UNITED STATES DEAPRTMENT OF EDUCATION RANDOLPH- SHEPPARD ARBITRATION PROCEEDING

JAMES CYRUS,	)	
	)	Case No.: r-s/15-12
Complainant,	)	Panel:
v.	)	Joseph W. Gardner, Chair
	)	Jacqueline M. Boney, Member
OPPORTITIES FOR OHIOANS WITH DISABILITIES/BUREAU OF SERVICES FOR THE VISUALLY IMPAIRED,	)	David George Hasselback, Member
	)	**ARBITRATION OPINION AND AWARD**
	)	
	)	
Respondent.	)	

This matter is before the Panel on the Complaint filed on April 20, 2015 with the U.S. Department of Education, Office of Special Education and Rehabilitation Services, by James Cyrus' (hereafter "Cyrus" or "Complainant") against the Opportunities for Ohioans with Disabilities, Bureau of Services for the Visually Impaired (hereafter "the Bureau" or "Respondent"). Following the resolution of pre-hearing motions, the Panel conducted an evidentiary hearing on January 27, 2017.

By agreement of the Parties, the record of the Administrative Hearing held before the State of Ohio Opportunities for Ohioans with Disabilities Agency on February 18 and 19, 2015 (herein cited as "Admn. Tr.) ") was incorporated into the Arbitration Hearing record (cited herein as Arb. Tr."), together with all Exhibits admitted and/or proffered during the Agency Hearing. The incorporated Exhibits are State Exhibits Nos. 1 through 8 and Cyrus Exhibits 1 through 10, 12 through 17 and 19 through 30. At the Arbitration Hearing the Panel heard testimony from Cyrus, Ron Coon, Sr., CPA, and Christine Houck. Additional Cyrus Exhibits Nos. 31 through 42 and State Exhibits Nos. 12 and 13 were admitted into evidence.

At the conclusion of the January 27, 2017 evidentiary hearing it was agreed that the Complainant's request for attorney fees would be addressed only after the Panel deliberated and determined whether Cyrus had prevailed. (Arb. Tr. 299 – 302). On May 23, 2017 the Panel announced that it had reached a tentative decision and established a briefing schedule for the issue whether the Complainant was entitled to an award of attorney fees and or costs and, if so, the amount of fees and/or costs that should be awarded. The parties were also given the opportunity to a request a hearing on the issue.

On May 31, 2017, the Bureau submitted a Motion of Defendant/Appellee for Hearing on Attorney Fees and To Issue Decision on the Merits. The Motion requested a hearing on the issue of attorney fees, and also asked the Panel to issue its decision on the merits before the Bureau was required to brief whether the Complainant is entitled to an award of attorney fees. Due to the Panel's concern that the issuance of a merits opinion with only partial relief might divest the Panel of jurisdiction to issue any further relief in

the nature of attorney fees or costs, the Panel denied the Motion, adhered to its original briefing schedule, and set a hearing on the attorney fee issue for July 21, 2017.

Complainant submitted his Motion for an Award of Attorney Fees on June 8, 2017. The Memorandum of Defendant/Appellee Opposing Attorney Fees was submitted on June 23, 2017. A hearing on the Motion was held on July 21, 2017. [1]

The Complaint

Cyrus' Complaint against the Bureau is brought under the Randolph-Sheppard Vending Act, 20 U.S.C. Section 107, et seq. (hereafter "Randolph Sheppard" or "the Act"), the federal act that promotes the operation of vending facilities by blind vendors, and under Ohio Revised Code Sections 3304.28 to 3304.35 (hereafter "the Mini Randolph Sheppard Act"), and related administrative regulations. In essence, the Complaint alleges that the Bureau breached duties owed to Cyrus under both Randolph Sheppard and the Mini Randolph Shepard Act by conduct that resulted in Cyrus, a licensed blind vendor, being compelled to pay commissions to the University of Toledo and certain Lucas County, Ohio agencies as a condition of Cyrus' participation in contracts with those entities under Ohio's blind vendor program, known as the "Business Enterprise Program." The Complaint asserts that the commissions, which were paid by Cyrus over many years, were unlawful and inconsistent with the Bureau's duties under

[1] Prior to the hearing on attorney fees, Cyrus filed a Motion for Immediate Supplemental Relief, asking the Panel to order the Bureau to cease certain action taken after the January 27, 2017 evidentiary hearing regarding the Lucas County agreements that Cyrus claims is retaliatory. The Bureau opposed the Motion. On Jul 20, 2017, the Panel informed the parties that it had concluded that the Motion for Immediate Supplemental Relief is outside the scope of the current arbitration Complaint and will not be considered by the Panel. The allegations in the Motion may or may not be related to the instant arbitration. However, the Motion alleges new complaints, new grievances and/or new requests for relief. Before a new dispute may be arbitrated via the Randolph Shepard process, the "steps" leading up to the arbitration must be followed. Failure to follow the steps may deprive both sides of the mandated opportunity to settle their differences.

Randolph Sheppard and the Mini-Randolph Sheppard Act. The Complaint seeks a variety of relief, including declaratory and injunctive relief and monetary compensation, including attorney fees.

A. Jurisdiction

The Bureau concedes that Cyrus has satisfied the procedural requirements to bring this Arbitration, and also concedes that the Panel has the authority to adjudicate the merits of the claims and to award "prospective relief." However, the Bureau filed a pre-hearing Motion to Dismiss seeking dismissal of Cyrus' claim for monetary compensation on the grounds that an award of monetary damages is barred by sovereign immunity. By a vote of 2 to 1, a majority of the Panel (Members Gardner and Boney) denied the Motion to Dismiss in an Opinion and Order issued December 23, 2016. The Opinion and Order and the Dissenting Opinion of Panel Member David Hasselback are attached and are incorporated into this Opinion and Award by reference.

B. Findings of Fact

James Cyrus is a licensed blind vender who operates vending facilities in Toledo, Ohio pursuant to the Randolph Sheppard Act. (Cyrus Ex. 14) Cyrus began his career as a Randolph Sheppard vendor in 1989 (Admn. Tr.125); in 1992, he began operating vending sites at several Lucas County locations, including the Lucas County Corrections Center, the Lucas County Work Release, the Adult Treatment Center, the Youth Treatment Center, and the Lucas County Probation Department. (Admn. Tr. 128-131) At approximately the same time, Cyrus began operating vending sites located at the Medical

College of Ohio (MCO), a state supported facility that subsequently became known as the Health Science Campus of the University of Toledo (UT). *(Id.; Admn.* Tr. 20)

Cyrus's vending operation is overseen by the State of Ohio's Bureau of Services for the Visually Impaired ("the Bureau"). (Admn. Tr. 70-71) The Bureau is a division of Opportunities for Ohioans with Disabilities (OOD). Under Ohio law, the Bureau is the designated Ohio agency responsible for implementing the provisions of the Randolph-Sheppard Act and the Mini-Randolph Sheppard Act, together with related provisions of the Ohio Administrative Code. See, O.A.C. § 3304:1-21-01(E). In Ohio, this blind vendors program is known as the "Business Enterprise Program."

