

UNITED STATES DEPARTMENT OF EDUCATION
REHABILITATION SERVICES ADMINISTRATION

Case No. R-S/15-06

In The Matter of the Arbitration Between:

PATRICIA HOMAN,
Petitioner,

v.

STATE OF MARYLAND, DEPARTMENT OF EDUCATION
DIVISION OF REHABILITATION SERVICES
Respondent

Before a Tripartite Board of Arbitration:
Fred Shroeder, Petitioner-Appointed Member
Dana Murray, Respondent-Appointed Member
M. David Vaughn, Chair

OPINION AND AWARD

This arbitration proceeding takes place pursuant to the Randolph-Sheppard Act, 20 U.S.C. Sec 107 *et seq.*, Chapter 6A, Vending Facilities for the Blind. The Code of Federal Regulations ("CFR") contains regulations pertinent to this case which are found in CFR Title 34, Part 395. Petitioner Patricia Homan ("Homan" or "Petitioner") requested arbitration against the State of Maryland, Department of Education, Division of Rehabilitation Services ("DRS", "DEP" or "Respondent") to adjudicate a claim filed on November 25, 2013 that Ms. Homan was wrongly deprived of a promotion as the most senior qualified vendor for a vending facility at a federal building located on the campus of the National Institutes of Health ("NIH") in Bethesda, Maryland. Petitioner and Respondent are the "Parties" to the proceeding.

This proceeding takes place before a tripartite board of arbitration (the "Board" or the "Panel") consisting of Petitioner-Appointed Member Fred Schroeder, Respondent-Appointed Member Dana Murray and M. David Vaughn, as Chair, jointly

selected by the Parties. The proceeding is governed by the 20 U.S.C.107d-1(a) and 107d-2 and the implementing regulations CFR 395.13 as well as by case specific scheduling and administrative procedures confirmed on August 4, 2016.

A hearing was conducted on November 21, 2016 in Baltimore, MD. The evidentiary record was completed on that date. A second scheduled day of November 22, 2016 was canceled. In the proceedings, Petitioner was represented by Attorney Susan Rockwood Gashel. Respondent was represented by Maryland State Department of Education Assistant Attorney General Elliott Schoen. A court reporter was present at the hearing; the transcript of the hearing (page references to which are designated by day, page and line as "Tr. __") constitutes the official record of the proceeding. The witnesses who testified are identified in the transcript. Petitioner Exhibits A through K ("CX __") and Respondent Exhibits 1 through 11 ("RX __") were offered and received into the record. Prior to the hearing, the Parties agreed to a set of 15 numbered stipulation of fact ("FS __"), which were also received into the record.

The Parties closed by written Post-Hearing Briefs. Upon receipt of the Post Hearing briefs on January 17, 2017, the record of proceeding was complete. A draft Opinion and Award was circulated for Panel review and its deliberations considered and reflected herein. This Majority Opinion and Award is based on the evidentiary record and considers the arguments and authorities submitted by the Parties. It interprets and applies applicable law, regulations and authorities. A separate Dissenting Opinion is appended hereto.

I. FACTUAL BACKGROUND AND FINDINGS

The Parties

Respondent, DRS, is the state licensing agency that has been authorized by the Department of Education to administer the Randolph-Sheppard Act program in Maryland.

Claimant has been a licensed blind vendor in the Maryland DEP program since 2009 (FS 1.). She operated a dry stand at the National Institutes of Health in advance of the announcement at issue. At all times relevant, Ms. Homan held a current food service sanitation (Serv-Safe) Certificate.

Applicable Law and Regulation

The Randolph-Sheppard Act, adopted in 1936, established a federal-state cooperative program to provide employment opportunities to visually handicapped citizens. The program is overseen by the U.S. Department of Education ("USDOE") which authorizes state agencies to implement the program and train and license blind persons to manage and operate vending facilities located in federal facilities. States also administer the application and bidding process by which blind vendors are awarded the right to operate such facilities.

Federal regulations promulgated pursuant to the Randolph-Sheppard Act provide for the establishment of committees of blind vendors and mandate that such committees "actively participate with the State licensing agencies in major administrative decisions and policy and program development decisions affecting the overall administration of the State's vending facility programs." 34 CFR §395.14.

When a federal vending facility located in Maryland becomes available for assignment to a vendor, State regulations provide that the Agency will assign applicants to facilities based on their qualifications and seniority, unless the DRS or the Maryland State Committee of Blind Vendors ("Committee") can show that the senior applicant does not qualify based on the assignment criteria, which are set forth in the posted announcement. If the most senior applicant is not qualified, the DRS will assign the next most senior applicant who qualifies. COMAR §13A.11.04.06 (D) (2).

After the last date for responses, the Committee is afforded an opportunity to review the DRS assignment determination and to provide each more senior applicant who was found to be unqualified an opportunity to show how he or she is qualified. Administrative Manual, Section 4.C.3. Section 4 of the Maryland Administrative Manual for the program provides that in order to be assigned a vending facility the applicant must meet the specific criteria established for the facility. After the last date for responses, DRS makes an assessment of applicant qualifications and determines the senior-most qualified bidder whom it recommends for the assignment. When the Agency makes a formal award of the bid to the senior qualified applicant, the recommendation becomes final. If the recommended applicant is not the most senior bidder, the Agency is required to identify any applicants with more seniority and state to the Committee the reasons the applicants were found to be unqualified. It is then required to provide to the Chair of the Committee the name of the applicant recommended for the assignment (who must be the most senior qualified applicant). Thereafter, the Committee is required to schedule a meeting at the request of a more senior applicant found by the Agency to have been unqualified, in order to allow that applicant to show that he or she is, in fact, qualified. If the Committee disagrees with the DRS recommendation, the Agency and the Committee are required to hold a conference to resolve the disagreement. If they are unable to do so, the Agency determination is final; however, applicants dissatisfied with the determination may appeal the Agency's decision by requesting an Administrative Review pursuant to COMAR 13A.11.04.13. Administrative Manual, Section 4.C.4.

The VF #25 Solicitation and Bidding Process

Procedures for the assignment of vendors to facilities are set forth in Section 4 of the Administrative Manual. In accordance with those procedures, on February of 2013, the State of Maryland entered into a process to re-bid a facility known as VF #25 located in the NIH Building at 9000 Rockville Pike,

Bethesda, Maryland. This facility was a "dry stand" that served prepackaged food and freshly brewed coffee. NIH classified facilities that made coffee to be "food service facilities." The Federal Agency that controls the space where a vending facility, sets the requirements for the space and the qualifications required of a vendor who will operate the facility. Section 4.A.3 requires listing minimum assignment criteria for each announcement. Prior to the solicitation/bidding at issue here, NIH had sometimes required vendors of dry stands to have Food Service Sanitation Certificates ("Serv-Safe Certification"). (CX K).

As part of the minimum criteria for bidding on NIH VF #25, the February, 2013 announcement contained a specific criterion that bidders must have a current food service sanitation certificate as of the time the bid was awarded. (FS 2.) Petitioner bid on VF #25 (FS 4.) along with several other bidders.

The bidding for NIH VF #25 closed on March 7, 2013 (FS 3.) For purposes of this bid, Petitioner was the third bidder in seniority (FS 4.) Applicants Norberto Borja ("Borja") and Rashid Reyazuddin ("Reyazuddin") had more seniority than Ms. Homan. (RX-5.) Although both more-senior bidders had time to acquire a Serv-Safe Certificate prior to submitting their bids on VF #25 (and thereby become qualified), neither of these bidders possessed a current certificate at the time they bid, as was required by the announcement. (Tr. 43:17-19). As a result, DRS determined that Petitioner was the most senior applicant who met all of the bidding criteria. (Tr. 42:9-12.) and recommended Ms. Homan to the Committee for assignment to VF #25. (FS 5.) Borja acknowledged have not read the application. Reyazuddin indicated that he had no interest in acquiring the certificate.

