

undersigned as the Panel Chairperson, in accordance with the Randolph-Shepherd Act, 20 USC §107, et seq. (RS Act).

PROCEDURALBACKGROUND

The Petitioner submitted a Complaint For Arbitration on May 7, 2015, claiming that Respondent was taking the position that the new Fort Riley dining facility attendant (DFA) Services Contract would not be subject to the Randolph-Sheppard Act (RS Act). On October 15, 2015, the Rehabilitation Services Administration (RSA), in the Office of Special Education and Rehabilitative Services, of the United States Department of Education (DoE), authorized the convening of an arbitration panel, pursuant to 20 USC 107d-1(b) and 107d-2, which address complaints of State Licensing Agencies (SLA) of noncompliance with the RSA by Federal Agencies.

Pursuant to the statutory procedures contained in the RS Act, the undersigned was officially notified of her selection as Panel Chairperson, on August 2, 2016, to hear and decide the matter in dispute, along with the other panel members.

The hearing of this matter was, by agreement of the parties, scheduled for one day, and was held on January 20, 2017, in Public Meeting Room 1040, at the Kansas Department of Children and Family Services, located at 402 State Ave., Kansas City, Kansas. The hearing commenced at 9:03 a.m., as scheduled, and concluded at 3:23 pm., at which time the record was closed.

At the hearing, a transcriber was used, reporting for Neal R Gross, Court Reporters and Transcribers, 1323 Rhode Island Ave., NW, Washington, DC 20005-3701; copies of the transcript, and all Exhibits, were provided to both parties, and the Panel members. No issue was raised as to whether this matter properly being before the Panel for decision, whether all steps of the arbitration procedure had been followed or whether the Panel had the authority to render the decision in this matter.

All witnesses were sworn, testimony and evidence was received. Larry Graham, a Contract Specialist with Mission and Installation Contracting Command (MICC) (Graham); Terry Smith, Consultant with National Association of Blind Merchants (Smith); and Don James, Food Services Inc., Gainesville (FSIG) (James) gave testimony for the Petitioner.

The Respondent called Graham; Russell Campbell, Chief Warrant Officer 5, Quarter Master,

Food Program Manager, US Army Sustainment Command Rock Island Arsenal, Rock Island, Ill. (CWO Campbell); Amy Williams, Acting Deputy Director, Defense Procurement and Acquisition Policy Undersecretary of Defense (Deputy Director Williams), (telephonically) ; and Joe Diaz, Vice President of Operations, SourceAmerica (Vice President Diaz). Both parties received the opportunity for cross-examination and rebuttal. Both parties submitted post-hearing briefs, which were received on February 17, 2017. At that time, the case stood submitted. Thereafter, Respondent submitted Supplemental Facts And Argument to Post Arbitration Brief, to which Petitioner submitted a Response. The latter was received by March 10, 2017, whereby the Decision was to be rendered by April 10, 2017.

STATEMENT OF THE ISSUES

The issues, as agreed upon by the parties, are whether the RS Act applies to the contract in question, and, if so, what is the proper remedy. The RSA, by its convening letter, indicated an additional issue, to wit: whether the proposed inclusion of DFA Services to the United States AbilityOne Commission's (AbilityOne) procurement list violated the no-poaching provisions of the JWOD Act.

FACTS

Pursuant to the RS Act, the State of Kansas (Kansas), through its Department of Children and Family Services, was designated as an SLA. Under that designation, Kansas became obligated to select Federal property sites, together with the head of the department or agency in control of such property, for the operation of vending facilities, as defined by the terms of the RS Act. Kansas took steps to satisfy this obligation, when it entered into a contract, in 2006, with the Respondent, for the operation of cafeterias at Fort Riley. This was for an up to five-year term, renewable annually, at the option of Respondent. The Army renewed the contract for the full duration of the terms and, then, on September 1, 2011, awarded a second follow-on contract, with the same term. The number of this contract was W91 1RX-11-D-006.

The contract was a requirements contract for the entire operation of cafeterias, at several dining facilities at Fort Riley. The nature of the contractually required performance

was either for full food service (FFS) or dining facility attendant (DFA), L or a combination of both types, depending on the status of troop deployment of Army cooks. When the contract was initially let, the required performance was for FFS. This was carried forward in the second contract.