As a condition of operating his Randolph Sheppard vending facilities, Cyrus is required by the Bureau to execute Bureau Operator Agreements (hereinafter Operator Agreements). (Admn.Tr. 131-132, 26) Operator Agreements spell out the terms under which a licensed blind vendor may operate vending facilities under the Randolph Sheppard Act. (Admn. Tr. 71, 25) Operator Agreements are prepared by the Bureau for signature by the vendor. At the Bureau's direction, Cyrus executed Operator Agreements in 1993 (Cyrus Ex. 2) and again in 2010 (Cyrus Ex. 6), which pertain to Facility #304. (Admn. Tr. 131-132, 144-145; Arb. Tr. 192) The Operator Agreements required Cyrus to comply, with among other things, the Bureau-Grantor Agreement that pertain to the Facility. (Cyrus Ex. 2 and 6)

The Bureau is mandated to identify vending facilities for its blind licensees. O.R.C. § 3304.29.[2] In order to carry out this mandate, the Bureau executes agreements, known as Bureau-Grantor Agreements (hereinafter Grantor Agreements), with various entities

[2] See, also, O.A.C. 3304:1-21-11(E) (2010 Supplement); O.A.C. 3304:1-21-11(A) (1999 Supplement).

for the purpose of establishing blind vending facilities. (Admn. Tr. 71-72) Grantor Agreements specify the terms under which blind vending operations may be established at specified federal, state, county and/or private locations. *(*Admn. Tr. 71-73) With respect to the facilities operated by Cyrus, the Bureau executed Grantor Agreements with Lucas County and MCO and UT. (Admn. Tr. 75, 134-135, 137-138, 143, 145; Cyrus Ex. 3, 4, 5, 8, and 8a)

The Operator Agreements executed by Cyrus required his compliance with the terms of any Grantor Agreement through which the Bureau secured authorization to establish any of his vending facilities, including those Grantor Agreements that were negotiated and executed by the Bureau with Lucas County, MCO and UT. (Hr.Tr. 25, 133-134, 136, 144, 146; Cyrus Ex. 2 and 6) Relevant to this arbitration, each of the Grantor Agreements negotiated by the Bureau contained a provision requiring Cyrus to pay a commission that would be remitted to the Grantor. (Admn. Tr. 28, 136, 138, 144; Cyrus Ex. 3, 4, 5, 8, 8a. The commission payment was to be based on a percentage of Cyrus' gross revenue at each vending location. (*Id; Admn.* Tr. 39) The commission to MCO and the University of Toledo was 7%. (Cyrus Ex. 6, Par. 11) The commissions to the Lucas County facilities varied: 2.5% for the Probation Department (Cyrus Ex. 8(a), Bates No. 000082) and the Rehabilitation & Corrections Services Correctional Treatment Center (*Id*. at 000084); none for the Youth Treatment Center (*Id*. at 000086); and a sliding range of zero to 15% for the Lucas County Corrections Center (Id. at 000087). Simultaneously, Cyrus paid a service charge, also referred to as a "set aside," to the Bureau. (Admn. Tr. 39, 96-97)

As directed by the Bureau, Cyrus paid the required commissions, and made all other required payments on time beginning in 1991. (Admn. Tr. 76, 180) Over the course of 23 years as a licensed operator, the commissions paid by Cyrus to Lucas County, MCO, UT, and other grantors amounted to well over $500,000. (Admn. Tr. 50, 185-187; Cyrus Ex. 23)

Taking commissions from a blind vendor's gross vending revenue was not unique to Cyrus. (Admn. Tr. 122-123) The Bureau agreed to the inclusion of similar provisions in Grantor Agreements with entities at which other blind licensees established vending facilities. (*Id).* Furthermore, the Bureau aggressively enforced compliance with these payment obligations. If a blind vendor failed to pay the required commission, the Bureau demanded that they do so. (Admn. Tr. 122-123; Arb. Tr. 168-169, 174-186) If a vendor was unable or unwilling to pay, the Bureau took steps to remove them from their blind vending facility. (Admn. Tr. 139-140; Arb. Tr 168-169, 174-186)

In June 2013, the Executive Director of OOD sent correspondence to the Attorney General of Ohio requesting a formal opinion on the legality of taking part of a blind licensee's gross vending revenue for the purpose of paying a commission. In his correspondence, OOD's Director expressed the view that, with respect to state facilities, payment of commissions was not authorized by law and was illegal. In pertinent part, the Director's letter to the Attorney General, stated as follows:

> State Universities and colleges often require the BE Program to pay a commission in order to establish a vending facility on their campus. Neither the Ohio Revised Code nor the Ohio Administrative Code contains a provision for such a requirement. In fact there is no statutory basis for such a commission. The Randolph Sheppard Act also does not require the BE Program to pay a commission…There simply is no basis in law for the commission.

(Admn. Tr. 119; Cyrus Ex. 10)

On March 4, 2014, the Attorney General issued a formal opinion concluding that "[c]ollecting commissions from blind vendors in order to remit them to state or state-affiliated universities contravenes the letter and spirit of the pertinent state and federal laws." A.G. Opinion 2014-008, State Ex. 7 at numbered p. 7 (hereafter referred to as 2014 OAG Opinion).

After receiving the Attorney General's Opinion, the Bureau took no action to halt the payment of commissions by Cyrus or any other blind vendor. (Admn. Tr. 156, 159; Cyrus Ex. 13) In fact, when Cyrus inquired in April 2014 about his obligation to continue making these payments in light of the Attorney General's opinion, the Bureau responded that Cyrus should continue making the payments since a Grantor Agreement remained in place. (Cyrus Ex. 13) The Bureau had no further communication with Cyrus regarding his continued obligation to pay commissions. (Admn. Tr. 163) According to Cyrus, "I had no direction from the Bureau about what to do. I could not get anyone to answer my question and I desperately was seeking guidance." (Admn.Tr. at 165-166). Cyrus stopped paying commissions to the University of Toledo effective May 15, 2014 (State Ex. 8), and on June 4, 2014 sent correspondence to the Bureau stating his intention to discontinue commission payments to the University of Toledo in light of the Attorney General's opinion. (Cyrus Ex. 17; Admn. Tr. 165-166) The Bureau did not respond. (*Id.)*

On April 29, 2014, Cyrus filed a grievance that requested an end to compelled payment of commissions, along with reimbursement of payments that previously were made. (State Ex. 2, Cyrus Ex. 14, Admn. Tr. 160)

The Bureau met with Cyrus on May 20, 2014 to discuss his concerns regarding the commissions. (State Ex. 3). After the meeting, the Bureau directed correspondence to the University of Toledo dated May 28, 2014, in which the Bureau stated:

> Although our operator has been responsible to pay commissions since the agreement was executed, based on [the A.G. Opinion], OOD believes that the requirement in the contract to pay commissions is void and can no longer be part of the agreement.

(State Ex. 4)

Cyrus stopped paying commissions to the University of Toledo effective May 15, 2014 (State Ex. 8). On June 4, 2014 Cyrus sent correspondence to the Bureau stating his intention to discontinue commission payments to the University of Toledo in light of the Attorney General's opinion. (Cyrus Ex. 17; Admn. Tr. 165-166) The Bureau did not respond. (*Id.)*

On June 18, 2014 the Bureau denied the Cyrus grievance, asserting that payments to the University of Toledo had been discontinued and that no further relief was warranted. (State Ex. 3) The Bureau took no action with respect to the Lucas County Bureau-Grantor agreement, and the Bureau continued to publish the availability of blind vending opportunities, including those at state facilities, which required payment of a commission. (Cyrus Ex. 25-29)

Cyrus subsequently requested a state administrative hearing pursuant to Ohio law. (Cyrus Ex. 19) A state hearing was convened on February 18, 2015; relief was denied. (Hearing Officer Decision, attached to the Complaint) Cyrus then filed the instant Complaint for Arbitration on April 20, 2015.