Following the DRS determination that Homan was the senior qualified bidder and its notice to the Committee of its determination, the Committee met and recommended to the DRS that VF #25 be rebid and not awarded to any bidder (FS 6.) Petitioner was not informed of, nor was she allowed to attend,

the March 13, 2017 meeting of the Committee where this decision was taken, notwithstanding her request to the Committee Chair to be included.

Petitioner found out about the meeting when she called Borja. She testified at the hearing that Borja informed her that he "was the most senior bidder but that there were problems because he did not have the Serv-Safe and that he was waiting because they were going to take care of it." (Tr. 29:9 - 16). Homan was then asked, "And did you ask him what he meant by 'take care of it'?" to which she replied, "Well he sort of led me to understand that the program was going to do whatever so that he could get the facility." (Tr. 29:17-21)

When the Committee met it did not make a finding that either of the bidders who were senior to Homan met the qualifications of the announcement. Instead, the Committee concluded that based on their longevity in the program, their work experience and the fact that the DRS "inappropriately" sent the announcement out with the Serv-Safe requirement that had it had just obtained from NIH the day that the solicitation was posted, that Borja and Reyazuddin had been treated unfairly and either should have been awarded the bid in preference to Petitioner. (Tr. 110:23-T.111:2)

According to the testimony of Committee Chair Abbott, the Committee based its recommendation to re-bid the solicitation on the claimed unfairness of when the certificate would be required. The Committee posited that the Serv-Safe certificate should have been required as of the date the solicitation closed as opposed to the date the bid response was to be submitted by the applicants. (Tr. 47:2-48:2.)

The Minutes of the March 13, 2013 Committee meeting (CX K) notes under the heading "Facility Transfers":

VF #25 to Tico Borja - on hold.

On March 18, 2013, following the Committee meeting concerning the recommendation of DRS that Ms. Homan be awarded VF #25, the Committee held a conference call with Borja and Reyazuddin (RX 5) as per the procedures set out in COMAR and in Part 4, Section C.3 of the Administrative Manual. The conference call did not address Borja and Reyazuddin's qualifications for the facility as posted, (Tr. 42:13-43:19). The call was devoted, instead, to Borja and Reyazuddin's arguments as to why they should have been given the opportunity to acquire their Serv-Safe Certificates after their bids were submitted to DRS but before the March 29, 2013 date for starting operation of the facility. (Tr. 42:13-43:19).

The Administrative Manual provides, as indicated, that, if the Committee disagrees with DRS's recommendation, the Agency and the Committee will hold a conference to resolve the disagreement. If the conference does not resolve the disagreement, the Manual provides that DRS's recommendation shall be effective. DRS could either accept or reject the Committee's recommendation. (Administrative Manual, Section 4, C. 4.) However, the language from the Administrative Manual limits the Committee's role in the assignment of vendors to choosing the most senior qualified applicant for the assignment. The Manual does not provide for the Committee, at this stage of a pending announcement process, to make policy recommendations or to unwind the solicitation then underway.

DRS accepted the Committee's recommendation to withdraw the announcement and to re-issue it with changes stated by the Committee (FS 7.). On March 20, 2013, the BEP issued a revised solicitation for VF #25 with the following relevant revision, "The vendor must have a valid Food Service Sanitation Certification (Serv-Safe) *at the time of signing the Operating Agreement*, or will forfeit the facility to the next qualified vendor." (FS 8.) Emphasis added. The revision did not eliminate the Serv-Safe requirement, but merely changed the time during the assignment process at which the certification was required.

Petitioner did not bid on VF #25 when it was reposted (FS 9.). Norberto Borja bid on and was awarded the facility VF #25 (FS 10.). Ms. Homan objected to the award and timely requested an administrative review conference (CX C, p. 1), which was conducted on April 8, 2013 by Susan Shaffer, Director of Vision of Blind Services, pursuant to COMAR 13A.11.04.13(A). Ms. Shaffer issued a written Decision on April 19, 2013 (FS 11.). The Decision noted that Ms. Homan was not notified at the time that the BEP originally recommended her as the most senior qualified bidder to the Committee (CX C, p. 1). The Decision further noted that at the Administrative Review conference, Ms. Homan stated that she attempted to meet with the Committee and tried to obtain information from the Committee, but that "both were denied." (CX C, p. 2).

Ms. Shaffer's Decision concluded that all of the actions taken by DRS were in full accord with Section 4 of the Administrative Manual. She further concluded that there was no requirement for Ms. Homan to be notified that she was the recommended bidder the first time that VF #25 was bid because "the assignment action had not been completed" prior to the telephone conference with the Committee and more senior applicants Borja and Rayazuddin. (CX C, p. 3).

Following the Decision by Director Shaffer, on May 7, 2013, Ms. Homan sought a full evidentiary hearing. DRS referred the request to the Maryland Office of Administrative Hearings (OAH) on May 13, 2013 (FS 12.). After some postponements, (FS 13), a hearing was held on September 18, 2013 before Administrative Law Judge (ALJ) John Henderson, Jr., who issued a Proposed Decision in accordance with COMAR 13A.11.04.13(B)(11)(c) on October 13, 2013. The ALJ found that the controlling law and regulations in this matter are the Randolph-Sheppard Act and its regulations contained in 34 CFR, which provide that the Committee "shall actively participate with BEP in major administrative decisions and policy and program development decisions affecting the overall administration of the State's vending facility program." However, noted the ALJ, the federal regulations contain no

language granting DRS or the Committee "authority to re-bid after bidding has closed and a vendor has been recommended to operate the subject facility." (CX E, p. 13).

The ALJ's Proposed Decision found that DRS had no authority to withdraw and re-bid the closed announcement. As a result, the ALJ held that the agency's action was arbitrary and capricious. The ALJ also found that there was no requirement under the law that applicants be "forewarned" of any new bidding criterion, so the unsuccessful bidders could not prevail on a claim that the new requirement contained in the solicitation was "unfair" or that they had not been on notice of the Serv-Safe certificate would be required.

The ALJ's Proposed Decision was transmitted to Suzanne Page, Assistant State Superintendent of Schools, who issued a Final Decision on October 29, 2013 pursuant to COMAR 13A.11.04.13B(11)(d).(FS 14). The Final Decision rejected the ALJ's analysis. Ms. Page stated that she based her reversal of the proposed Decision on the following considerations:

1. The BEP added the Serv-Safe certification requirement to the solicitation announcement on the day it was issued without seeking the advice of the Committee about the additional criterion.

2. COMAR 13.A.11.04.02(B)(1) defines "active participation" to mean "an on-going process of negotiations between the Division and the Committee to achieve joint planning and approval of program policies, standards, and procedures before their implementation by the Division."

3. In this case, the BEP did not seek participation of the Committee when it added the Serv-Safe criterion to the solicitation announcement. The agency, therefore, concluded that the solicitation announcement was void *ab initio*.

4. The BEP has the inherent authority to rebid an assignment when the Committee advises that the bid process was unfair to all the vendors and the BEP agrees.

After the Agency issued its Final Decision, Ms. Homan submitted the instant Complaint against the State of Maryland, DRS for arbitration pursuant to the arbitration provision of the Randolph-Sheppard Act. This proceeding followed.

II. POSITIONS OF THE PARTIES

The positions of the Parties were set forth at hearing and in thorough post-hearing briefs. They are summarized as follows:

Petitioner's Position

Petitioner Homan objects to the conclusions contained in the Final Decision of the Assistant State Superintendent of Schools (CX F) as based on incorrect application of applicable law to the facts. She alleges that ALJ Henderson correctly applied the law to the facts and that his proposed decision is fully consistent with applicable law and regulations.

