustainable alone. (Tr. 36-37, 137-141)

BEP's Decision to Merge Vending Facilities Nos. 190 and 341

Ed Mial operated Vending Facility No. 341 in the Manuel Maloof Building as a permanent operator prior to the merger of Vending Facilities Nos. 190 and 341. (Tr. 176) On September 20, 2010, Peter Brown, one of BEP's business counselors, completed a "Vending Facility Analysis" of the facility because Vending Facility No. 341 consistently failed to produce a viable income for a vendor. (R. Ex. 2) Mr. Mial's income generally was \$1,000 to \$1,400 per month, or a maximum annual income of \$16,800, before the merger. For some years, however, Mr. Mial only earned \$6,000 to \$7,000 for the year.⁴ (Tr. 34, 174-175)

Vending Facility No. 190, a snack bar in the DeKalb County Courthouse, was located a block away from the Manuel Maloof Building. Vending Facility No. 190 also historically produced a low income for the vendor, anywhere from \$16,000 to \$17,000 for the year. (Tr. 34)

After the CBV meetings in July, 2011, BEP considered merging Vending Facilities Nos. 190 and 341 under the new policy. (Tr. 34) Both of the vending facilities generated an annual income of less than \$20,000, the cut-off point identified by the CBV as insufficient to be designated as a standalone facility. The new policy approved at the CBV's July 2011 meeting, provided that the SLA could decide whether to merge or close vending locations that did not produce a sufficient annual income. (Tr. 44-45) BEP believed that a merger of the two facilities would be in the best interest of the vendors and the program because it would preserve the locations as business opportunities for the vendors and maintain BEP's relationship with the DeKalb County Government. (Tr. 138)

On October 3, 2011, BEP Business Counselor Peter Brown completed an analysis to determine if the two vending facilities could be merged, and if so, how to accomplish the merger. (R. Ex. 3, "Vending Analysis Report) Mr. Brown recommended the vending facility in the Manuel Maloof Building be changed to all vending or to a self-managed mini-snack bar. (R. Ex. 4) Mr. Brown stated that this change would alleviate the need to staff Vending Facility No. 341 all day, which he felt was not feasible based on the sales data for the site. (R. Ex. 4) Mr. Brown recommended the merger of Vending Facilities Nos. 190 and 341, particularly as they were a block from each other. Mr. Brown believed that one vendor could operate both facilities which would then provide a viable income for a vendor. Mr. Brown recommended that the vendor at the Maloof Building operate both vending facilities. (R. Ex. 3) (Tr. 185-186) David Fisher, Director of the DeKalb County Government, had informed Mr. Brown that Mr. Fisher "...wanted to ensure that

⁴BEP has several sources to evaluate the gross sales and income generated by a vending facility. The Georgia Cooperative Services for the Blind provides BEP with monthly income settlement statements. BEP counselors are required to review weekly and monthly sales figures for the vending locations which are incorporated into a financial system called the Financial Edge. (Tr. 183-184). BEP also assigns a business counselor to conduct a business analysis report of a vending facility that is experiencing problems. (Tr. 47)

the current vendor, Ed Mial, would continue to be employed and be the benefactor of the merger.” (R. Ex. 3) (Tr. 104)

On October 5, 2011, Ms. Gandy, BEP’s Director, approved Mr. Brown’s recommendations. (R. Ex. 3)

BEP Seeks Approval of the Merger from the Grantor

Each building where BEP has a vending facility has a Grantor. The state licensing agency must obtain the Grantor’s approval before it makes changes to a vending facility in the Grantor’s building. (Tr. 33)

DeKalb County Government was the Grantor of the two sites (Manuel Maloof Building and DeKalb County Courthouse) where Vending Facilities Nos. 190 and 341 were located. (Tr. 33, 115) On October 28, 2011, Mr. Brown sent a letter to David Fisher, Director of the DeKalb County Government, officially seeking approval to merge the two vending facilities. (R. Ex. 4) BEP had to obtain the Grantor’s approval not only to merge the two facilities, but also to agree with BEP’s proposal to change the snack bar in the Manuel Maloof Building to all vending or to a self-managed mini-snack bar that is automated. (R. Ex. 4) The letter stated that the change would:

“...alleviate the need for a vendor to staff that facility all day, which is not feasible based on the current sales data. Instead the vendor will be relocated to the Dekalb County Courthouse, where the staffing hours would be warranted based on the sales. However, we would like to improve the modest sales of the Courthouse location as well due to changing customer buying habits and requests. Therefore, we would like to expand our offerings of freshly prepared cold foods and maybe offer some limited items of hot foods that are merely re-thermalized. We would offer the revenue of both locations to one vendor, thereby making this employment opportunity a more viable source of income.