Chronology

March 12, 2012 - However, after several months into the life of the second contract, the Army determined that it required only DFA services, along with some limited food preparation, leaving food preparation-in-the-main to military cooks. This pattern continued for three years.

March 13 2015 - the Army informed Kansas that it no longer had a follow-on requirement for any of the food preparation, and that the new contract would proceed for DFA services only, and would not be subject to the RS Act.

March 16, 2015 - the U.S. AbilityOne Commission informs the RSA, at the DoE, that it had been asked by the Army to assess a "food-related service requirement" for addition to the Procurement List, pursuant to the JWOD Act.

March 19, 2015 - Kansas requested that any new solicitation for dining facility services continue to recognize the priority of the RS Act. This the Army, on May 27, declined to do.

May 7, 2015 - Kansas filed a complaint with the RSA, requesting arbitration, maintaining that the Army's attempt to remove the contract for DFA services from the RS

¹ By Army regulations, a cafeteria is defined as a food dispensing facility which provides a broad variety of prepared foods and beverages (including hot meals) primarily through the use of a serving line where the customer serves or selects for himself from displayed selections. A cafeteria may be fully automatic, self-service, or have limited waiter or waitress service. Table or booth seating facilities are always provided (Army Regulation 210-25). This Regulation mirrors the defining language found in the regulations promulgated under the RS Act and has not changed since it became effective in 1979. Since then, attempts to change the Army Regulation have resulted in various and sundry Policies, Explanatory Statements, etc. to establish a definition on the Army side: a full food service contract is one in which the contractor is asked to provide all labor and management required to serve food in a military dining facility, including preparation of meals; a dining facility attendant contract is defined as custodial, for the cleaning of pots and pans, washing dishes, floors, windows, surfaces, bussing, tables, etc. and the contractor provides the labor required to perform discrete support functions related to military dining facility operations, up to but not including meal preparations. On the DoE side, under the RS Act, the definition of a cafeteria has not changed and does not recognize any such distinction.

Act priority is a violation of the RS Act and of the No Poaching Provisions of the JWOD Act.

May 15, 2015 - Kansas asked the Army to agree to maintain the status quo at Fort Riley, pending the outcome of the arbitration.

May 27, 2015 - The Army denied Kansas' request to continue to operate the dining facilities.

June 8, 2015 - The RSA, forwarded a copy of Kansas' complaint to the Army and asked the parties to meet and confer, in an attempt to settle the matter.

July 7, 2015 - Kansas was informed by the Army that the second contract would be extended through Feb 28, 2016, but only on a month to month basis. The contract's Performance Work Statement (PWS) required the contractor to transition DFA service support operations and be fully staffed with qualified personnel that meet or exceed the qualifications stated in the PWS; to perform the janitorial and custodial duties within dining facilities, including cleaning, sweeping, mopping, scrubbing, trash removal, dishwashing, waxing, stripping, buffing, window washing, pot and pan cleaning and other sanitation related functions in the dining facilities. The Vision Statement, in the PWS, referred to providing quality services in support of the installation program that supports the warfighter with flexible, efficient and cost effective service. Also included was a requirement that the Contractor maintain a Quality Control Plan in support of Dining Facility operations.

July 15, 2015 - the Army responded to the RSA, taking the position that Kansas' request for arbitration should be dismissed and declined to enter into any discussions with Kansas to attempt to settle.

July 17, 2015 - the Army proposed a DFA contract and placement of the same on the JWOD Act Procurement List, designating Lakeview Center as the source of supply. This was published in the Federal Register. The number of this contract was W911RX-15-R-010. It is this contract which is the subject of this arbitration.

July 22, 2015 - Kansas filed a complaint for injunctive relief in the US District Court, for the District of Kansas.

February 22, 2016 - the RSA notified the Army that it was moving forward with the convening of an arbitration panel, overruling the Army's request that the arbitration be dismissed.

February 26, 2016 - The US District Court, for the District of Kansas, granted Kansas a preliminary injunction, enjoining the Army from "conducting any procurement, including making any award of contract in connection with cafeteria services at Fort Riley, except as permitted under the RSA [RS Act] and its regulations, until such time as the arbitration proceeding initiated by Kansas under the RSA [RS Act] is concluded, or further order modifying this preliminary injunction".