Petitioner questions the conclusion of the Agency's Final Decision that the regulations require an interactive process between the DRS and the Committee to include "active participation" by the Committee in establishing criterion for specific solicitations for vending facilities. Petitioner points out that no evidence was presented at the evidentiary hearing that led to the Final Decision that the DRS and the Committee are required to consult with respect to criteria every time a vending solicitation is issued. In fact, the Minutes of the Committee Meetings show many instances where the Committee required no consultations with DRS concerning the specific language of solicitation documents (CX K).

Ms. Homan also alleges that the Final Decision misstated the law when it said that "the Committee has the power to disagree with the BEP's recommendation" after DRS (BEP) selects a vendor and submits the name to the Committee. She argues that the COMAR regulation requires DRS to schedule a meeting with any

purportedly more-senior qualified applicant if the most senior vendor does not meet the Vending Facility assignment criteria. COMAR § 13A11.04.06(E)(3). She denies that the Committee's right to contest the lack of qualification of rejected applicants constitutes a right on the part of the Committee to unwind the solicitation. She points out that, if the Committee disagrees with the recommendation of DRS as to the lack of qualification of any applicant, the regulation requires DRS and the Committee to hold a conference to resolve the disagreement, but that no such resolution conference was requested or held in this case (Tr. 133:14-134:11).

Petitioner also rejects the Final Decision's conclusion that the Committee has a role in the solicitation and bidding process and "its role at large in building a relationship between the BEP and the vendors." She maintains that as a result of that erroneous conclusion, the Final Decision extrapolated that DRS had the authority to follow the Committee's recommendation and withdraw and re-bid the completed solicitation. Petitioner avers, consistent with the ALJ's proposed decision, that neither the federal regulations set out in 34 CFR section 395.14, nor COMAR or the state's Administrative Manual allow for an opportunity to re-bid a published solicitation for which bids had been submitted and closed.

Petitioner points out that the requirement for applicants to hold Serv-Safe certifications had been included in previous solicitations, including the 2011 NIH bid for VF #117 (which was a dry stand like VF #25 at issue in this case). As a result, the Committee's argument that no Serv-Safe criteria had previously been imposed on a dry stand in the past, is simply incorrect.

Petitioner also takes issue with the Final Decision's conclusion that DRS may establish the criteria for a solicitation only with the "active participation" of the Committee." She argues that, while COMAR does provide for "active participation" to "establish written criteria for each

vending facility," the Minutes of past Committee meetings and the Committee Chair's own testimony show that DRS does not, in fact, consult with the Committee with respect to individual solicitations. (CX K; Tr. 46:14-18).

Petitioner asserts, further, that the required "consultation" is provided when the Committee contributes to drafting the written criteria contained in the Administrative Manual and not when the Committee might sporadically comment on specific language in a solicitation.

Petitioner also disputes the finding of the Final Decision that DRS has the "inherent authority" to rebid an assignment when the Committee believes that the bid process was unfair and the DRS agrees. Ms. Homan points out that, under State regulations, the Committee's role was limited to exploring whether senior bidders determined by DRS to be unqualified might, in fact, be qualified and presenting the Committee's evidence and argument in that regard to the Agency.

Petitioner also points out that the Randolph-Sheppard Act requires that the Committee serve as advocates for vendors in connection with their grievances. 34 C.F.R. §395.14(b)(2). Ms. Homan complains that, instead of advocating for Petitioner, the Committee took a position, and its Chairman testified, against her.

Finally, Ms. Homan objects to the Final Decision's conclusion that "to require the BEP to assign a vendor in a process deemed unfair would fly in the face of reason." Petitioner asserts that the State regulation gives final administrative authority for the program to DRS, not to the Committee of Blind Vendors. Furthermore, she argues that there was no evidence in the solicitation at issue of unfairness to vendors. She argues that evidence submitted at the evidentiary hearing before the ALJ showed that vendors had time to obtain the required Serv-Safe certificate between the time of the solicitation announcement and the bid closing date. She points out that "There was evidence presented at the hearing that

showed a serve-safe certificate could be obtained within two weeks; or at least between February 19, 2013 and March 7, 2013." (CX E, p. 16, footnote 4.)

Petitioner requests that the arbitration Panel grant her relief from the agency's Final Decision by sustaining her position and ordering DRS to install her permanently as a blind licensee for VF #25. Respondent also requests that she be paid lost earnings from the date that she would have been assigned to VF #25, but for DRS's refusal to go ahead with her initial selection, until the date that she is finally installed as the operator of that facility. Respondent further requests that she be granted her costs and attorneys' fees in this matter.

Respondent's Position

Respondent argues that DRS's unilateral change of required qualifications for the Vending Facility #25 was the first time that such a change had been made since at least 1958. The Department characterizes the requirement that vendors possess a Serv-Safe Certificate as a "major administrative decision" that required the active participation of the Committee. Respondent asserts that the change was made without notice to the blind vendors and without any grace period for the vendors to obtain the Serv-Safe Certificate.

Respondent maintains that similar decisions by blind vending programs without the active participation of other states' Committees have been invalidated by courts and arbitration panels as violations of the Randolph-Sheppard Act. In support of this proposition, Respondent cites *Committee of Blind Vendors v. District of Columbia*, 736 F. Supp. 292 (D.D.C. 1990), rev'd on other grounds, 28 F.3d 130 (D.C. Cir. 1994); *Smith v. Rhode Island State Services for the Blind & Visually Handicapped*, 581 F. Supp. 566 (D.R.I. 1984); *Bird v. Oregon Commission for the Blind*, U.S. Department of Education Arbitration, R-S07-2, Nelson, Arb. (2009); and *Autry v. Johnson*, CIV 3:04CV587 H, 2006 WL 3240810 (W.D. Ky. Nov. 3, 2006).

Respondent points out that, as a result of the telephone conference call with Borja and Reyazuddin, the Committee determined that they were qualified to bid on VF #25 "on the basis of their longevity and work experience" and that "the procedure to change the specific criteria was flawed." (Abbott Testimony, Tr. 110:23 - 111.2). The Department asserts that if DRS would not have accepted the Committee's recommendation to cancel the original solicitation, it would have been in violation of the Randolph - Sheppard Act as well as Maryland's own regulations and Administrative Manual. The Agency contends that, by accepting the Committee's recommendation, it avoided the "active participation" violations cited by the D.C., Rhode Island and Kentucky courts, as well as by the Department of Education arbitration panel decision from Oregon cited above.

The Respondent further argues that the Agency's decision to accept the Committee's recommendation to void and rebid the Solicitation was within its inherent authority. Respondent concedes that DRS's determination to accept the Committee's decision is not expressly addressed in the law or in the State Agency's policy. It relies for this proposition on the Committee's Chair's testimony that, at times, it was necessary to "change the policy or revise something within the administrative manual to make it permanent kind of situation." (Tr. 64:9-18).

Respondent contends that the Panel's role is to review the agency's Final Decision and that the standard of review to be applied by this Panel is that standard used by a review of an agency's decision under the Administrative Procedure Act, 20 U.S.C. § 107d - 2(a). That is, an agency decision cannot be reversed if an administrative decision does not exceed the Agency's authority, is not unlawful and is supported by competent, material and substantial evidence. It contends that the evidence submitted by Petitioner fails to meet those burdens.

Finally, the Respondent argues that DRS's decision to cancel the original solicitation was "consistent with [its]

obligation to actively participate with the Committee on major administrative decisions." Petitioner maintains that there is no evidence that the program acted illegally, abused its discretion or that the Final Decision can be deemed to be arbitrary or capricious, and that the Decision must, therefore, stand.

It urges, on that basis, that the Complaint be denied.

III. FINDINGS OF FACT, CONCLUSIONS OF LAW AND REASONS

Issues for Determination

1. Whether DRS violated the Randolph-Sheppard Act when it failed to award Claimant NIH VF #25;
2. Whether the State of Maryland violated its regulations regarding the transfer and promotion of vendors; and
3. If there has been a violation of the Randolph-Sheppard Act and the concomitant state regulations, what is the appropriate remedy?