We anticipate that these changes will improve the overall sales revenue of the combined facility....Our goal is to improve the overall revenue of our blind vendor so that they will be in a better position to pay the expenses that are inherent of being in the program, as well as earn a viable living.”(R. Ex. 4)

BEP Discusses the Merger with RSA

Ms. Gandy discussed the proposed merger with Dan Fry and Ray Hopkins, program managers with RSA, around the time of the CBV meetings in July, 2011. (Tr. 35, 37, 106-108). Both Mr. Fry and Mr. Hopkins felt that BEP had the discretion to merge the two facilities and to transfer operation of the consolidated facility to Mr. Mial under BEP's transfer policy. (Tr. 35, 106-108) BEP's "Rules and Regulations and Policies and Procedures," (2009 ed.) provides:

"VII. Transfer and Promotion of Vendors

- A. **TRANSFER** of licensed vendors may be necessary from time to time to meet the best interests of the licensed vendor and/or the State Licensing Agency. A transfer shall be arranged by the State Licensing Agency if the best interest of the program is served thereby." (J. Ex. 2, R. Ex. 5)

Ms. Gandy decided to move ahead with the project after her discussions with RSA. Ms. Gandy based the merger of the two facilities on BEP's transfer policy. (Tr. 98) Ms. Gandy testified that she relied not only upon RSA's approval of the merger under BEP's transfer policy, but also:

"...after having looked at facility analysis reports, looking at monthly income statements, and seeing the numbers by both facilities, we felt it would be in the best interest of the program to combine the two locations." (Tr. 35)

The Petitioner Becomes the Temporary Operator of Vending Facility No. 190

Carl Lee was the operator of Vending Facility No. 190 before the Petitioner assumed operation of this location. Mr. Lee successfully bid on, and became a permanent operator at another vending location which left Vending Facility No. 190 without an operator. (Tr. 32) While waiting for the Grantor to approve the merger and for the final documents to be signed, BEP decided to obtain a vendor to temporarily operate Vending Facility No. 190 in the interim. Ms. Gandy was aware that the Petitioner was unemployed and did not have a vending site of her own to operate. Ms. Gandy had kept the Petitioner in mind when opportunities for employment arose. As Ms. Gandy testified at the hearing: "Anything that became available, your (the Petitioner's) name was the first to come up." (Tr. 115)

On October 24, 2011, GVRA and the Petitioner entered into a “Temporary Agreement of Operation for Vending Facility #190” (“Agreement”) (J. Ex. 4) BEP’s decision to merge Vending Facilities Nos. 190 and 341 was made before BEP offered the Petitioner an opportunity to operate Vending Facility No. 190 under a temporary agreement. (R. Ex. 3) (Tr. 186)

The Agreement states that the Petitioner will operate the facility as a relief operator, on a temporary basis, and not as a permanent vending facility operator. The Agreement states:

“This agreement may be terminated at any time by the SLA. The SLA shall make every effort to provide the Relief Operator with a minimum of one week’s notice prior to termination. This agreement will be terminated upon the revocation or termination of the SLA’s permit to operate a vending facility on federal or other property.”⁵ (J. Ex. 4)

During the arbitration hearing, the Petitioner acknowledged that she was aware of the merger and that she operated Vending Facility No. 190 on a temporary basis. (Tr. 318) The Petitioner was aware of the ramifications of signing a temporary agreement as she previously operated another vending facility (Ritche’s Café) on a temporary basis and signed the same agreement with BEP. (Tr. 96, 164, 181-182)

Ms. Gandy testified that she believed that Mr. Brown, the Petitioner’s counselor at the time, also informed the Petitioner about the proposed merger when the Petitioner signed the Agreement. (Tr. 98, 118) BEP’s standard practice is to review the terms of any agreement with the vendor at the time the vendor signs the agreement. (Tr. 180) Ms. Gandy’s testimony is supported by the findings of an administrative review conducted in response to the Petitioner’s request to review GVRA’s decision to merge Vending Facilities Nos. 190 and 341. After an administrative hearing on June 27, 2012, David Rollins, Program Manager for GVRA stated, in a letter addressed to the Petitioner which is dated July 12, 2012:

“By your own admission, you admitted during the Administrative Review that you were aware of the possible merger of the Courthouse and Maloof locations when you signed your Temporary Agreement of Operation back on October 24, 2011. You stated that you were told of this possible merger by then BEP Counselor, Mr. Peter Brown, as well as the vendor of that location, Mr. Carl Lee, in October, 2011.” (J. Ex. 6)

⁵ The Petitioner was free to bid on other vending locations while she operated Vending Facility No. 190 on a temporary basis. (Tr. 144)

BEP Completes the Merger and Terminates the Petitioner's Temporary Agreement

On July 27, 2012, GVRA merged Vending Facilities Nos. 190 and 341 and terminated the Petitioner's Agreement. (Tr. 104-107) GVRA transferred operation of the consolidated facilities to Mr. Mial, the only permanent licensed vendor of either facility at the time. The Petitioner's last day of work was July 25, 2012. (Tr. 121)