March 1, 2016 - the Army let a bridge contract for DFA services with Kansas, pursuant to the terms of the preliminary injunction. The number of this contract was W91IRX-16-D-0006.

March 22, 2016 - the District Court rendered a supplemental order, denying the Army's motion to dismiss and staying the case pending arbitration.²

June 24, 2016 - The District Court considered a motion of SourceAmerica and Lakeview Center to intervene in the injunction action, based on their claim that SourceAmerica was the AbilityOne designated nonprofit agency to help identify suitable nonprofits which employ people with significant disabilities to provide services on the Procurement List required by the JWOD; that Lakewood was one such agency; and that one week before Kansas filed its complaint, AbilityOne proposed listing Lakeview as the "Mandatory Source of Supply" for the contract, which had been proposed by the Army to replace the contract with Kansas. The motion to intervene was granted. However, their motion to dismiss, which was filed at the same time, was denied. SourceAmerica and Lakeview Center have since filed an appeal as to the motion to dismiss with the 10th Circuit Court.³

At the hearing, Graham testified that he was the contract specialist at Fort Riley for the contract in question, and was involved in the entire process since January 2015. It was

²Other matters were addressed, but not discussed here since they are not germane to the issues at hand.

³No evidence was presented as to the outcome of this appeal.

his belief that DFA contracts were not subject to the RS Act, pursuant to Army policy. He clarified that when the second contract period began, all of the FFS facilities at Fort Riley became DFA facilities, but that Kansas continued to provide FFS services, for the benefit of Kansas, instead of terminating the contract. This continued until 2012 when the Army decided to put military cooks back into the management of, and food preparation in, into the dining facilities, and implement the removal of all FFS contracts for its facilities at Fort Riley. After this time, the Army stopped ordering the full food service tasks from Kansas, but continued with the DFA portion of the required services, and this arrangement continued each year, as the Army exercised its option to keep Kansas in place. One reason for the change was the need to save costs required by sequestration and the other was that the extent of deployment had lessened, leaving more Army cooks on base to perform FFS duties within the dining facilities. When the US District Court issued its injunction in 2016, the Army, on March 1, 2016, issued a bridge contract, for one year, to Kansas, for DFA services.

It was his testimony that at one time the task of peeling potatoes was included in the DFA contracts, but because RS Act arbitration panels had held that this constituted food preparation and was enough to bring a contract within the RS Act. He stated further that it was for this reason that the task of peeling potatoes had been removed from the proposed and current bridge DFA contracts and that the decision to do this had been made in the Army higher up than Fort Riley.

Graham also stated that the JWOD Act procurement list is a list of products and services. Once a provider of services is listed, the Army (and all other Federal agencies) are required to contract for such services only with that provider. The parties stipulated that the RS program and the JWOD program are two of many programs designed to benefit certain groups. If a contract is to be let under the RS program, it is governed by the RS Act. In that instance, other groups might compete, but not JWOD entities. If the contract is under the JWOD program, then only JWOD entities are assigned to that contract, and other groups, including RS Act state licensing agencies (SLAs) are not allowed to receive the contract.

Graham explained further that poaching was part of the National Defense Authorization Act of 2007 and provided that there would be no poaching between RS programs and JWOD programs, i.e. once a contract is determined to be within the terms of

the RS Act, entitled to be let with priority to assigned licensed blind vendors of the SLAs, follow-on contracts cannot be let to entities within the JWOD program ; and the reverse is true, as well. He believed that there had been no poaching in this case because it was opinion that the DFA contract did not fall within the terms of the RS Act.

In response to questions from the Panel, it was Graham's testimony that the Army had not submitted to the Secretary the question of whether a vending facility would adversely affect the interest of the United States.