Standard of Review

The Randolph-Sheppard Act provides that the arbitration hearing proceeding is to be conducted in accordance with the Administrative Procedure Act, 20 U.S.C. §107d-2-a. Petitioner can prevail only if she can prove that the Agency's Final Decisions exceeded its authority, was unlawful and/or was not supported by competent, material and by substantial evidence. Substantial evidence is that evidence considered on the record as a whole which is more than a scintilla but less than a preponderance of the evidence.

DISCUSSION AND ANALYSIS

Respondent relies for its authority to make the determination set forth in the Final Decision on the statutory

language requiring "active participation" on the part of the Committee to justify its cancelation and re-bidding of the solicitation for VF #25. While Respondent acknowledges that there is no specific statute or regulation that addresses re-bidding, it argues that the "expansive language" of the Randolph-Sheppard Act and Agency policy give it the authority to withdraw the announcement and repost and re-bid. The Board is not persuaded.

The Agency is responsible for the assignment of blind vendors to vending facilities. It carries out those responsibilities through an announcement and application procedure at the conclusion of which the senior qualified bidder is to be awarded the right to operate the facility. Administrative Manual, Section 4. That process must be administered in accordance with the agency's own procedures and in a fair and regular manner. While the Agency may have a right to annul a solicitation in the event of circumstances negating the purpose of the announcement (e.g. the facility burns down), the solicitation process must be fair and regular and cannot be short-circuited for the purpose of changing the announcement to elevate one applicant over another, certainly not after the application period has closed and a senior qualified applicant identified and recommended.

However, the evidence establishes that the agency's actions were taken in order to adopt the recommendation of the Committee. The determination to consider and adopt the recommendation is based on the Committee's role of "active Participation." Federal regulations promulgated under the Randolph-Sheppard Act found at 34 CFR §395.14 set out the "active participation" requirement with respect to the State Committees of Blind Vendors:

(b) The State CBV of Blind Vendors shall:

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

(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 blind vendors.

The relevant regulations make clear that the Committee's right is to actively participate in major administrative decisions and in policy and programs affecting the overall administration of the programs and in the development and administration of a state system for the transfer and promotion of blind vendors. The language does *not* provide for the Committee to intervene in support of one or more vendors over another in an application process after it has been properly conducted and closed, when that process has been fair and regular on its face. The nature and scope of the Committee's participation clearly implies that participation not provided for is not a part of the Committee's role. Indeed, by providing that the Committee may present evidence and argument as to why a senior applicant designated by the Agency in a particular bidding process as unqualified should be deemed qualified implies that such right is the limit of its authority with respect to such process.

The Panel does not believe that the State of Maryland can never cancel and re-bid a pending solicitation. It simply must do so as part of an overall policy and program decision, not in the context of an individual announcement the language of which certain favored vendors of the Committee may have an objection. For the State to undertake this process on an *ad hoc*, secretive basis as it did in this case was arbitrary and capricious.

In her initial review, Director Schaffer wrote that with respect to the first bidding process for VF #25, "the reasons that the Committee rejected the bids were not discussed at the conference and documents presented did not discuss the reasons." (CX G, p. 3) She went on to state, "For reasons not explained

at the conference or in the documents submitted, the Committee recommended rebidding the facility. . ." Her determination to endorse the Committee's position without even ascertaining the reasons the Committee recommended re-bidding VF #25 cedes plenary authority over the application and vendor assignment process to the Committee. Such authority is not conferred on the Committee by law and regulation.

For example, Ms. Homan was denied the opportunity to participate in the March 13, 2013 Committee meeting that discussed the DRS recommendation that she be awarded the bid. She was similarly excluded from the follow-up telephone conference call with the two unqualified senior bidders. Indeed, the Meeting Minutes from the March 13, 2013 meeting (CX K) indicate that Borja was already pre-designated as the bid winner even before the conference call with the two most senior applicants took place. As the Meeting Minutes read, "VF 25 to Tico Borja - on hold." (CX K). It appears that the Committee had already decided who would win the bid for VF #25 even before it listened to Borja and Reyazuddin's reasons why they should not be disqualified.

There is no transcript of the telephone conference call between the two more-senior applicants and the Committee, but Committee Chair George Abbott testified at the hearing before the Panel that Borja stated during the call that he had never held a Serv-Safe Certificate and was "not interested" in holding such a certificate. (Tr. 140:19-25). Mr. Abbott also testified that Reyazuddin had previously held a Serv-Safe Certificate, but it had expired prior to the date of the solicitation at issue here. (Tr. 154:18-21). The evidence shows that Reyazuddin had "left the program" in the year 2012 to go to India. When he returned to Maryland, his Serv-Safe certificate had expired. (Tr. 154:13-17)

The Chair of the Committee further testified that the bidders had no advance notice of the "new" requirement that NIH would require the successful applicant to have a current Serv-Safe certification (Tr. 144:22-145:3). Abbott emphasized that

the State had scheduled Serv-Safe training session for March 23, 2013 after the original bidding process closed which training session Borja and Reyazuddin were planning to attend. He opined that, in order to be fair, the two more senior applicants should have been given the opportunity to obtain their Serv-Safe certificates before they had to submit their bids for VF #25. (Tr. 47:2-7).¹

The Committee's intervention against Ms. Homan - and, more importantly, the Department's acceptance of the Committee's position - was premised on the unfairness of the solicitation/bidding process as a result of the inclusion of a "new" bidding requirement which the more senior applicants were unable to satisfy.

These reasons are not persuasive. For one thing, the requirement for bidders to have a Serv-Safe Certificate was not "new." At least one other solicitation for a similar vending facility (VF #117) had contained Serv-Safe requirements in the past. (Tr. 123:9-124:24) Reyazuddin was, in fact, the previous holder of VF #117. (CX B) When the bid for VF #117 came up again for solicitation after Reyazuddin's previous tenure was over, the bid documents listed Reyazuddin as one of the contact persons for interested potential bidders to contact for information about the site. (CX B). For Reyazuddin to claim in March of 2013 that he was uninformed that NIH was "newly" requiring Serv-Safe certificates for its vending facilities was disingenuous on his part.

The evidence also shows that Montgomery County, Maryland had the same requirement as the NIH had with respect to Serv-Safe Certificates for its food service facilities. (Tr. 131:13-23). In addition, Mr. Abbott volunteered that the GSA started

¹ The evidence showed that the two more-senior bidders had other opportunities other than the Maryland program-sponsored March 23, 2013 training session to acquire their Serv-Safe certificates. Training was also offered by the National Restaurant Association (Tr. 131:24-132:8) as well as by community colleges (Tr. 173:6-13). Indeed, Mr. Borja testified that he had acquired his past Serv-Safe Certificate by going to a private teacher (Tr. 143:1-3).

to impose this requirement on a nationwide basis at least in 2013. (Tr. 99:20-23 - 132:9-13). Since Montgomery County, the NIH and GSA required Serv-Safe Certificates for facilities serving coffee, we find it difficult to believe that Borja and Reyazuddin were incredulous when they found out that the requirement would be imposed on them.

The two more senior unqualified vendors made much of the fact that they were not "forewarned" about the requirement for VF #25 that a Serv-Safe certificate would be required for bidders. There was, however, no requirement in the Maryland state regulations or procedures that required the DRS to give blind vendors any advance warning of changes in the bidding criteria for individual solicitations. Indeed, the putative "winner" of the first bidding round, Norberto Borja, told the Committee that he never even read the bid requirements. (Tr. 140:9 - 18) and that Borja "never cared for it [the Serv-Safe requirement]" (Tr. 140:21-25). Indeed, had the senior bidders read the announcement, they would have learned of the requirement and could have acquired the certificate within the time allowed prior to the close of bids. The senior applicants were unaware of the requirements because neither read the announcement. Indeed, one said he had no interest in obtaining such a certificate. An applicant's failure to read an announcement before he sends in his bid and an applicant's distaste for a bidding requirement does not make the bidding process unfair or irregular to him. The Agency's uncritical acceptance of the Committee's broader assertion of both facts and authority exceeded its lawful authority. There is not "inherent authority" to arbitrarily pull a closed announcement in order to deny one applicant's rights under that announcement in favor of others.