Although the Petitioner was aware of the merger when she signed the temporary agreement for Vending Facility No. 190, the Petitioner was unaware that BEP did not intend to use the competitive bid process to select the vendor for the consolidated facilities. (Tr. 318) The Petitioner first learned about BEP's decision to transfer Mr. Mial to operate the merged facilities on June 12, 2012, during a site visit with Petitioner's BEP counselor. (Tr. 315) Until that time, the Petitioner believed that she would have an opportunity to bid on the consolidated locations because she temporarily operated one of the merged facilities.⁶ (Tr. 316)

BEP utilizes a competitive bid process to select an operator for a vending facility only if the location is "vacant." Ms. Eggleston testified that the consolidated facility was not a vacancy because one of the vending facilities had a permanent operator. (Tr. 330, 334) According to Ms. Gandy, BEP was not required to advertise the position for competitive bid because BEP was authorized to transfer management of a location to a blind vendor who already had an existing permanent agreement under Section VII.A of BEP's "Rules and Regulations." (Tr. 263, 269)

Ms. Gandy testified that the difference between the Petitioner and Mr. Mial was that while the Petitioner had a temporary agreement to operate one of the facilities, Mr. Mial was a permanent operator. BEP could transfer the operation of the merged facilities to Mr. Mial because he was a permanent operator but not to the Petitioner because she was a relief operator. (Tr. 237)

POSITIONS OF THE PARTIES

The Petitioner's Position

The Petitioner points out that the intent of the Randolph-Sheppard Act is to provide blind persons with remunerative employment, enlarge their economic opportunities and encourage their self-support through the operation of vending facilities in federal buildings. The program was broadened in most states including in Georgia, to include facilities in state and municipal locations. In calendar year 2014, 2,108 blind vendors operated 2,389 vending facilities in public buildings. The program generated \$693.6 million, and the average wage of a vendor was \$59,012.00 for calendar year 2014.

⁶ Section VII.B.2 of BEP's "Transfer and Promotion of Vendors," provides that a vendor has to operate his or her present vending facility for a minimum of six months before the closing date of a vacancy announcement to which he or she intends to apply." (J. Ex. 2/R. Ex. 5)

The Petitioner contends that BEP's decision to merge two standalone facilities violated the R-S Act and BEP's "Rules and Regulations." According to the Petitioner, BEP arbitrarily merged two historically separate and distinct standalone snack bars with attached vending machines, into one joint facility. Both locations existed as standalone facilities for thirty years. The Petitioner contends that each facility separately provided a viable income for a vendor. BEP's decision to merge the facilities was made in deference to Mr. Mial's income and opportunity, to the Petitioner's detriment.

The Petitioner also contends that BEP violated the R-S Act and state law when it assigned Mr. Mial to operate the merged facilities. BEP violated the law when it failed to follow proper procedure to advertise the vacancy and permit the vendors to competitively bid on the opening in the new location. The Petitioner asserts that by arbitrarily assigning one vendor to the merged facilities without opening the process to competitive bid, and further removing the Petitioner from her location, resulted in disparate treatment of the Petitioner. The temporary nature of the Petitioner's Agreement did not negate her right to fair and equitable treatment under the Randolph-Sheppard Act.

The Petitioner maintains that Ms. Gandy and Ms. Eggleston acknowledged during their testimony both during the state administrative review proceedings and before the arbitration panel, that the situation at hand involving the merger of two historically-viable, standalone snack bars and transferring one vendor to operate the merged facilities to the detriment of another licensed blind vendor, was a first-time event. For this reason, Ms. Gandy and Ms. Eggleston both testified that they felt it necessary to obtain approval for the merger and Mr. Mial's transfer from the RSA, the Grantor and the CBV.

According to the Petitioner, Ms. Gandy and Ms. Eggleston failed to provide sufficient evidence of their communications with the RSA, the Grantor or the CBV, such as written correspondence with the three entities and/or specific dates or times of their contacts with the RSA, the Grantor and the CBV. The only evidence that the CBV supported BEP's decision to merge two historically standalone facilities was a proposal made by the CBV which was documented in the minutes of a committee meeting. Ms. Gandy testified however, that she did not accept or adopt the committee's proposal. In addition, the proposal was not sent to the floor for an open blind vendor's vote.

Even if there is evidence that BEP contacted the RSA, the Grantor and the CBV, Ms. Gandy failed to disclose that the merger would adversely affect the Petitioner's employment. The Petitioner contends that:

“...this omission of information and full disclosure, by the Director of the GVRA-BEP (Ms. Gandy), was a purposeful way to avoid answering any questions or concerns that might have arisen from these Entities when they were consulted. Thus the questions that would occur with Ms. Davis, went undisclosed. (This action would be the second loss of vending facility in 2 years’ time for Ms. Davis, through no fault of her own).” (Petitioner’s Brief, page 8)

The Petitioner maintains that BEP has an affirmative obligation under the law to locate gainful employment for each licensed blind vendor. BEP violated the law when it failed to afford or find employment for the Petitioner after it removed her from her position. BEP was aware of the Petitioner’s continuing desire for alternate employment including a willingness to be placed in temporary positions until a permanent position became available, by Petitioner’s request for administrative review of BEP’s actions. During the administrative review, BEP was also informed of the Petitioner’s financial difficulties. Despite BP’s awareness of the Petitioner’s willingness and ability to work in any capacity, BEP has failed to offer any additional position to the Petitioner.