The University of Toledo did not respond to the Bureau's May 28th letter or otherwise complain about Cyrus' decision to stop paying the commissions. (Admn. Tr.76) The Bureau took no administrative action against Cyrus for his failure to pay the commissions. (Admn. Tr. 202) On October 14, 2016, the Bureau and the University of Toledo entered into an amendment to its 2006 Bureau-Grantor Agreement that removed the obligation of the operator to pay commissions. (State Ex. 12)

Cyrus has continued to pay commissions to Lucas County as required by his Bureau Operator Agreement and Bureau-Grantor Agreement between the Bureau and Lucas County. (Admn. Tr. 40, Arb. Tr 194)

Cyrus proved the amount of commissions he has paid to the University of Toledo and Luca County. (Admn. Tr. 179-195; Cyrus Ex. 22, 23, 24, 38, 39, 40, 41, 42; Arb. Tr. 187 – 191, 224 – 238).

Complainant's Motion for an Award of Attorney Fees seeks an award based on a "Lodestar" calculation using a rate of $250.00 per hour. The Motion, acknowledged, however, that the contractual rate agreed to between Complaint and his counsel is $150.00 per hour.

With his Motion for an Award of Attorney Fees the Complainant submitted the Affidavit of his counsel, Paul T. Belazis. The Affidavit included as Exhibit A contemporaneous time records recording 324 hours of service by Mr. Belazis in representation of Cyrus in the pending matter from April 2014 through submission of the fee motion. At the July 21 2017 hearing Mr. Belazis submitted an amended Exhibit A which added time for the January 27, 2017 hearing which was inadvertently omitted from the original Exhibit A. The revised Exhibit A, which was admitted by the Panel

without objection, shows total time of 332 hours. The Bureau stated at the July 21, 2017 hearing that it did not contest the reasonableness or the appropriateness of the time reflected in the revised Exhibit A.

The Belazis Affidavit stated that he is familiar with hourly rates charged by lawyers in the Toledo community with comparable skills, experience and reputation; and that he believes that "$250.00 per hour is reasonable and well within the range of Toledo market rates for litigation of this kind." The Cyrus Motion for fees was also supported by the Declaration of Toledo attorney Stephen M. Dane, who also attested that an hourly rate of $250.00 for Mr. Belazis is reasonable and within the range of Toledo market rates for civil rights cases. The Motion also was supported by a survey of legal fees in the Toledo, Ohio community completed by Daniel J. Steinbock, Esq. in 2012 which demonstrated that fees for attorneys with greater than 20 years' experience ranged from $224 per hour to $280 per hour. At the July 21, 2017 hearing the Bureau stated that it did not challenge the Complainant's contention that $250.00 per hour was an appropriate "Lodestar" rate.

At the July 21, 2017 hearing Cyrus testified that he has paid Mr. Belazis $40,588.97 in connection with his representation in the matter; and Mr. Belazis confirmed that this amount satisfies Cyrus' contractual obligation.

C. Respondent's Legal Arguments

The Respondent has advanced several legal arguments that it contends limit the power of the Panel to award the relief Cyrus seeks. Each argument is addressed below.

1. Respondent contends that the Panel may not make a monetary award against the sovereign State of Ohio.

As noted above, the Respondent filed a pre-hearing Motion to Dismiss, arguing on the grounds of sovereign immunity that the Panel lacks the authority to award Cyrus any monetary relief. That Motion was denied by the majority Opinion and Order issued December 23, 2016, and that ruling is hereby affirmed and adopted.

2. Respondent Contends that the Claims for Prospective Relief are Moot.

In connection with its argument that sovereign immunity prevents the Panel from making a monetary award, the Respondent argues that the Panel has only the authority to award prospective relief. Respondent further argues that prospective relief is not warranted on the grounds that Cyrus' claims for anything other than damages are "moot". The Bureaus argues that it has "already agreed to do things differently, and in that respect has given Cyrus everything he wants" (Respondent's Post-Hearing Brief at 7), and therefore any prospective relief "makes no sense." (*Id.*)

As a threshold matter, the Panel's finding that it does have the authority to award monetary relief defeats Respondent's mootness claim. But even if the Panel did lack the authority to make a monetary award, the claim of mootness respecting prospective relief would fail because the record does not support the Respondent's contention that there is no reasonable expectation that the alleged violations will continue to occur or that the effects of the alleged violation have been completely or irrevocably eradicated.

The Respondent's argument is based largely on the fact that the Bureaus-Grantor Agreement with the University of Toledo that imposed the obligation to pay a commission was amended effective October 2016 to remove the obligation to pay a

commission. (State Ex. 12) The Respondent also relies on the fact that in May 2014 Cyrus stopped paying the commissions owed under the UT Agreement, and neither the Bureau nor the University has requested that Cyrus pay the commissions owed for the period May 2014 to October 2016.

But these facts alone do not irrevocably relieve Cyrus of the effects of the obligation imposed by the UT Agreement. The October 2016 amendment does not waive or release the obligation to pay the unpaid commissions. Nor has the Bureau waived or released its rights under its Bureau Operator Agreement to either compel such payments or subject Cyrus to administrative action.

And while the Bureau removed the commission obligation from the University of Toledo agreement during the pendency of the Arbitration, the Bureau has not conceded that the imposition of such an obligation, even in a Bureau-Grantor Agreement for a "priority facility", is unlawful and void. In pre-hearing briefing in the matter, the Bureau has argued that the 2014 OAG Opinion is not binding on the Bureau, and has asserted that Cyrus is in breach of contract by not paying commissions to the University. See Pre-hearing Brief of OOD Bureau of Services for the Visually Impaired, August 1, 2016, at 9-11. Even after the 2014 OAG Opinion was published, the Bureau continued to publish Business Enterprise Program opportunities for priority sites that required the payment of commissions. (See Cyrus Ex. 25, 26 and 29) And in its Post-Hearing Brief, the Bureau continues to defend imposing a requirement that vendor's pay commissions even for priority facilities on the grounds that such commissions are a necessary tool to grow business for the Business Enterprise Program. (Respondent's Post-Hearing Brief at 11) This record clearly demonstrates that, absent an adjudication

of the Bureau's authority to impose a commission obligation on blind vendors, Cyrus has a reasonable and legitimate expectation that such commissions will be required by the Bureau as a condition of future opportunities even at priority sites. Accordingly, the Cyrus claim for prospective relief regarding the Bureau's authority to require blind vendors to pay commissions is not moot.

In further support of its mootness argument, the Bureau argues that no extant agreement requires Cyrus to pay commissions for Lucas County facilities, but Cyrus continues to pay such commissions. To the extent that this contention rests on the Bureau's claim that the Lucas County Bureau-Grantor Agreement "expired in August of 2016" (Respondent's Post-Hearing Brief at 6), the contention is not supported by the record. The Luca County Agreement on its face does not state a fixed five year term. The Lucas County Commissioner's Resolution authorizing the 2011 Lucas County Bureau-Grantor Agreements states that "the agreements will be reviewed and renewed every five year." (Cyrus Ex. 8, p.1). Likewise, the Agreement states "This Agreement and the addenda thereto shall be reviewed every five (5) years and may be renewed every give (5) years upon mutual agreement of the parties. Either party may terminate this agreement or any specified addenda thereto by giving (90) days written notice of such intent." (*Id*. at 2) Each of the five Addendum to the 2011 County Agreement also state that the "agreement shall be reviewed every five (5) years and may be renewed every five (5) years upon mutual agreement of the parties" (Cyrus Ex. 8a, Bates Nos. 00083, 00085, 00086, 00089, 00091). No evidence was presented that a written notice of termination has been given by either party. Further, the record testimony established that all parties continue to operate under the terms the 2011 Lucas County Agreement; and Cyrus

continues to pay the commissions required by the Agreement. Therefore, Cyrus' claim for relief from the terms of the Lucas County Agreement that require him to pay commissions is not moot.