Respondent cites several inapposite cases in an attempt to show that other states practices are in line with Maryland's position. The cases cited by Respondent in its brief can be distinguished from the facts in this case.

Committee of Blind Vendors v. District of Columbia, 736 F.Supp. 292 (D.D.C. 1990), rev'd on other grounds 28 F.2d 130 (D.C. Cir. 1994), had to do with the District of Columbia's overall mismanagement of the blind vendor program in the 1980's. Among the mismanagement allegations was an allegation that DC terminated its management nominee without consulting the Committee of Blind Vendors. The Court found that the vendors were allowed no meaningful participation on this issue nor were they allowed to participate in many other areas of the program's major administration and policy decisions. This situation in the DC case is easily distinguished from the situation in Maryland, where Mr. Abbott of the Committee testified that the Committee has substantial input into the applicable sections of COMAR and into writing the Administrative Manual as well as in other major areas of the programs as required by the Randolph-Sheppard Act. (Tr. 64:5-8; 86:20 - 87:25). *Smith v. Rhode Island State Services for the Blind & Visually Handicapped*, 581 F.Supp. 566 (D.R.I. 1984), similarly dealt with a major program decision undertaken unilaterally by a state agency. In Rhode Island the state agency formulated a detailed seniority system for the State's blind vendors without participation by the vendors.

In the *Bird v. Oregon Committee for the Blind*, US Dept. of Education Arbitration R-S/07-2 (2009), decision, the issue was whether a decision by the state agency constituted a "major decision." In that case, the state agency decided to include community colleges in the program without considering the blind vendor's committee's vote on the topic. The arbitration panel found that the inclusion of community colleges in the program was a major decision within the meaning of 34 CFR §395.14(b) pursuant to which the state was obligated to allow the Committee active participation. The instant matter, by contrast, did not constitute "major administrative decisions and policy and program development decisions" as set out in this subsection of the federal regulations. Rather, the Maryland issue involves the wording of a single bid solicitation and the post-facto

determination to reject the successful bidder and rescind the solicitation.

Respondent also cites *Autry v. Johnson*, CIVVA 3:04CV587 H, 2006 WL 3240810 (W.D. Ky. Nov. 3, 2006), where the vendor appealed the program's award of a vending facility, citing the alleged lack of active participation by the Committee. Since the program director had actually consulted a subcommittee of the Committee, the arbitration panel upheld the agency's decision. In the Maryland case, there is no allegation of failure by the State agency to consult the Committee of Blind Vendors. The case does not address the right of the Committee to extend its active participation to recommend setting aside a solicitation, fair and regular on its face, for which bidding had closed or the Department's authority to rely on that recommendation to do so.

Even if the Agency's action were to be determined to be within its authority, it was not supported by substantial evidence. In making its recommendations and otherwise urging the Agency to set aside the announcement, and Petitioner's status as the Senior qualified bidder, the Committee exceeded its authority. The announcement and application process was fair and regular. The evidence submitted by Respondent to establish that it was not is unpersuasive. The Committee's assertions were not valid. Absent demonstrated unfairness or irregularity, for which there is no evidence, the Department had no authority to set aside and rebid the announcement, whether based on the Committee's recommendations or *sua sponte*. The Petitioner has met her burden to show that the Agency acted beyond its statutory authority and without substantial evidence to support its position.

Remedies

A majority of the Panel concludes that Petitioner should have been awarded the permanent operation of VF #25 located at the NIH building in Rockville, Maryland. She is to be granted relief for her lost earnings from the date she would have been

placed in VF #25 and continuing until she begins to operate the facility. The Agency's actions in denying the facility to her were in violation of the law and regulations and caused the Petitioner to suffer economic losses, but for which violation she would not have incurred. Previous court rulings such as *Premo v. Martin*, 119 F.3d 764, 769 (9th Cir. 1997), cert. denied, 522 U.S. 1147 (mem) (1998) have allowed compensatory damages in similar arbitrations.

The Panel Majority also finds that Respondent acted beyond its statutory authority and contrary to its regulations in rescinding the solicitation for which Petitioner was the senior qualified applicant. It thereby violated Claimant's rights, but for which she would have been awarded the right to operate NIH VF #25 and would have received compensation based on that award. Claimant shall be made whole for damages suffered as a result of this failure.

The Panel Majority further finds it appropriate to allow application for reasonable attorneys' fees as part of the compensatory process.

The matter will be remanded to the Parties for a period of 45 calendar days for the purpose of fashioning a remedy. The Panel will retain jurisdiction over this matter for ninety 90 calendar days to address matters of remedy in the event the Parties are not successful.

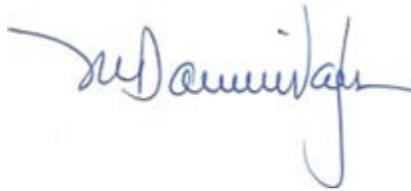
A W A R D

1. The Maryland Division of Rehabilitation Services violated the Randolph-Sheppard Act by acting beyond its authority, in an arbitrary and capricious manner and without substantial evidence in support of its position when it failed to award the vending for NIH Facility VF #25 to Claimant in March, 2013.
2. The Maryland Division of Rehabilitation Services shall award Claimant the vending for NIH Facility VF #25,

subject, however, to the thirty (30) day period provided for in paragraph number 5 below.

3. As a result of the Agency's violation, Petitioner suffered economic losses but for which she would not have incurred. The State of Maryland, through the Division of Rehabilitation Services, shall pay Petitioner compensation to make her whole for damages incurred.
4. The State of Maryland, through the Division of Rehabilitation Services, shall pay Petitioner's reasonable attorneys fees in connection with this case. Petitioner may submit and serve on Respondent a Petition for Attorneys Fees within 30 calendar days from issuance of this Award, to which Respondent shall have 30 calendar days from receipt of service to respond.
5. The matter is remanded to the Parties for 30 days for purposes of determination of appropriate remedy.
6. The Panel will retain jurisdiction for 120 days following the issuance of this Award, and, thereafter by agreement of both Parties or upon the written application of either Party for good cause shown to address any matters which may arise in the implementation of this Award and to rule on any Petition for Attorney's fees.

It is so awarded this 30th day of March, 2017.



M. David Vaughn, Arbitrator
Chair of the Panel



Fred Schroeder
Petitioner-Appointed Member

DISSENTING-SEE SEPARATE OPINION

Dana Murray
Respondent-Appointed Member

DISSENTING OPINION

I respectfully Dissent from the majority panel Opinion and Award.

The Randolph-Sheppard Act's active participation requirement compels the state licensing agency to partner with the Committee in major administrative decisions and policy and program development decisions affecting the overall administration of the State's vending facility program. 20 U.S.C. § 107b-1(3); 34 C.F.R. § 395.14(b)(1). Among the major administrative decisions requiring active participation with the State agency is the development and administration of a transfer and promotion system for blind licensees. 20 USC 107b-1(3)(D); 34 C.F.R. § 395.7. Maryland regulation, COMAR 13A.11.04.06D(1) and (2), requires the state licensing agency, with the active participation of the Committee, to establish written criteria for each vending facility which an applicant is required to meet in order to qualify for assignment to the vending facility. The Administrative Manual, Section 4(B)(4)(1) (Vendor Assignment Procedures) mandates that specific criteria are established for a facility by the current manager, a representative of the Committee, the Program Director and the counselor for that facility.