The Respondent’s Position

GVRA did not violate the R-S Act, implementing regulations or state law when it transferred the operation of the merged facility to Mr. Mial and cancelled the Petitioner’s Temporary Agreement to operate Vending Facility No. 190. Although GVRA has a prescribed way in which it places vacancies in vending facilities out to competitive bid, GVRA also has rules and regulations where it may elect to transfer licensed vendors as necessary to meet the best interest of the licensed vendor and/or the SLA, without competitive bid. These rules are found in BEP’s “Rules and Regulations” regarding its transfer and promotion policies.

The Respondent has broad authority under federal and state law to manage the program and facilities in the best interest of the vendors and the program. The Respondent lawfully exercised its discretion when it combined two poorly performing sites into one to avoid closing both locations. The Respondent lawfully transferred operation of the merged facilities to the vendor who operated one of the locations under a permanent agreement. The Respondent conducted a thorough evaluation and analysis of what to do with the two locations, and whether and/or how to accomplish the merger of the two facilities. During the hearing, the Respondent presented substantial evidence of its meticulous study and analysis. The Respondent also presented detailed evidence and documentation that the CBV and RSA approved of the Respondent’s decisions. The Petitioner’s Temporary Agreement stated that the Respondent could terminate the agreement at any time. The Petitioner testified that she understood the terms and conditions of the Agreement. The Petitioner was aware that she did not have any vested right or permanent opportunity to manage Vending Facility No. 190, once the Respondent terminated the

Temporary Agreement. The Petitioner signed previous temporary agreements with the GVRA and was aware of the ramifications of signing a temporary agreement.

The Petitioner raised matters that were not included within the scope of the issue defined by RSA's "Convening Letter" and in this arbitration proceeding. The extraneous matters include the termination of the Petitioner's license and the Petitioner's bankruptcy. The Petitioner was terminated from the program in 2013 which was a substantial period of time after the Petitioner filed a grievance and requested an administrative review of the Respondent's decision to merge the two facilities. The Petitioner never filed a separate grievance to contest BEP's termination of the Petitioner's license, a matter which is separate and apart from the issues under consideration in this proceeding.

The Petitioner also alleged discriminatory treatment of the Petitioner compared to other vendors. The Petitioner failed to present any evidence of discriminatory treatment on the part of the Respondent. The Respondent's decision to merge the two facilities and transfer operation of the facilities to Mr. Mial occurred prior to the Petitioner even being asked to operate Vending Facility No. 190. Rather than discriminate against the Petitioner, BEP sought to help the Petitioner by offering her the opportunity to temporarily operate Vending Facility No. 190, as it was aware that the Petitioner was in need of employment at the time.

CONCLUSIONS OF LAW

The Petitioner contests two actions on GVRA's part. First, the Petitioner asserts that GVRA lacked the authority to merge Vending Facilities Nos. 190 and 341. Second, the Petitioner contends that GVRA improperly transferred operation of the merged facilities to Mr. Mial. The Petitioner contends that GVRA should have initiated its competitive bid procedure in accordance with Section VII.B of BEP's "Rules and Regulations" to fill the position of operator at the merged facility. (J. Ex. 2. R. Ex. 5)

BEP Properly Merged Vending Facilities Nos. 190 and 341

Under the Randolph-Sheppard Act as well as Georgia state law, the state licensing agency has authority to administer the Business Enterprise Program for the benefit of the vendors and the program in its entirety.

As required by federal law, BEP acts in tandem with the CBV to consider and make policy changes and decisions. During the quarterly meeting of the CBV in July, 2011, the CBV proposed that BEP either close or attach to another facility, any vending facility that does not produce a minimum annual income of \$20,000 for the operator. The proposal was initiated for

the benefit of the vendors/operators in order for each vendor to have a “viable” income. The proposal also ensured that BEP operated its program in a prudent manner, particularly as BEP invests in the various vending locations by providing equipment, initial stock and operating capital for the vending facilities.

For several years, Vending Facilities Nos. 190 and 341 both had a poor sales record and produced a subsistent income for its operators. BEP applied the new policy initiated by the CBV to close or attach facilities earning less than \$20,000 in annual income for an operator, to Vending Facilities Nos. 190 and 341. BEP decided to merge the vending facilities to preserve the business operations at the two locations for the benefit of the vendors and the entire program, particularly as BEP recognized the desirability of continuing its business relationship with the DeKalb County Government.