Respondent also argues that Cyrus' claim regarding the payment of commissions to Lucas County is moot because Cyrus has continued to pay the commissions, and has testified that he does not want the Bureau to inform the County that he will no longer pay commissions, citing Cyrus' testimony at Arb. Tr. 198. But the fact that Cyrus has continued to pay the County the contractually mandated commissions while he litigates his obligation to do so does not make the payments "voluntary". The Bureau has vigorously defended its legal right to require vendors to pay commissions at non-priority facilities, and continues to argue that, whatever the precedent value the 2014 OAG Opinion may be, it does not apply to County facilities. On this record, Cyrus cannot be faulted for continuing to pay the County commissions during the pendency of this arbitration. And Cyrus has made clear that he seeks an adjudication that any commission obligation that the Bureau has negotiated with the County, or negotiates in the future, cannot be imposed on Cyrus, but rather must be paid by the Bureau. (Arb. Tr 199-201, 203; Cyrus Post Arbitration Reply Memorandum at 12). Whatever the merits of that request, it is not a moot issue on this record.

For all of the reasons stated above, the Panel finds that the Complainant's claims for prospective relief are not moot, and this Panel has the authority to adjudicate them.

3. Respondent Contends that The Panel May not Award Monetary Relief from Void Contract Terms.

The Bureau argues that Cyrus' claim for monetary relief is defeated by the holding in *Buchanan Bridge Co. v. Campbell*, 60 Ohio St. 406 (1899).

In *Buchanan*, the County Commissioners of Franklin County contracted for the construction of a bridge, but failed to follow the statutory notice requirements for a public bridge contract. After the plaintiff had substantially performed the contract, the County refused to pay for the work on the grounds that the contract was not entered into in conformance with the statutory requirements for public construction contracts. The plaintiff sought to be paid on the basis of an implied contract. The Court rejected the claim, holding that public contracts made in violation or disregard of statues are not merely voidable, but are void, and the courts will not lend their aid to enforce such contracts, directly or indirectly, but will leave the parties where they place themselves. (*Id.* at 420) The Court held that because the express contract was null and void for failure to follow the statutory requirements, to permit recovery on the basis of an implied contract would permit evasion of the statutes, which the Court described as necessary to preserve the public interest. The Court found that this rule was necessary to "prevent the evils which induced the enactment of [statutes on pubic contracts]. (*Id.* at425)

The Bureau claims that *Buchanan* is applicable because Cyrus' monetary claim rests on his contention that the contractual obligations pursuant to which he has paid commissions to the University of Toledo and to Lucas County are void and unenforceable under the Randolph Sheppard Act and the Mini Randolph Sheppard Act. The Bureau argues that to the extent that Cyrus has paid commissions to the University

and the County under a void term, *Buchanan* requires that the Panel leave the parties in the position in which they find themselves, and Cyrus can have no recovery. This argument is flawed and is rejected.

First, *Buchanan* has no application to the extent that Cyrus' claim is based not on the Bureau-Grantor Agreements themselves, but rather on the fact that the Bureau compelled blind vendors, including Cyrus, to pay commissions that the Bureau contracted for as a condition of participation in the Business Enterprise Program; and failed to advise Cyrus regarding the impermissibility of such payments under the Randolph Sheppard Act and Min Randolph Sheppard Act.

Further, the Bureau's reading of *Buchanan* is overbroad. The *Buchanan* holding was clearly intended to prevent a party from benefiting from evading statutory contracting requirements that are intended to protect the public interest. In this case there is no claim that any statutory requirements were evaded in the formation of the Bureau-Grantor Agreements. Nor can it be argued that it is necessary to deprive Cyrus of a monetary remedy in order to preserve any public interest in the enforcement of laws to protect the public, or to avoid any abuse. Cyrus is not a party to the Bureau-Grantor Agreement; and the record is clear that he had no role in its negotiation. (Admn. Tr. 133-134, 135, 136, 138). It would be contrary to the purposes of the Randolph Sheppard Act to deprive a blind vendor of a remedy because the Bureau negotiated and subjected the vendor to an illegal and void contract term.

4. Respondent Contends that Cyrus has Failed to Mitigate his Damages by Continuing to Pay Commissions to the County after the 2014 OAG Opinion.

The Bureau argues that Cyrus may not receive a monetary award for commissions he paid to Lucas County after issuance of the 2014 OAG Opinion because he has continued to pay those commissions even after he discontinued paying commissions to the University of Toledo. The Bureau also argues that payments to Lucas County after February 2016 were voluntary because the Lucas County Bureau-Grantor Agreement had "expired". This argument is also flawed and is rejected.

As noted above, the Lucas County Agreement has not "expired" and has not been terminated. It is on-going and all Parties agree that the parties are continuing to operate under its terms, which include the obligation to pay commissions.

On April 29, 2015, Cyrus gave the Bureau clear notice that he is challenging the payment of commissions to both the University of Toledo and Lucas County. (See State Ex. 2). The letter is sufficient to preserve his right to recover ongoing commission payments to Lucas County.

Cyrus had reasonable grounds to continuing paying commissions to Lucas County while pursing his grievance even while he ceased payments to the University of Toledo. As the Bureau has repeatedly stated, the 2014 OAG Opinion that Cyrus relied on to stop payments to the University does not, on its face, hold that commission payments to non-state owned facilities are impermissible under the Randolph Sheppard Act. Indeed, the Bureau has consistently argued, and continues to argue, that non-priority facilities such as the Lucas County facilities are not within the scope of the 2014 OAG Opinion, and are in fact permissible.

Further, in stopping commission payments to the University, Cyrus could reasonably rely on the Bureau's May 28, 2014 letter to the University in which it stated that it believes "that the requirement in the contract to pay commissions is void and can no longer be part of the agreement." (State Ex. 4) As noted, the Bureau has taken the opposite position regarding the Lucas County facilities.

There is ample record evidence that the Bureau has taken adverse action against facility operators who failed to pay commissions that the Bureau contractually obligated blind vendors to pay. On this record, it was entirely reasonable for Cyrus to continue paying commissions to Lucas County while adjudicating his obligation to do. Had Cyrus not continued to pay the commissions, his contract to operate the Lucas County facilities might well have been terminated, resulting in an even greater financial loss. Viewed in this light, continuing to pay the commissions to Lucas County was itself an act of mitigation. In any event, the Bureau has cited no authority that would bar Cyrus from recovering the Lucas County commissions simply because he continued to pay them while grieving and arbitrating his obligation to do so.

5. Respondent Contends that any Award of Monetary Relief is Barred by the Applicable Statue of Limitations.

The Bureau contends that the applicable statute of limitations is found in O.R.C. Section 2743.16(A), which provides that all actions against the State in the Court of Claims must be commenced no later than two years after the date of the accrual of the cause of action. The Bureau maintains that the cause of action accrued when Cyrus signed the Bureau-Operator Agreement in March, 2010, and because the subject grievance was not filed until April 29, 2014, his claims are untimely and must be dismissed.

Cyrus argues that O.R.C 2743.16(A) is facially inapplicable because this arbitration proceeding arises under federal law, and the Ohio Court of Claims has no jurisdictional involvement or other relationship to this proceeding. The Panel agrees.

Cyrus points to Ohio's four year statute of limitations for claims based on breach of fiduciary duty, O.R.C. 2305.09, but argues that the Ohio 15 year statute of limitations for contract claims arising before June 26, 2012 should apply on the grounds that the duties imposed under the Randolph Sheppard Act are implied in the Bureau Operator Agreement, and Cyrus' Second Claim alleges a breach of contract based on the implied duties. Cyrus also argues that, in any event, the applicable statute of limitations should be found to be tolled based on the Bureau's conduct.