The process to develop specific criteria as defined in the Administrative Manual is at the core of the transfer and promotion blind vendors and the overall operation of the blind vending program. T: 87-88. DRS' unilateral change of the specific criteria of the vending facility for gift shops that serve coffee, had not previously been changed since at least 1958. T. 79. This was a major administrative decision and a decision effecting the transfer and promotion of vendors and required the active participation of the Committee. The unilateral change was made without notice to the blind vendors and without any grace period for vendors to obtain the new requirement. No one told Mr. Borja or Mr. Reyazuddin about the new Serv-Safe certification requirement to be eligible to bid on

the facility before the criteria was changed. T. 140:21-25; T.150:14-15; T.158:17-19.

DRS has cited substantial legal authority to support the fact that if the state agency administering the Randolph-Sheppard program does not include "active "participation" of the Committee, its unilateral actions will be held to be violations of the Randolph-Sheppard Act and will be overturned. *Committee of Blind Vendors v. District of Columbia*, 736 F. Supp. 292, 316 (D.D.C. 1990), rev'd on other grounds 28 F.3d 130 (D.C. Cir. 1994). *Smith v. Rhode Island State Services for Blind & Visually Handicapped*, 581 F. Supp. 566 (D.R.I. 1984); *Bird v. Oregon Commission for the Blind, U.S. Department of Education Arbitration, R-S/07-2* (2009). In each of these cases, the unilateral decisions violated the Randolph-Sheppard Act and were invalidated.

The Panel Majority seeks to distinguish these cases from the one at hand by claiming that the decision in this case is not a "major policy decision" requiring Committee participation. 34 CFR section 395.14(b)(1). But the Majority ignores the fact that both 34 CFR section 395.7 and 34 CFR section 394.14(b)(3) require that the Committee "actively participate with the State Agency in the development and administration of a state system for the transfer and promotion of blind vendors." The establishment of a new criteria by which a vendor will be chosen to transfer to another facility must have input from the Committee.

DRS recommended Ms. Homan to the Committee; she had not yet been assigned. In reviewing the recommendation, the Committee was made aware of the new requirement. When DRS sought the active participation of the Committee on how to resolve the issue, the Committee unanimously recommended that DRS re-bid the facility. Had DRS ignored that recommendation, the whole requirement of "active participation" would have been nullified.

It is well settled that the express grant of statutory power to a governmental agency carries with it -by necessary

implication- the authority to use all reasonable means to effect the grant of power. *M'Culloch v. Maryland*, 17 U.S. 316 (1819). The broad delegation of authority to the agency includes the authority to make "significant discretionary policy determinations." *Christ v. Dep't of Natural Resources*, 335 Md. 427, 445 (1994). An agency has implied powers which include by implication all powers and duties incidental and necessary to make the legislation effective. *Phelps Dodge Corp. v. N.L.R.B.*, 313 U.S. 177, 194 (1941) (The power with which Congress invested the Board implies the responsibility of exercising its judgment in employing the statutory powers). Because Congress could not define the whole gamut of remedies to effectuate policies in an infinite variety of specific situations it met these difficulties by leaving the adaptation of means to end to the agency's experience of administration. *Virginia Concrete Co. v. N.L.R.B.*, 75 F.3d 974, 988 (4th Cir. 1996).

In *Bernard Werwie v. Pennsylvania Office of Vocational Rehabilitation*, Case NO. R-S 07-9 (March 1, 2009), the Pennsylvania DRS decided to advertise a satellite vending facility only in the region where the vending facility was located. Mr. Werwie, the most senior vendor in the Pennsylvania program, objected to the program's regional advertising of the vending facility and the program's decision not to allow him to bid on the facility. Mr. Werwie argued that the agency's decision to advertise only in a region was not addressed in law or agency policy and was arbitrary. The arbitration panel concluded the program's decision was not arbitrary, capricious or in bad faith. "Respondent's decision was a reasonable attempt to remedy a difficult situation; it was within its decision making authority under the Act and implementing regulations; and was done in furtherance of the best interests of all blind vendors in the State of Pennsylvania." *Id* at 10. The arbitration panel citing *Massachusetts DPW v. Secretary of Agriculture*, 984 F.2d 514 at 521 (1st Cir. 1993) noted that, "Neither the fact that there are other possible places at which the line could be drawn nor the fact that the administrative scheme might occasionally operate

unfairly from a participant's perspective is sufficient, standing alone, to undermine the schemes legality." Id. at 14.

The incidental and necessary powers of the DRS to implement the Randolph-Sheppard Act and operate the program necessarily gives it the discretionary latitude to accept the Committee's recommendation to revise the specific criteria and rebid VF 25. *Christ v. Dep't of Natural Resources*, 335 Md. at 445. Although the DRS' decision to accept the Committee's recommendation is not expressly addressed in law or agency policy, the DRS' decision was not arbitrary, capricious or in bad faith. Like the Pennsylvania program decision in *Bernard Werwie*, where the decision the program made was not expressly stated in law or policy, the DRS was well within its authority under the Randolph-Sheppard Act, regulations and the Administrative Manual to accept the Committee's recommendation to revise the specific criteria and rebid the vending facility. The Randolph-Sheppard Act expressly grants the DRS, as the State Licensing Agency, the authority to operate the blind vending program. 20 U.S.C. §107a(b) and (c); 20 U.S.C. §107b; 20 U.S.C. §107b-1. The Randolph-Sheppard Act, regulations and the Administrative Manual could not envision every unique situation that arises in the operation of the DRS. Accordingly, agency discretion is critical because not every situation that can arise can be specifically addressed by a regulation or policy. The DRS' experience of administration of the blind vending program fills in the gaps in the gamut of remedies to address the specific situations the DRS encounters; such as this situation. *Virginia Concrete Co. v. N.L.R.B.*, 75 F.3d at 988. As Mr. Abbott stated regarding regulations and agency policies, "You can write them and then you find sometimes situations that occur that you didn't cover and so you have to come up with some judgment for making a decision right at that time and then either change the policy or revise something within the administrative manual to make it permanent kind of situation." T.64:9-18. This is why decisions are made with the consultation of the Committee." T. 65:19-T. 66:6.

The DRS' implied powers to operate the blind vending program are incidental and necessary to operate the program required by the Randolph-Sheppard legislation. *Phelps Dodge Corp. v. N.L.R.B.*, 313 U.S. at 194. The program's decision was a reasonable attempt to remedy the improperly changed specific criteria, the unfair solicitation, and craft an equitable remedy. T. 47:21-T. 48:2; T. 71:23-T. 72:8; T. 74:14-18. The bid was within the DRS' inherent decision making authority under the Act and implementing regulations; and was done in furtherance of the best interests of all blind vendors. To require DRS to award Ms. Homan VF 25 based on a solicitation deemed by the Committee to be unfair and inequitable would fly in the face of reason. *Homan Ex. I*, p. 3, Agency Final Decision. The Committee's active participation would be meaningless if the DRS did not have the authority to accept the recommendation to remedy the flawed change in specific criteria and unfair solicitation. Without the opportunity to accept the decision, DRS could make unilateral decisions affecting the operation of the program, including promotion and transfer, without any involvement of the Committee, and be unable to correct a bad or illegal decision. To avoid nullifying the Committee's active participation mandate and create absurd results, it is a necessary, essential and proper for the program to have the authority to remedy Randolph-Sheppard violations identified by the Committee. Acceptance of the recommendation is consistent with the intent of the legislative imperative of the Committee's active participation in major administrative decisions.