BEP decided to merge the facilities after it was unable to consistently improve the sales at these locations by other means. Although the annual sales and income of the two facilities failed to justify assigning two vendors to the locations, the combined revenue of the two facilities was adequate for one vendor. A merger was appropriate because the two locations were within close physical proximity. After BEP automated the vending facility in the Manuel Maloof Building, a single vendor could easily operate the two facilities.

BEP decided to merge the two facilities only after it completed a vending facility analysis of the locations and studied the feasibility of a merger. BEP also obtained approval of the merger from the program managers for the R-S Act at the federal Rehabilitation Services Administration. The federal RSA believed that BEP had the authority to merge the facilities under the transfer provision of BEP’s “Rules and Regulations.”

The Petitioner alleged BEP’s merger of the facilities was discriminatory but failed to submit any evidence of this claim. BEP followed its rules and regulations, and exercised careful review and study over several years prior to making this decision. The Petitioner was not even operating Vending Facility No. 190 at the time BEP made the decision to merge the two locations. BEP also established that it offered the Petitioner the opportunity to temporarily operate Vending Facility No. 190 out of concern because the Petitioner was unemployed. These facts refute the Petitioner’s contention that BEP acted in a discriminatory manner to the Petitioner.

BEP Properly Transferred Operation of the Merged Facilities to the Permanent Vendor

As required by the R-S Act, a state licensing agency must issue rules and regulations that govern the operation of the state’s BEP. GVRA, as the state licensing agency, issued BEP’s “Rules and Regulations” which were approved by the RSA. (J. Ex. 2, R. Ex. 5) Although BEP has procedures for placing vending facilities out for bid, BEP may elect to transfer licensed vendors without competitive bid, to vending facilities as deemed necessary to meet the best interest of the

licensed vendor and/or the state licensing agency. (See, Section VII “Transfer and Promotion of Vendors” of BEP’s “Rules and Regulations,” J. Ex. 2/ R. Ex. 5)

In this case, BEP exercised its regulatory authority when it transferred management of the merged facilities to the permanent vendor of Vending Facility No. 341 rather than initiate a competitive bid for the position. BEP properly took this action under Section VII of its “Rules and Regulations.” The only language in Section VII that limits BEP’s transfer authority is that the transfer must be in the best interest of the licensed vendor and/or the State Licensing Agency. BEP presented substantial evidence that having Mr. Mial operate the merged facilities was in the best interest of the vendors and the business enterprise program. In this regard, BEP’s decision preserved the business opportunities and income from two existing locations rather than having to close the facilities. BEP’s decision also maintained an ongoing and important business relationship with the DeKalb County Government which desired that Mr. Mial operate the two facilities after the merger.

The decision to transfer operation of the merged facilities to Mr. Mial was approved by the RSA. Both Mr. Fry and Mr. Hopkins, program managers at RSA, informed Ms. Gandy that BEP was authorized under its transfer policy, to transfer operation of the merged facilities to Mr. Mial, rather than to initiate a competitive bid to fill the position. RSA informed BEP that it was authorized to transfer management of the merged facilities to Mr. Mial because he was a permanent operator. At the time of the transfer, Mr. Mial was the only vendor who operated either vending facility as a permanent operator.

Under Section VII.B of BEP’s “Rules and Regulations,” a process to fill a position by competitive bid is initiated when a new vending facility is established or a licensed vendor vacancy occurs in an existing vending facility. Neither of these situations occurred in this case. The merger of the two facilities was not a “brand” new vending facility as this type of facility is typically viewed. The fact that BEP properly used its discretion to merge or attach the two facilities did not create a new facility. The merger also did not create a vacancy in an existing vending facility. BEP established that the consolidated facility was not “vacant” because one of the facilities had a permanent operator.

DECISION AND AWARD

Based on the entire record and consistent with the foregoing discussion and findings, the Award of the Arbitration Panel is ORDERED AS FOLLOWS:

1. The Respondent’s process for terminating the Petitioner’s Temporary Agreement to operate Vending Facility No. 190 did not violate the Randolph-Sheppard Act, its implementing regulations and state rules and regulations.

2. The Respondent acted in accordance with applicable laws, rules and regulations when it merged Vending Facilities Nos. 190 and 341.
3. The Respondent acted in accordance with applicable laws, rules and regulations when it transferred operation of the consolidated facility to the permanent operator of one of the vending facilities, rather than to place the position out for competitive bid.

Gail R. Smith, Panel Chairperson Date

Peter Nolan, Panel Chairperson Date

Closing Decision from Rev. Dr. Lillie Pickett.

Assigned Panel Member for Petitioner- Mrs. Phyliss Davis.

Case No. R-S/15-03 October 19.2017

Georgia Vocational Rehabilitation Agency –vs- Mrs. Phyliss Davis- Licensed Blind Vendor- since (June -2006)

On April 25-26, 2017-, The Arbitration Panel convened in Marietta, Georgia to hear the complaint of Mrs. Phyliss Davis, against the Georgia Vocational Rehabilitation Agency's decision in July -2012 to terminate her Temporary Agreement of Operations at Vending Facility# 190- DeKalb County Courthouse and award another Blind Vendor the facility.