When a federal statute contains no period of limitations, courts are directed to "borrow" the most applicable state limitations period. Ohio provides a six year period of limitations for "an action upon a liability created by statute". O.R.C Section 2305.07. The Panel finds that this statute is the most applicable state limitations period for the Cyrus claims. See generally *Cosgrove v. Williamsburg of Cincinnati Management Company*, 70 Ohio St.3d 281 (1994), (holding that the six-year limitation for claims arising from a liability created by a statute applied to claims under Ohio's statute providing a cause of action for employment discrimination). See also *McAuliffe v. Western States Import Company, Inc.*, 72 Ohio St.3d 534, 537-538 1995), affirming that a "liability created by statute" under O.R.C 2305.07 means a liability that would not exist but for the statute. This standard is met in this case. Although Cyrus asserts a general breach of duty, there is no common law duty owed by the Bureau to Cyrus. The only duties owed to Cyrus by the Bureau arise from the Randolph Sheppard Act and/or the

Mini Randolph Sheppard Act. And the action for breach of those statutory duties cannot be converted to a breach of contract action merely by implying the statutory terms into the contract. At its core the Cyrus claim is for breach of a liability created by statute, and it therefore is governed by the six-year statute of limitations. There is no authority for extending this six-year limitation period based on equitable tolling.

The Panel agrees with the Bureau that the cause of action accrued when the 2010 Bureau- Operator Agreement was signed. The subject grievance was filed on April 29, 2014, and the claim is therefore timely. Cyrus may maintain his claim for monetary relief for all commission payments made after March 19, 2010.

6. Respondent Contends that an Award of Attorney fees is Barred by Sovereign Immunity and by the American Rule

The Bureau argues that the Complainant's prayer for an award of attorney fees is barred by sovereign immunity. The Panel rejects this argument for the reasons previously stated.

The Bureau further argues that there is no statutory or contractual basis for attorney fees in this case, and that the Panel must therefore follow the *American Rule,* which generally requires each party to bear his own attorney fees. The Bureau relies on United States Supreme Court authority holding that attorney fees are not to be awarded in the absence of express statutory authority. Because the Randolph Shepard Act contains no express language providing for an award of attorney fees to a blind vendor who prevails in an arbitration proceeding under the Act, the Bureau maintains that no award is permissible.

Cyrus, however, relies on the opinion of the Sixth Circuit Court of Appeals in *Tennessee Dep't of Human Services*, supra, to distinguish the authority cited by the Bureau. *Tennessee* presented the precise issue presented in this case: whether an award of attorney fees could be made in an arbitration proceeding conducted under the Randolph Shepard Act. The Sixth Circuit considered the application of the *American Rule*, and expressly held that the *American Rule* regarding attorney fees applies to parties that have litigated their cases in federal courts, "and does not apply in this case, which concerns the awarding of attorney fees incurred during the arbitration process." 979 F.2d at 1169.

The Bureau argues that the Panel should disregard the Sixth Circuit ruling in *Tennessee* and rather follow authority which has applied the *American Rule* to bar awarding attorney fees in administrative proceedings. See, e.g., *Summit Valley Indus., Inc. v. Local 112, United Brotherhood of Carpenters and Joiners of America*, 456 U.S. 717,721 (1982) (holding the *American Rule* applies in an administrative proceeding before the National Labor Relations Board). But *Tennessee* was decided ten years after *Summit Valley*, and *Summit Valley*, which did not involve an arbitration proceeding, provides no basis for the Panel to disregard the express ruling of the Sixth Circuit in *Tennessee*. Moreover, in 2012 the Sixth Circuit expressly cited *Tennessee* for the proposition that the *American Rule* is inapplicable to arbitration proceedings. See *WMA Securities, Inc. v. Wynn*, 32 Fed. Appx. 726, 730 (6th Cir. 2012). The Panel believes that it is obligated to follow applicable Sixth Circuit precedent, and therefore will follow the *Tennessee* ruling that the Panel has the authority to award attorney fees incurred in a Randolph Shepard arbitration proceeding.

D. Conclusions of Law

The Arbitration Complaint sets forth three claims for relief. The First Claim asserts that Respondent's actions in requiring the payment of commissions is a violation of the Randolph Sheppard Act and the Minis Randolph Sheppard Act and their respective implementing regulations. (Complaint, p.7) The Second Claim asserts that the above cited statutes and regulations are implied terms of the Grantor-Operator Agreement between Cyrus and the Bureau, and that as such the mandatory imposition of commissions on the sales of blind vendors is a breach of the Grantor-Operator Agreements. (*Id.*) The Third Claim asserts that Respondents acts and omissions were negligent and a breach of duties established by law. (*Id.*)

As noted above, there are no "duties established by law" relevant to this matter other than those duties imposed under the Randolph Sheppard Act and the Mini Randolph Shepard Act and their respective implementing regulations. Therefore, the Third Claim has no independent basis and is rejected.

The First Claim and the Second Claim rest on the same legal question: Does the Bureau breach duties owed to blind vendors under the Randolph Sheppard Act and the Minis Randolph Sheppard Act and their respective implementing regulations when it compels them to pay commissions to Grantor agencies. For the reasons stated below, the Panel finds in the affirmative.

1. The Authority and Responsibility of the State Licensing Agency

The Randolph Sheppard Act was enacted "[f]or the purposes of providing blind persons with remunerative employment, enlarging the economic opportunities

of the blind, and stimulating the blind to greater effo1ts in striving to make themselves self-supporting." 20 U.S.C. § 107(a). To accomplish these purposes, blind vendors are authorized by the Act to operate vending facilities on federal and other property. 20 U.S.C. § 107(a); 20 U.S.C. § 107a(5).

The Act provides for implementation of these purposes by a state agency designated by the United States Rehabilitation Services Commission. 20 U.S.C. §§ 107a(l) and (5). The responsibilities of the state licensing agency include issuance of vending licenses to blind persons, providing management services, including consultation to vendors, and establishing appropriate accounting procedures and policies that relate to the selection and establishment of new vending facilities, distribution of income to blind vendors, and the use and control of any funds set aside from blind vending operations. 20 U.S.C. § 107a(l) and (5). 34 C.F.R. § 395.3(2).

Each state licensing agency is required to establish legal authority, rules, and regulations to accomplish these purposes. *See* 34 C.F.R. § 395. l(i). In Ohio, the Bureau of Services for the Visually Impaired is "the designated Ohio agency responsible for implementing the provisions of the Randolph-Sheppard Act... , sections 3304.28 to 3304.35 of the Revised Code, [and its implementing regulations]." *See,* O.A.C. § 3304:1-21-0l(E). The Ohio Administrative Code imposes on Bureau the authority and responsibility to "seek and secure suitable vending facilities," "negotiate and enter into agreements... or contracts," and "assist and train licensees concerning legal, contractual, and policy compliance obligations." *See,* O.R.C. § 3304.29; O.A.C. §

3304:1- 21-1 l(D), (E), and (I) (2010 Supplement). See, also, O.A.C. § 3304:1-21-1 l(A) (1999 Supplement).

2. The State Licensing Agency has Limited Authority to Use Funds Derived from Blind Licensees

A state licensing agency has limited authority to set aside some of the funds from the net proceeds of a blind licensee's vending operation. The Randolph Sheppard Act specifies the narrow purposes for which "set aside" funds derived from blind licensees may be used by a state licensing agency:

> A State Agency for the blind... shall ... agree (3) that if any funds are set aside, or caused to be set aside, from the net proceeds of the operation of [a licensed blind vendor's] vending facilities such funds shall be set aside, or caused to be set aside *only* to the extent necessary for and may be used *only* for the purposes of (A) maintenance and replacement of equipment; (B) the purchase of new equipment; (C) management services; (D) assuring a fair minimum return to operators of vending facilities; and (E) retirement or pensions funds, health insurance contributions and provision for paid sick leave and vacation time. (Emphasis added)

See, 20 U.S.C. § 107b(3). This provision of the Act is self-limiting. It makes clear that funds set aside from the proceeds of a blind vendor's facility may be used *"only"* for specified purposes. Payment of a commission is not among the authorized purposes.