Although the DRS decision to accept the Committee's recommendation was perceived by Ms. Homan to operate unfairly against her, the decision was made with the active participation of the Committee, remedied a Randolph-Sheppard violation, and was made to fashion an equitable remedy in fairness to all vendors. The DRS's decision was a reasonable solution to a difficult situation, made consistent with the structure of the Randolph-Sheppard Act, regulations, and the Administrative Manual to operate the program to benefit all vendors. The

Committee's review and recommendation of DRS' unilateral change of the specific criteria acts as an appropriate check on the DRS process to ensure that the Committee can identify errors in the operation of the program and make recommendations to correct errors. *Committee of Blind Vendors v. District of Columbia*, 736 F. Supp. at 316. The DRS was exercising necessary authority and its decision was legal, rational, and reasonable.

Moreover, based upon sovereign immunity, I dissent from the award of money damages and legal costs.

In *Federal Maritime Commission v. South Carolina State Ports Authority*, 535 U.S. 743, 122 S.Ct. 1864, 152 L.Ed.2d 962 (2002), the Supreme Court held that sovereign immunity prevents the "impermissible affront to a State's dignity to be required to answer the complaints of private parties" or "defend itself in an adversarial proceeding against a private party" in federal court or before an administrative tribunal of an agency.

The Supreme Court distinguishes *Premo v. Martin*, 119 F3d 764, (9th cir. 1997), cert. denied, 522 U.S. 1147 (mem) (1998), cited by the Majority Panel for compensatory damages. The Supreme Court concluded that the waiver of immunity to some form of relief does not necessarily extend to awards of monetary relief for past damages, such as those awarded by the arbitration panel in that case. It held that the Randolph-Sheppard Act makes no reference to monetary relief or even to sovereign immunity generally. "In analyzing whether a sovereign has waived its immunity, we strictly *1015 construe the scope of any alleged waiver in favor of the sovereign. We may not enlarge the waiver beyond what the language [of the statute] requires."

Other Supreme Court cases hold to the contrary of *Premo* sovereign immunity cannot be waived by implication. See also *Lane v. Pena*, 518 U.S. at 192, 116 S.Ct. 2092; *United States v. Nordic Village Inc.*, 503 U.S. 30, 34, 112 S.Ct. 1011, 117 L.Ed.2d 181 (1992); and *Nelson v. Miller*, 570 F.3d 868, 883(7th Cir. 2009).

As to legal costs as well as monetary damages, in Wisconsin Dept. of Workforce Dev., Div. of Vocational Rehab. v. U.S. Dept. of Educ., 667 F. Supp. 2d 1007, 1009 (W.D. Wis. 2009), the court held that there was no waiver of sovereign immunity for past money damages in Randolph-Shepard Act and no attorney's fees could be assessed. The court held that the Eleventh Amendment bars enforcement of an arbitration panel award of retroactive money damages. It held that nothing in the Act states, either expressly or by "overwhelming implication," that the state may be required to pay retroactive damages to blind vendors dissatisfied with state actions.



Dana Murray, Arbitrator

June 13, 2017 Ruling on award and attorney's fees

CASE NO. R-S/15-06

UNITED STATES DEPARTMENT OF EDUCATION REHABILITATION
SERVICES ADMINISTRATION

In The Matter Of The Arbitration Between:
PATRICIA HOMAN,

Petitioner,

v.

STATE OF MARYLAND, DEPARTMENT OF EDUCATION
DIVISION OF REHABILITATION SERVICES

Respondent.

Before a Tripartite Arbitration Panel:

Fred Shroeder, Petitioner-Appointed Member Dana
Murray, Respondent-Appointed Member

M. David Vaughn, Chair

DECISION AND ORDERS

This proceeding was the subject of an Opinion and Award which issued on March 30, 2017 and which is incorporated herein and made

Petitioner, Patricia Homan submitted an Opposition thereto. Petitioner Patricia Homan also submitted a Petition for Attorneys' Fees and Costs as well as a First Amended Motion for Attorneys' Fees and Costs, to which Motion and Amendment Respondent submitted an Opposition. On May 23, 2017, Petitioner Homan submitted a Request to Extend Remedial Jurisdiction and a Petition to Approve Damages in the Amount of \$1,982 per Month from March 7, 2013 to the

Date of Petitioner's Placement in VF 25, to which Respondent submitted an Opposition on June 4, 2017. This Decision and Orders addresses all outstanding matters.

POSITIONS OF THE PARTIES

I. Motion for Reconsideration/Petition for Attorneys Fees

Respondent bases its Motion for Reconsideration and its Opposition to Homan's Petition for Attorneys Fees on its claim that the State cannot be held responsible for damages or attorneys' fees in this case because the State has sovereign immunity from the award of such damages as provided in the 11th Amendment to the United States Constitution.

The State further argues that compensatory money damages, including attorney's fees and costs, are not authorized by the Randolph-Sheppard Act, 20 U.S.C. §107d-2(a) which governs the proceeding. It primarily relies on a case from the 8th Circuit (McNabb v. United States Dep't of Educ., 862 F.2d 681, 683 (8th Cir.1988); a case from the 1st Circuit (New Hampshire v. Ramsey,

366 F.3d 1(1st Cir. 2004); and a federal district court case from Wisconsin (Wisconsin Dept. of Workforce Dev., Div. of Vocational Rehab. v. U.S. Dept. of Educ., 667 F. Supp. 2d 1007 (W.D. Wis. 2009). The primary holding of each of these cases, is that 11th Amendment sovereign immunity afforded to the States bars the award of retroactive money damages, including attorney's fees.

Maryland also cites Maryland State Dept. of Educ. v. U.S. Dept. of Veterans Affairs, 98 F.3d 165 (C.A.4 (Md.) 1996) for the proposition that the Act does not

allow the arbitration Panel to award a specific remedy once a violation of the Act has been found.

The State also maintains that the primary case relied on by Homan to justify the award of monetary damages and attorneys' fees, *Premo v. Martin*, 119 F.3d 764 (9th Cir. 1997), is no longer good law. While there is no authority reversing *Premo v. Martin*, the State submits that the Supreme Court cast doubt on *Premo* in its decision in *Federal Maritime Commission v. South Carolina State Ports Authority*, 535, U.S. 743 (2002).

As to the award of attorneys' fees to Petitioner, Maryland submits that no evidence was presented at the arbitration hearing to support an award of attorneys' fees. The State's position is that the Panel should have asked the Parties to submit briefs on the Panel's authority to award retroactive monetary damages and attorneys' fees.

The State urges that the Motion for Reconsideration be granted and the Petition for Attorney's Fees and Petition to Approve Damages be denied.

Petitioner points out that the State did not raise the argument of sovereign immunity at all in any of its pre-Award pleadings before the Panel. This is so, despite Homan's explicit request in her pleadings for monetary damages and attorneys' fees. In addition to having requested such relief, Homan points out that she set out the legal basis for her request. Since the State did not respond to this part of her pleadings, Homan maintains that the State is now barred from raising its 11th Amendment issue at all in this stage of the proceeding, as provided in Fourth Circuit precedent.

Petitioner points to *Premo v. Martin*, supra, as allowing such damages. Homan argues that *Premo v. Martin* is still good law and that the Federal Maritime Commission case did not directly or indirectly overturn *Premo*. In fact, she points out, the Federal Maritime Commission did not mention the Randolph-Sheppard Act at all, nor any cases construed under that Act.

Homan distinguishes *Maryland State Dept. of Educ. v. U.S. Dept. of Veterans Affairs* by noting that this case dealt with a different section of the Randolph-Sheppard Act than the proceeding at issue in this arbitration. The arbitration in the *Dept. of Veterans Affairs* case was constituted under the provisions of Sec. 107d-2(b)(2) of the Act. That section involves arbitration between a State and federal government agency and not arbitration between an individual blind vendor and a State agency, as is the case here.