The GVRA decision to promote another vendor in to the newly vacant vending facility, followed the Agency's arbitrary decision to allow the other Vendor to retain his current Vending facility (#341) while obtaining Vending facility (#190).

Mrs. Davis argued that the GVRA violated the Randolph Sheppard Act's enabling legislative policy of affirmatively providing remunerative employment and enhanced economic opportunity for each and every duly licensed blind Vendor by the State licensing Agency.

“Under the Randolph Sheppard program, state licensing agencies recruit, train, license, and place individuals who are blind as operators of vending facilities located on federal and other properties’.(1936-1954-1974)

Thus, Mrs. Davis contentions and arguments of the GVRA's violations of the Randolph Sheppard Act's enabling legislation in 2012 and continuing, must be adjudicated and affirmed.

The GVRA 's Director-Mrs. Rajaunda Gandy and the Northern Program Manager- Mrs. Theresa Egelston testified before Judge Woodward on 01/31/2013 and again before the Arbitration Panel on 04/25-26,2017.

In both testimonies, dates and times, they affirmed that they were acting in their management roles at the GVRA and were well aware of the Randolph Sheppard's Act's purposes and intentions.

“The Vending Facility program authorized by the Randolph-Sheppard Act provides persons who are blind with remunerative employment and self-support through the operation of vending facilities on federal and other property. The program, enacted into law in 1936, was intended to

enhance employment opportunities for trained, licensed blind persons to operate facilities.” (RSA-1936-1954-1974).

Both Agency staff members testified that although they were fully aware of the devastating consequences their official actions in violating Randolph Sheppard enabling legislation would have on Mrs. Davis, they chose to continue.

When questioned by the Arbitration Panel, both Agency staff member affirmed to Mrs. Davis’ status under the Randolph Sheppard’s Enabling Legislation and authority.

1. Blind- Affirmative –Mrs. Davis has provided proof to the GVRA of her disabling condition that allowed her entrance in to the GVRA-BEP program under the Randolph Sheppard’s guidance and policy and provision.

2. Trained- Affirmative- Mrs. Davis entered into and complete her training to operate a Vending facility under the GVRA training program in the State of Georgia, in June-2006.

3. Licensed- Affirmative- Mrs. Davis license as a Blind Vendor in the State of Georgia was entered into evidence both at the Administrative Review in 2013, and again before the Arbitration Panel in 20117.

Mrs. Davis thus proved her status under the Randolph Sheppard enabling legislation and under the SLA of Georgia policies and procedures. (Written policy manual-2009)

Mrs. Davis became a member of this protected class- under the Randolph –Sheppard Act’s enabling legislation (1936-1954-1974) on June 30, 2006- when she was granted her license by the State Licensing Agency- the GVRA.

Under these protections, the GVRA has no authority to promote, or enhance the economic opportunity or provide remunerative employment of one duly licensed trained blind vendor over another.

The policy the GVRA director and staff member used to justify this violation was the GVRA’s BEP transfer policy. They testified that this transfer policy was applicable, is in violation of the Randolph Sheppard Act under the latter part.

The GVRA’s assertion that this award to Mr. Mial, was in the ‘best interest of the BEP program’ to merge two stand -alone snack bars’ has no merit or justification.

The GVRA-BEP program had no, and still has no financial stake in either facility’s operations or revenues.

Both locations have been granted to the GVRA-BEP program as rent free enterprises since their inception in 1978. The GVRA’s only investment in these locations has been the licensing of trained blind Vendors ‘, and the Blind Vendor’s initial petty cash loan to buy operating stock.

Since this operating capital is always a loan, the GVRA recoups each monetary output within 18 months of each operator being awarded the location. (This was after historically an open bid hiring and selection

Mrs. Gandy testified that she sought active participation from the Georgia Committee of Blind Vendors on this merger and promotion since it was outside of the Randolph Sheppard enabling legislation ,and also outside the GVRA-BEP policy manual of (2009). However, she could not produce written evidence of any meeting, talks, or phone calls from the Committee of Blind Vendor's in their role of active participants in any major policy change that will effect and affect the protected class of licensed blind vendors in the State of Georgia.

However, her actions as the director of the GVRA-BEP is this matter, is in clear violation of the Randolph Shepard Act (1336-1954-1974).

The program, enacted into law in 1936, was intended to enhance employment opportunities for trained, licensed blind persons to operate facilities

§395.14 The State Committee of Blind Vendors.

(a) The State licensing agency shall provide for the biennial election of a State Committee of Blind Vendors which, to the extent possible, shall be fully representative of all blind vendors in the State program on the basis of such factors as geography and vending facility type with a goal of providing for proportional representation of blind vendors on Federal property and blind vendors on other property. Participation by any blind vendor in any election shall not be conditioned upon the payment of dues or any other fees.