Federal regulations promulgated pursuant to authority established under the Act are to the same effect:

> The State licensing agency shall establish ... the extent to which funds are to be set aside or caused to be set aside from the net proceeds of the operation of the vending facilities...Funds may be set aside... only for the purposes of:
> (1) Maintenance and replacement of equipment;
> (2) The purchase of new equipment;
> (3) Management services;
> (4) Assuring a fair minimum of return to vendors; or
> (5) The establishment and maintenance of retirement or pension funds, health insurance contributions, and provision for paid sick leave and vacation time...

See, 34 C.F.R. § 395.9(a) and (b).

Ohio's Mini-Randolph-Sheppard Act, O.R.C. §§ 3304.28-3304.35 likewise establishes the same limitations. O.R.C. § 3304.35 states that

> [n]o funds derived from ... blind licensees under the Randolph-Sheppard Vending Stand Act... shall be spent for purposes other than those set forth in that act.

Ohio's implementing regulations, as set forth in the Ohio Administrative Code, also narrowly limit the charges that may be imposed on the revenue generated by licensed operators. Although the code allows the Bureau to collect a monthly "service charge" from blind licensees in order to administer the Business Enterprise Program [O.A.C. § 3304:1-21-0S(E)], it specifies that the monthly service

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charge "shall be used pursuant to 34 C.F.R. 395.9 [use of set aside funds],

and may include assuring a fair minimum return to a displaced operator." O.A.C. § 3304:1-21- 08(1). As noted, *supra.,* 34 C.F.R. 395.9 allows funds set aside from the proceeds of a blind vendor's facility to be used only for "(1) Maintenance and replacement of equipment; (2) The purchase of new equipment; (3) Management services; (4) Assuring a fair minimum of return to vendors; or (5) The establishment and maintenance of retirement or pension funds, health insurance contributions, and provision for paid sick leave and vacation time..."

In sum, the applicable provisions of both federal and state law specify the purposes for which funds derived from blind licensees may be used. All of these authorized purposes are for the benefit of the blind vendors whose interests are to be served, including purchase, maintenance and repair of vending equipment, providing for vendor's retirement benefits, health insurance, and sick pay, assuring a fair minimum return to vendors, and management services "to support and improve vending facilities operated by blind vendors." See, 34 C.F.R. §395.l(i).

3. The 2014 Ohio Attorney General Opinion

In June 2013, the Executive Director of Opportunities for Ohioans with Disabilities ("OOD") apparently became concerned the Bureau's long-standing practice of requiring blind vendors to pay commissions to Grantor agencies was not lawful. The Director sent correspondence to the Attorney General of Ohio requesting a formal opinion on the legality of the practice. In his correspondence, OOD Director expressed the view that, with respect to state facilities, payment of commissions was not authorized by law and was illegal. In pertinent part, the Director's letter to the Attorney General, stated as follows:

> State Universities and colleges often require the BE Program to pay a commission in order to establish a vending facility on their campus. Neither the Ohio Revised Code nor the Ohio Administrative Code contains a provision for such a requirement. In fact there is no statutory basis for such a commission. The Randolph Sheppard Act also does not require the BE Program to pay a commission…There simply is no basis in law for the commission.

(See State Ex. 10).

On March 4, 2014, the Attorney General issued a formal opinion concluding that "[c]ollecting commissions from blind vendors in order to remit them to state or state-affiliated universities contravenes the letter and spirit of the pertinent state and federal laws." (OAG Opinion 2014-008, State's Ex. 7 at numbered p. 7)

The Ohio's Attorney General distinguished the charges permitted by the Randolph Sheppard Act from the commissions at issue in this case, stating:

> BSVI has adopted rules for the establishment of the Business Enterprise program. These rules authorize the collection of monies from blind vendors to administer the BE program and operate it for the benefit of the blind vendors. These rules are in keeping with the requirements of the federal Randolph-Sheppard Act. Collecting commissions from blind vendors in order to remit them to state or state-affiliated colleges and universities contravenes the letter and spirit of the pertinent state and federal laws.

(*Id.*)

The Ohio Attorney General's ruling that requiring blind vendors to pay commissions to state entities contravenes the letter of the federal and state Randolph Sheppard Acts is supported by the Eighth Circuit Court of Appeals ruling in *Sate v Minnesota, Department of Jobs and Training, State Services for the Blind and Visually Handicapped v. Riley*, 18 F.3d 606 (8th Cir. 1994). Although the Bureau has argued that

the 2014 OAG Opinion is not binding precedent, it has not offered any contrary authority. Nor has it pointed to any flaw in the reasoning of the Ohio Attorney General or the Eight Circuit, or articulated any contrary interpretation of the applicable statutes that would support requiring blind vendors to pay the commissions at issue, at least as to state entities.

The Bureau has argued that the rulings in the 2014 OAG Opinion and *Riley* should not be applied to the payment of commissions for non-state facilities such as the Lucas County facilities at issue in this case. The Bureau correctly notes that the 2014 OAG Opinion concerns only state entities. However, the Panel finds no basis to apply a different rule to the Bureau's obligations with respect to the County facilities. The Randolph Sheppard Act's implementing regulations apply to "other prope1ty", which is defined to include "property which is not Federal property and on which vending facilities are established or operated by the use of any funds derived in whole or in part, directly or indirectly, from the operation of vending facilities on any Federal property." *See,* 34 C.F.R. § 395.l(n). Based on this federal statutory authorization, the Bureau has established vending facilities on federal, state, county, and even private facilities. (Adm. Hr. Tr. 73, 96-98. *See, also,* Arb. Tr. 171-173, 254). The Bureau receives both unassigned income from federal facilities, as well as set aside funds from federal, state, county and municipal facilities. (*Id).* These funds are intermingled and used to operate the Ohio's Business Enterprise Program, including the management of the program and establishment and ongoing supp01t of all vending facilities. (*Id.)* As such, all blind vending facilities in Ohio are "established or operated by the use of ... funds derived in whole or in part,

directly or indirectly, from the operation of vending facilities on ... Federal property." Because the Bureau derives federal funds from the County facilities, the Panel finds no basis to apply different rules to the County facilities.

At the Arbitration hearing, the Bureaus defended its practice of requiring the payment of commissions on the grounds that the commission payments helped the Bureau to grow participation in the Business Enterprise Program and created additional vendor opportunities. But the Bureau's "proof" on this issue consisted of the opinion of a single witness with limited experience in the Program, which was without foundation, and unpersuasive. Moreover, this contention ignores the fact that as to priority facilities, no private contract is permitted unless the Bureau has determined that such facility is not a satisfactory site for blind vendor. In other words, at a priority facility, the entity has no choice but to allow the Bureau to establish and operate an available vending site as long as it is financially viable to the vendor. And even if compelling proof of this contention was offered, it would not override the fact that the requirement that blind vendors pay commissions violates applicable law.

4. Conclusion

Therefore, based on the statutes and regulations cited above, the 2014 OAG Opinion, and the Eight Circuit opinion in *Riley*, the Panel finds that the requirement that blind vendors pay commissions to Grantor agencies is a violation of both the Randolph Sheppard Act and the Mini Randolph Sheppard Act.

There is extensive and uncontroverted record evidence that the Bureau required blind vendors, including Cyrus, to pay commissions as a condition of participation in the Business Enterprise Program. The Panel finds that the Bureau's conduct in requiring the payment of such commissions breached the Bureau's duties imposed by the Randolph

Sheppard and Mini-Randolph Sheppard Acts. There can be no more obvious breach of the Bureau's duty to "negotiate and enter into agreements or … contracts" or to "assist and train licensees concerning legal, contractual and policy compliance obligations" than to negotiate contracts that require blind vendors to pay unlawful commissions; and to then compel adherence to such contracts under threat of termination.