While Petitioner concedes that the *McNabb* case from the 8th Circuit and the *New Hampshire* case from the 1st Circuit cited by the State may be good law in those Circuits, but asserts that they are not binding on the Fourth Circuit, within whose jurisdiction the Panel's Opinion and Award issued. Furthermore, argues Petitioner, the Wisconsin district court case did not involve a blind vendor like Homan, rather it involved a State regulatory agency in litigation against the US Department of Education.

As to the challenge whether there was any evidence submitted at the hearing to support the award of attorneys' fee, Homan argues that the entire record shows how her rights were denied by the State throughout multiple administrative steps. Petitioner points out that, after a hearing on the record in 2013, the Maryland Administrative Law Judge found Homan's rights to have been violated under the law.

Despite clear evidence of arbitrary and capricious action by the State, Ms. Homan complains that she still has not received any redress four years later.

Petitioner urges that the Motion for Reconsideration be denied and the Petitions to Approve Damages and for Attorneys' Fees be granted.

II. Request to Extend Remedial Jurisdiction and Petition to Approve Damages

Petitioner Homan requested that the Panel extend remedial jurisdiction as appropriate and necessary to rule on her Petition to Approve Damages.

Petitioner requests that the Panel approve damages in the amount of \$1,982 per month from March 7, 2013 to the date of Petitioner's placement in VF 25. This motion is based on several factors. First, Petitioner's attorney has request at least five times that Respondent give her copies of monthly reports filed by Mr. Borja, the current operator of Vending Facility 25. To date, Respondent has failed to provide this information to Homan.

Petitioner contends that, due to Respondent's failure to provide the requested information, Petitioner does not know the Post announcement earnings for this facility. As a result, she has had to make alternative calculations to estimate the earnings for VF 25, comparing the earnings for Petitioner's own vending facility and the historical earnings for VF 25 which have been published by the State of Maryland. Petitioner extrapolated those historic earnings to calculate her damages at \$1,982 per month from March 7, 2013. Petitioner also notes that the monthly damage calculation would have to be extended through the time that she would be placed as

the operator of VF 25. In this way, she would be made whole.

Homan further argues that she is entitled to a negative inference that she would have earned at least twice her current monthly net, but for Respondent's wrongful conduct. She asserts that Respondent should not be rewarded by its deliberate failure to produce the earning records for VF 25.

Respondent filed an Opposition to Homan's Petition to Approve Damages. As a threshold matter, the State maintains that the arbitration Panel's award of attorney's fees and costs is barred by the 11th Amendment to the US Constitution.

Respondent further argues that Homan's request for VF 25 is moot, since she is unable to operate more than one primary vending facility under the law.

Respondent did not address Petitioner's request to extend remedial jurisdiction.

DISCUSSION

I. Respondent's Motion for Reconsideration

The 8th and 1st Circuit cases cited by the State deal with the same provision of the Randolph-Sheppard Act at issue here. They do not constitute binding precedent in the Fourth Circuit, however. Neither does a federal district court case from Wisconsin constitute binding precedent in this Circuit.

Premo v. Martin has not been directly or by implication overturned by the Supreme Court in the Federal Maritime Commission v. South Carolina State Ports Authority decision, *Supra*. The Federal Maritime Commission case dealt with an entirely different

regulatory scheme involving a dispute between a State agency and a federal government agency. That is not the case here.

Under the provision of the Randolph-Sheppard Act at issue in this proceeding, the State of Maryland specifically agreed to submit itself to certain procedures set out in the Act, recognizing economic benefits due to blind vendors and providing procedures for the adjudication of such rights. To disclaim entitlement to damages for violation of its procedures and improper denial of rights would create rights without remedies. The clear implication of the State's role is that it has given up its 11th Amendment sovereign immunity for purposes of these procedures.

II. Petitioner's Request to Extend Jurisdiction and Petition to Approve Damages in the Amount of \$1,982 per Month.

The original March 30, 2017 Opinion and Award stated that the Panel would retain jurisdiction for 120 days following issuance of the Award, and thereafter by agreement of both Parties or upon the written application of either Party for good cause shown.

Petitioner Homan has asked for an extension of jurisdiction and has shown good cause therefor. Respondent has not objected to Petitioner's request to extend jurisdiction. The Orders will reflect the Panel's disposition of the request.

FINDINGS

Respondent failed to raise its 11th Amendment sovereign immunity challenge at any time during the arbitration proceeding. Respondent also failed to brief its position that the Panel has no legal

authority to order damages and attorneys' fees to be paid to the Petitioner. This is despite the fact that Petitioner had pled, presented and fully briefed these issues for the Panel. As a result, the Panel holds that the State is now barred from raising these issues after the Opinion and Award has been issued. The Panel had no duty to request the Parties to brief the sovereign immunity issue or the issue of damages and attorneys' fees after the hearing had ended.

Even if the Respondents were not barred from raising their new issues after the record has closed, *Premo v. Martin* provides ample authority for the Panel's action. Neither the 11th Amendment nor any case arising from another Circuit requires this Panel to deny the award of damages and attorneys' fees to the Petitioner.

The Randolph-Shepard Act establishes a set of entitlements on the part of blind vendors to operate and receive revenue from vending facilities in Federal Buildings. It provides procedures for the determination of such rights through delegations to the States. As the Opinion and Award indicates, Maryland failed to comply with its obligations under those procedures, thereby depriving Petitioner of benefits to which she was entitled and, which, but for the State's improper actions, she would have received.

Petitioner's attempt to be awarded the right to operate VF 25 is not moot. She is not attempting to operate two primary facilities at the same time. She is simply trying to uphold her rights to be treated fairly under the Randolph-Sheppard Act and receive the net economic benefits she should have received from operating VF 25, in keeping with the remedial purpose of that law.

The Panel holds that the compensatory purposes of the Act and the remedial procedures to determine rights and obligations constituted a clearly implied waiver of sovereign immunity. The creation of such clear cut rights clearly implies the availability of a remedy to enforce them.

Furthermore, the remedial thrust of the Randolph-Sheppard Act presupposes the cooperation of the State agencies in attempting to make the prevailing Petitioner whole. In this case, the State of Maryland has refused to turn over requested reports on VF 25 to Petitioner, despite the Petitioner's request for such records.

This failure warrants a negative inference. Such a negative inference results in the Panel's adoption of Petitioner's alternative method for calculating her damages.

While there have been no numerical calculations based on the actual earnings of VF 25 from 2013 on submitted into evidence, the Panel finds Petitioner's method of calculation of her damages to be reasonable considering all of the circumstances. It will, therefore, award Petitioner damages in the amount of \$1,982 per month from March 7, 2013 until Petitioner is placed as the operator of VF 25. The Panel will, however, stay the damage award for thirty days in order to encourage communication between the Parties with respect to the damage calculation and possible resolution. The Orders so reflect.

ORDERS

Respondent's Motion for Reconsideration is Denied. Petitioner's First Amended Motion for Attorneys'

Fees and Costs is granted in the amount of \$42,391.67.

Petitioner's request to extend remedial jurisdiction is granted for an additional ninety (90) day period beyond the end of jurisdiction presently retained.

Petitioner's Petition to Approve Damages in the Amount of \$1,982 per Month from March 7, 2013 to the Date of Petitioner's Placement in VF 25 is granted. The award of damages is stayed for thirty (30) days.

Issued this 13th day of June, 2017.

M. David Vaughn, Arbitrator Chair of the Panel

Fred Schroeder

Petitioner-Appointed Member Concurring

Dana Murray

Respondent-Appointed Member Dissenting

See Attached

For the reasons set forth in my Dissent to the Opinion and Award, I respectfully dissent from the Order Denying Respondent's Motion for Reconsideration, the Order Granting Petitioner's First Amended Motion for Attorney's Fees and the Order granting Petitioner's Petition to Approve Damages. I concur with the order granting Petitioner's request to extend remedial jurisdiction and the order staying the award of damages.

Dana Murray Respondent-Appointed Member