(b) The State Committee of Blind Vendors shall:

(1) Actively participate with the State licensing agency in major administrative decisions and policy and program development decisions affecting the overall administration of the State's vending facility program;

(2) Receive and transmit to the State licensing agency grievances at the request of blind vendors and serve as advocates for such vendors in connection with such grievances;

(3) Actively participate with the State licensing agency in the development and administration of a State system for the transfer and promotion of blind vendors;

(4) Actively participate with the State licensing agency in the development of training and retraining programs for blind vendors; and

(5) Sponsor, with the assistance of the State licensing agency, meetings and instructional conferences for blind vendors within the State.”

Mrs. Davis testified that she sought help from the then current President of the Committee of Blind Vendors-(Mr. Robert Matuzak- (Chairperson2010-2013). She testified she sought help from the Committee, since this merger was not written in policy, nor had been voted on by the blind vendors' committee or body. This proposal had been declined by the GVRA-BEP director- Mrs Gandy-, as per her own testimony and the meeting minutes she entered into evidence. Mrs. Gandy testified that she refused to adopt the Committee of Blind Vendor's proposal when it was introduced in 2010's meeting. When the (\$20,000) yearly threshold minimum revenue was proposed -Mrs. Gandy declined to make it policy or to have an open vote on its merits from the blind vendors themselves.

Mrs. Davis testified that the Committee of Blind Vendors advised her that they were not aware of this proposed merger, and had called the GVRA-BEP offices and staff, but could not get the GVRA-BEP director and staff to confirm or deny this allegation. Mr. Matuzak advised Mrs. Davis that the committee of blind vendors had no knowledge of this proposed merger, and had no active participation in the policy decision making that was leading up to Mr. Mial 's promotion.

Mr. Matuzak (Chairperson) advised Mrs. Davis to preemptively file a written request for an administrative review to held internally at the GVRA-BEP offices, as her first step in the arbitration process. Mrs. Davis testified that this was the fifth time she had to use the grievance process to protest a policy violation by the GVRA-BEP.

§395.14 The State Committee of Blind Vendors.

“3) Actively participate with the State licensing agency in the development and administration of a State system for the transfer and promotion of blind vendors;

It is therefore dis-ingenious for Mrs. Gandy to use that failed proposal from the active committee of blind vendors, as her defense and justification to Violate the Randolph Sheppard Act.

THE GVRA's defense that Mrs. Davis temporary agreement of operation for Vending (#190), gave her no protection or coverage. However, The GVRA-BEP was already in contract with Mrs. Davis when they issued her license. This guaranteed her fair and equal treatment. -There is not Randolph -Sheppard Act-caveat that sets aside the requirement to provide economic opportunity and equality -based on the type of Agreement to Operate a Vending facility.

The decision to promote Mr. Mail over Mrs. Davis was discriminatory and was based on the GVRA-BEP's own promulgated agreement of operations. Mrs. Davis was not offered the opportunity to sign a permanent agreement of operation and yet this difference was held against her in this matter.

The GVRA-BEP has been unable to offer into evidence a past or current complete written, codified and adopted, policy and procedures manual. This lack of written policy has been noted in writing, since 2012, when Mrs. Davis asked for her first internal review on this issue.

Moreover, At the Arbitration hearing in 2017, the GVRA-BEP was asked repeatedly by the Mrs. Davis, and by the Panel, for a copy of a complete written policy from 2009,-2012, along with all revisions.

The last known published, adopted manual disseminated to all clients and staff of the GVRA, agency wide, not just the BEP program and staff, and the manual was dated 04/2009.

Mrs. Davis' witness, Mr. Stanley Turman, testified that he had never been given a complete written policy and procedures manual-despite his repeated requests.

Mrs. Eggleston and Mrs. Gandy testified that the GVRA-BEP still did not have a complete manual, as of the date of the Arbitration hearing (04/2017). They were not able to point the Arbitration Panel to the chapter, page and line that was part of the GVRA defense for not bidding out the newly created mega facility Mr. Mial had been promoted to.

The Randolph-Sheppard Act, P.L. 74-732, as amended by P.L. 83-565 and P.L. 93-516; 20 U.S.C. Sec. 107 et seq. Code of Federal Regulations, Title 34, Part 395 — Vending Facility Program for the Blind on "Federal and Other Property...

“(c) The State licensing agency shall further establish in writing and maintain policies which have been developed with the active participation of the State Committee of Blind Vendors and which govern the duties, supervision, transfer, promotion, and financial participation of the vendors. The State licensing agency shall also establish procedures to assure that such policies have been explained to each blind vendor.”

Their obstruction, and lack of truthfulness about why the GVRA-BEP did not follow Randolph Sheppard Legislation in the mandated active participation of the Committee of Blind Vendors in the transfer and promotion policy, as it applies to this merger, became obvious to all in the Hearing.