For the reasons stated above, the Panel finds that Cyrus has proved the First Claim, and Cyrus is entitled to prospective and monetary relief. Respecting the claim for monetary relief, the Panel finds that Cyrus is entitled to an award in the amount of commissions for paid under the March 19, 2010 Bureau-Operator Agreement to the University of Toledo and to Lucas County.

The commissions paid for those periods are established by Cyrus Ex. 38, 39 and 41, and the testimony of Cyrus and Ron Coon, CPA. (Admn. Tr 179 – 195; Arb. Tr. 187-191, 224 – 238) The Bureau has not contested that accuracy of the Exhibits. To calculate the total commissions paid for the period March 19, 2010 to through 2016, the Panel has used the annual amount shown on Cyrus Ex. 41, and reduced the total shown for 2010 by the monthly payments shown on Ex. 38 for January, February and March, 2010. These calculations demonstrate total commissions paid to the University of Toledo for this period in the amount of $57,882.59; and total commissions paid to Lucas County for this period in the amount of $202,065.34.

The Panel agrees with the Bureau's contention that the amount paid as commissions is properly reduced to reflect the additional 18% service fee that Cyrus would have been required to pay had the commission payments not been deducted from the calculation of the service fee. Accordingly, the amount awarded for commissions paid to the University of Toledo is reduced by $10,418.87, resulting in an award of

$47,463.72. The amount awarded for commissions paid to Lucas County is reduced by $36,371.76, resulting in an award of $165,693.58.

The Panel concludes that this matter is appropriate for an award of pre-judgment interest from the date Cyrus filed his grievance, April 29, 2014. In deciding whether a pre-judgment interest award is warranted, a court considers the need to fully compensate the wronged party for actual damages suffered; considerations of fairness and the relative equities of the award; the remedial purpose of the statute involved, and such other general principles as are deemed relevant by the court. See *Loesel v. City of Frankenmuth*, 743 F. Supp.2d 619, 648-49 (E.D. Mich. 2010). An award of interest from the date of the grievance is appropriate in this case because the purpose of the Randolph Sheppard Act is to benefit the blind vendor, and because the 2014 OAG Opinion gave the Bureau clear notice that the commissions are impermissible.

In federal question cases, the rate of pre-judgment interest is left to the court's discretion. The Panel concludes that the post-judgment rate established by 28 U.S.C Section 1961 is an appropriate rate because the claim arises under federal law. See generally *Ford v. Uniroyal Pension Plan*, 154 F.3d 613,619 (6th Cir. 1988). The current Section 1961 rate is 1.12%, and the Panel will award pre-judgment interest at that rate from April 29, 2014 to the date of this award.

The Panel concludes that the Complainant has prevailed on substantially all issues and should be awarded attorney fees. The Bureau has not demonstrated any "special circumstances" that would justify denying Cyrus a fee recovery. The Sixth Circuit has expressly held that a "strong showing" of special circumstances is required to avoid a fee award, and a defendant's good faith in enacting a challenged provision is not

a special circumstance. *McQuery v. Conway*, 614 F. 3d 591, 604 (6th Cir. 2010), citing *Marscott, Inc. v. City of Cleveland*, 936 F. 2d 271,273 (6th Cir. 1991).

As noted above, the Bureau does not contest that the time devoted to the matter by Cyrus' attorney was reasonable and appropriate. Therefore, the only remaining issue is whether the fee award should be based on the agreed "Lodestar" rate of $250.00 per hour, or based on the amount actually paid by Cyrus. In the absence of any standard in the Randolph Shepard Act for determining the amount of the award for attorney fees, the Panel determines that the fee award should be only the amount necessary to make Cyrus whole. Accordingly, the Panel will award Cyrus the amount that he actually incurred for legal services: $40,588.97.

AWARD

For the reasons and on the grounds stated above, the Panel makes the following Award:

A. The Panel declares that it is impermissible under the Randolph Sheppard Act and the Mini Randolph Sheppard Act and their respective implementing regulations for the Bureau to compel blind vendors to pay commissions for the operation of vending facilities under Bureau Grantor Agreements with state or county entities.

B. The Panel declares that the Bureau has violated its duties to the Cyrus under the Randolph Sheppard Act and the Mini Randolph Sheppard Act and their respective implementing regulations by requiring Cyrus to pay commissions under the 2010 Bureau-Operator Agreement to the University of Toledo and to Lucas County.

C. The Panel has the authority to award prospective relief. The prospective relief awarded by the Panel is this:

a. The Bureau is enjoined from compelling Cyrus to pay commissions under the 2010 Bureau-Operator Grantor or taking any other adverse action against Cyrus for non-payment of such commissions.

b. The Bureau shall within 30 days notify any Grantor with which the Bureau has a Bureau-Grantor Agreement pertaining to a vending facility on state or county property that provides for the payment of a commission by the blind vendor operator that said provision is void and that the blind vendor operator is no longer obligated to pay said commission; and

c. The Bureau shall within 60 days publish notice to every state university, medical university, technical college, state community college, community college, university branch district or state affiliated college or university located in the State of Ohio calling the attention of those entities to the language of both R.C. §3304.30 and R.C. §3304.33. The notice shall also inform those entities that the Bureau shall, in the future, seek to enforce the provisions of those two subsections and any dispute will be resolved in accordance with R.C. § 3304.32.

D. The Panel has the authority to award monetary relief for commissions that Cyrus was compelled to pay under the 2010 Bureaus Operator Agreement.

   a. The Panel awards Cyrus the sum of $47,463.72 [$57,882.59 – 10,418.87] for commissions paid under the 2010 Bureau-Operator Agreement to the University of Toledo.

   b. The Panel awards Cyrus the sum of $165,693.58 [$202,065.34 – 36,371.76] for commissions paid under the 2010 Bureau-Operator Agreement to Lucas County through 2016; plus the amount of any commissions Cyrus paid to Lucas County from January 1, 2017 through this date, less 18% of such amount.

E. The Panel awards Cyrus pre-judgment interest on the sums awarded in Paragraph D, above, at the federal statutory rate of 1.12% from April 29, 2014 to this date. The interest award is $7,776.58.

F. The Panel awards Cyrus post judgment interest at the federal statutory rate to the date of payment.

G. Because the Panel has found that Cyrus has prevailed on substantially all issues and is entitled to an award of both prospective and monetary relief, the Panel has the authority to award Cyrus attorney fees. The Panel awards the sum of Forty Thousands Five Hundred Eighty-Eight Dollars and 97/100 Cents ($40,588.97).

Submitted: August 8, 2017

s/*Jacqueline M. Boney*, Panel Member

s/ Joseph W. Gardner, Panel Chair

Panel Member David George Hasselback concurs in part and dissents in part. See separate Dissenting Opinion attached.

CYRUS V. BSVI
CASE NO. R-S15-12
DISSENTING OPINION

I must respectfully dissent in part and concur in part from the holding by the two learned panel members in the "**ARBITRATION OPINION AND AWARD"** to which this **"DISSENT"** is attached. My dissent is not with the Findings of Fact or even with most of the discussion of law and fact but with the application of the law to the facts of this case as expressed in the section entitled **AWARD commencing on page 35.**

In the interests of brevity I will identify and "key" the portions of the **AWARD** with which I dissent or concur by the letter assigned to each subparagraph of said **AWARD.** I also adopt and incorporate my DISSENT submitted in connection with the panel **DECISION** regarding the Respondents Motion to Dismiss which is attached as part of the record in this case.

A. I concur with the finding that it is impermissible under the Randolph Sheppard Act and the Mini Randolph Sheppard Act and their implementing regulations for the Bureau to compel vendors to pay commissions for the operation of vending facilities under Bureau-Grantor agreements with state entities. I dissent from the majority of the panel including county entities (in this case Lucas County) in that prohibition. The applicable portions of the Ohio Revised Code and the OAG opinion (2014-008) address commissions paid to a state university, medical university, technical college, state community college, community college, university branch district or state affiliated college or university. There is no mention of counties

and counties are not “State” entities in Ohio for the purposes of the blind vendors program. [1]

B. Again I concur with the finding as it pertains to the University of Toledo but not to Lucas County for the reasons, set forth above.

C. I concur with the findings of the majority in this paragraph with one exception. I dissent from the prospective relief in subparagraph b to the extent that it includes counties. See my reasoning in my discussion of paragraph A above.

D. I dissent from the finding of the majority in subparagraphs a. and b. that the panel has the authority to award monetary relief to Cyrus for the reasons stated in my earlier DISSENT which I adopt and incorporate herein. In brief summary it is my opinion that this panel lacks authority to grant Cyrus a monetary damages award because there has been no consent by the State of Ohio to waive sovereign immunity under the 11th

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[1] R.C. §3304.28

“***

C) "Governmental property" means any real property, building, or facility owned, leased, or rented by the state or any board, commission, department, division, or other unit or agency thereof, but does not include any institution under the management of the department of rehabilitation and correction pursuant to section 5120.05 of the Revised Code, or under the management of the department of youth services created pursuant to section 5139.01 of the Revised Code. ***.”

R.C. §3304.30

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In the case of a state university, medical university , technical college, state community college, community college, university branch district, or state-affiliated college or university, the decision to establish a suitable vending facility shall be made jointly by the director of services for the visually impaired and proper administrative authorities of the state or state-affiliated college or university. ***.”

amendment to the Constitution of the United States. A state's sovereign immunity can be limited in only a few circumstances: (1) by a valid exercise of congressional power, [2]; (2) by the state's consent to suit in federal court; [3] or (3) by the state's decision to participate in a federal program clearly conditioned on such a waiver. [4]

The panel majority states that it is compelled to follow the case of *Tennessee Dept. Of Human Services v. United States of America Dept. Of Educ.* 979 F.2d 1162 (6th Cir 1992) as it relates to an award of damages including attorney fees. I disagree. As stated in *State of Florida v. United States of America* the assertion that, without its consent, a state may be subjected to a proceeding and prosecuted by a private individual in a Federal Administrative forum cannot be squared with the Supreme Court's broad articulation of the constitutional concept of state sovereign immunity.. [5] The panel majority finds an implied waiver of sovereign immunity in the language of the application by the then Rehabilitation Services Commission (now known as Opportunities for Ohioans with Disabilities) application to become a State Licensing Agency (SLA) under the provisions of the Randolph-Shepherd act. In my opinion such application alone does not meet the above requirement that the decision by a state to participate in this federal program was

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[2] *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 238, 105 S.Ct. 3142, 87 L.Ed.2d 171 (1985)

[3] *Lapides v. Board of Regents of the University System of Georgia* , 535 U.S. 613, 623 122 S.Ct. 1640, 152 L.Ed.2d 806 (2002);

[4] *Edelman v. Jordan* , 415 U.S. 651, 673-74, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974)

[5] 133 F. Supp.2d 1280, 1285, (N.D.Fla 2001) citing *Alden v. Maine*, 527 U.S. 706, 119 S.Ct., 2240, 144L.Ed..2d 636 (1999).

clearly conditioned on a waiver of sovereign immunity. What is required is a clear waiver of sovereign immunity . The State of Ohio has expressly waived immunity and a recovery of damages under either a negligence or breach of contract theory. However the claim must be brought in the Court of Claims which was created for that purpose. [6]

Therefore, no award of monetary damages can be made by this panel! Were this panel to have such authority the starting point for the calculation of monetary damages should be March 4, 2014 (the date of opinion 2014-008 by the Attorney General) and not March 19, 2010 as selected by the majority.

Not only does this panel not have the authority to award monetary damages for it to do so is inequitable. This panel should decline to award damages to Cyrus as to do so would be inequitable. OOD did not receive or profit from the payment of those commissions. Third parties (University of Toledo and others) received the funds. If they

[6] R.C. § 2743.02
(A)(1) The state hereby waives its immunity from liability, except as provided for the office of the state fire marshal in division (G)(1) of section 9.60 and division (B) of section 3737.221 of the Revised Code and subject to division (H) of this section, and consents to be sued, and have its liability determined, in the court of claims created in this chapter in accordance with the same rules of law applicable to suits between private parties, except that the determination of liability is subject to the limitations set forth in this chapter and, in the case of state universities or colleges, in section 3345.40 of the Revised Code, and except as provided in division (A)(2) or (3) of this section. To the extent that the state has previously consented to be sued, this chapter has no applicability.
Except in the case of a civil action filed by the state, filing a civil action in the court of claims results in a complete waiver of any cause of action, based on the same act or omission, that the filing party has against any officer or employee, as defined in section 109.36 of the Revised Code. The waiver shall be void if the court determines that the act or omission was manifestly outside the scope of the officer's or employee's office or employment or that the officer or employee acted with malicious purpose, in bad faith, or in a wanton or reckless manner.

have received funds to which they are not entitled then they have been unjustly enriched and equity demands that they and not OOD should be required to disgorge the funds to which they are not entitled. Those entities are not parties to this arbitration and are not subject to any decision this panel might make. Therefore in order to recoup funds which he alleges were improperly demanded and received Cyrus must seek relief other than from this panel, specifically in the Court of Claims.

E. I dissent from the majority awarding both pre-judgment interest and post judgment interest for the same reasons as stated above. This panel has no authority to award either pre-judgment or post-judgment interest just as it lacks authority to award monetary damages as discussed above and in my earlier DISSENT.

F. See my comments in connection with D and E above.

G. I dissent from the majority who award Cyrus attorney fees in the amount of $40, 588.97. In federal courts, the general rule is that parties pay their own attorney fees unless they can point to specific authority, such as a statute, regulation or contractual language that allows fee shifting.(recognizing that the " American rule" prohibits fee shifting in most cases). [7] The authority Cyrus has cited concern cases brought and decided under statutes such as civil rights enforcement which specifically provide for fee shifting. As stated in a recent sixth circuit court decision"There is no common law right to

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[7] *Wisconsin v. DOE*, 667F.Supp2d 1007, 1018-1019 (W.D.Wis 2009), citing Chambers *v. NASCO, Inc..*, 501 U.S. 32, 45, 111 S.Ct. 2123, 115 L.Ed.2d 27 (1991)

attorney's fees. Under the 'American Rule' the 'general practice' is not to award prevailing parties 'absent explicit statutory authority".[8] I must also dissent from the majority who address the concept of "special circumstances" being required to avoid a fee award. The cases cited by the majority [9] regarding the need for "special circumstances concerned cases brought under civil rights actions under 42 U.S.C. Sec 1983 et seq., which is not applicable here. Therefore, the American Rule is applicable and should be applied to deny any award of attorney fees.

s/s David G. Hasselback
David George Hasselback

Supreme Court # 0030308

Panel Member

[8] *McQuery v. Conway*, 614 F.3d 59, 596-597, (6th Cir 2010) citing *Buckhannon Bd. & Care Home v. W.va. Dep't of Health and Human Res.*, 532 U.S. 598, 602, 121 S.Ct. 1835,149 L.Ed.2d 855 (2001)

[9] *McQueary*, *supra at 604 and Morscott v. City of Cleveland* 936 F.2d 271, 273 (6th Cir1991)