Neither Mrs. Gandy nor Mrs. Eggleston referenced that the current Chairperson of the Committee of Blind Vendors, as having been actively engaged and participating in this merger and decision. Mrs. Gandy named several person as advisors and approvers of this major policy deviation.

However, none of the people named have authority to make policy changes under the Randolph Sheppard Act.

Mrs. Gandy elected not to follow the promotion-transfer legislation requirement as mandated by Randolph Sheppard. Mr. Robert Matuzak- Chairperson-(2010-2013) nor was the Committee of Blind Vendors -named or cited the people involved in this major policy decision.

Since Mrs. Gandy was and had been the director of the GVRA-BEP program for 7 years previous to this decision, she was well versed in the policy legislation of the Randolph Sheppard Act. This was an act of willful disregard and retaliation personally against Mrs. Davis. Mrs. Gandy was aware that Mrs. Davis was unemployed since her loss of permanent facility in 2009. No effort has ever been made to offer Mrs. Davis employment after the loss of her facility, and after the egregious merger.

According the Randolph Sheppard- RSA-1936-1954-1974)

(b) The State Committee of Blind Vendors shall:

(1) Actively participate with the State licensing agency in major administrative decisions and policy and program development decisions affecting the overall administration of the State's vending facility program;

(c) The State licensing agency shall further establish in writing and maintain policies which have been developed with the active participation of the State Committee of Blind Vendors and which govern the duties, supervision, transfer, promotion, and financial participation of the vendors. The State licensing agency shall also establish procedures to assure that such policies have been explained to each blind vendor.

When asked to clarify the GVRA-BEP subjective classification the new mega facility as being open but not vacant, Mrs. Gandy nor Mrs. Eggleston could not find the written policy or procedure to support their decision or position. Indeed both staffers testified that there is no current written policy manual to reference. Mrs. Gandy testified that this decision was based on her sole discretion as director of the GVRA-BEP.

According to Randolph Sheppard Act (1936-1954-1974), the State licensing Agency has an affirmative

Economic opportunity obligation to each Blind Vendor.

(RSA- 1936-1954-1974)

“§395.11 Training program for blind individuals.

The State licensing agency shall ensure that effective programs of vocational and other training services, including personal and vocational adjustment, books, tools, and other training materials, shall be provided to blind individuals as vocational rehabilitation services under the Rehabilitation Act of 1973 (Pub. L. 93-112), as amended by the Rehabilitation Act Amendments

of 1974 (Pub. L. 93-516). Such programs shall include on-the-job training in all aspects of vending facility operation for blind persons with the capacity to operate a vending facility, and upward mobility training (including further education and additional training or retraining for improved work opportunities) for all blind licensees. The State licensing agency shall further ensure that post-employment services shall be provided to blind vendors as vocational rehabilitation services as necessary to assure that the maximum vocational potential of such vendors is achieved and suitable employment is maintained within the State's vending facility program.

My Final Decision

I do hear-by affirm that this Panel must and should grant to Mrs. Davis, each and every request in her Prayer for Relief (08/207).

The GVRA-BEP program has failed in it's obligation to provide for Mrs. Davis as per her written and spoken requests, continuity in her opportunity to work and be treated to equal economic enhancements as Mr. Mail, and every other licensed Blind Vendor in the State of Georgia.

Mrs. Davis has long been subjected to malicious, retaliatory behavior by the director of the GVRA-BEP program. This behavior has resulted in Mrs. Davis' continued lack of employment and opportunity within the GVRA-BEP program since (2009). The financial devastation suffered by Mrs. Davis as a result of Mrs. Gandy's retaliatory actions in (2012) resulted in Mrs. Davis losing the Vending (#190) location. These financial repercussions have been documented by Mrs. Davis's admission of the Bankruptcy filing papers, 2 months after the loss of(190) and the lack of other opportunities within the GVRA-BEP.

At no time during any of the preceding 5 years of grievances, reviews or arbitration hearings has the SLA of the GVRA-BEP, offered or entered into or evidenced any attempt to compensate or compromise with Mrs. Davis.

The State of Georgia –GVRA-BEP program has never requested to hold settlement talks, offer any open vending facility opportunities for employment, any re-training classes or assistance to Mrs. Davis.

Yet there is well documented proof that all of these above actions have been offered to other similarly placed licensed Blind Vendors.

The discrimination Mrs. Davis has suffered and continues to suffer, must be compensated for and addressed.

The Sprit, letter and the laws of Randolph Sheppard Act (1936-1954-1974) have been violated by the State of Georgia GVRA-BEP in their actions towards the Petitioner-Mrs. Phyliss Davis.

These actions arose from the Program director and staff in their professional capacity.

We, the Arbitration panel, must grant Mrs. Davis her Prayer of Relief in entirety.

Respectfully submitted,

Rev. Dr. Lillie M. Pickett

Date: October 17, 2017