Smith testified that he was a consultant for the National Association of Blind Merchants, and worked with Kansas on the dining facility contract at Fort Riley. He stated that the services performed pursuant to the contract between the Army and Kansas, at Fort Riley, after March, 2012, included potato peeling; whereas the proposed contract does not. It was his opinion that even with the deletion of potato peeling, the proposed contract, as did the Bridge contract, still comes within the provisions of the RS Act because the services required pertain to the operation of a cafeteria. It was his further opinion that the Army did not have the discretion to remove the task of potato peeling, because the Army has an affirmative duty to establish a RS facility on all Federal property, limited only by whether or not it was feasible to delete that task, or that leaving it in would have an adverse affect on the United States, as determined by the Secretary of Education. Kansas offered Smith as an expert witness.

On cross-examination, Smith stated that his only involvement with Kansas was for the federal court proceedings, rather than any of the contracting decisions. It was his further testimony was that he was not getting paid to testify in this matter. He was aware of the Joint Explanatory Statement which has issued dealing with inconsistencies as to the priorities and obligations of the RS Act *vis-á-vis* the restrictions and obligations of the JWOD Act, but made clear that no regulations had been promulgated in furtherance of that Statement by DoE.

James testified that he worked for Food Services, Inc., of Gainesville, which teams with Kansas and its licensed blind vendor on the Fort Riley contract. He has done this since 2006. He prepared Petitioner's Exhibit 8, which reflects changes serially made to the original 2006 FFS contract between the Army and Kansas. He stated that since March 12, 2016, as

shown on Petitioner's Exhibit 8, cooking services were being done by the Army exclusively; nonetheless, the Army still treated this contract as a RS Act opportunity. He noted that a large majority of the DFA contracts with which he was familiar included a line item that would allow the Army to order contingency (civilian) cooks, who would provide food cooking services during times of deployment, as well as some food preparation.

It was his opinion that all of the functions in a DFA are related, or pertain, to military dining facility operations or cafeteria operations. He noted that in all contracts from the Army, including FFS and DFA contracts, the Army is to provide contract oversight and quality assurance. However, quality assurance is different from quality control, which is usually a civilian function.

As to the proposed contract, which is the one in question, it does not contain any food preparation, having eliminated potato peeling, and being silent as to provision of any contingency cooks. The proposed contract, however, does require the contractor to have several years of experience managing cafeteria-style or multi-entree-style operations, providing complete meal services; hire management and supervisory personnel, including a contract project manager and DFA supervisors; and pot and pan cleaning and other sanitation-related functions.

James testified that the Tri-Service Food Code is a military food code that is used by all branches of the military and which applies to the proposed contract. Under the Code's definitions, the employees of the proposed contract would constitute food employees, subject to personal health and training requirements, food training requirements, which is specifically required by the proposed contract, as well as obligating the contractor to maintain all records of that training. It was his opinion that all of these functions, as required by the proposed contract, pertain to the operation of the cafeteria services, and that the Fort Riley dining facilities could not be operated with the services provided by the DFA contractor, which were integral to the safe, efficient and hygienic operation of the dining facility.

On cross-examination, James explained that once a contract is on the JWOD Act Procurement List, it is no longer open to bidding by RS Act programs. He acknowledged

that pest control services, which was required by the proposed contract, could by itself be the subject of a separate contract, The same could be true for the task of grease removal.

Campbell testified that he was a Chief Warrant Officer in the Army, part of the US Army Sustainment Command, overseeing 174 of the Army's garrison dining facilities worldwide. His job title was Army Sustainment Command Food Program Manager., overseeing and implementing Army guidelines and policy, which includes financial planning and budgeting, staffing and funding for the facilities. At the time of the hearing, of the 174 dining facilities, there were only four DFA contracts, including the one at Fort Riley, which is the subject of the contract in question, and which were let pursuant to the RS Act, and all of them were the subject of litigation.

It was Campbell's testimony that current policy is that DFA contracts should either be placed on the JWOD Act Procurement List or let according to a mall business set-aside. It was his opinion that in an effort to be consistent across the Services and to have a standardized work product, as well as gain insight into their fiscal practices, was the reason for taking potato peeling out of the DFA contract and turn away from contracting under the RS Act for the letting of DFA contracts.

Campbell stated that a DFA contract is custodial and janitorial in nature. The DFA contractor is not in charge of directing food preparation, ordering food, receiving food, storing food or any of the other activities that support the operation; he is there to provide janitorial services and custodial-type services.

Amy Williams testified that she was the Acting Deputy, for the Defense Procurement and Acquisition Policy, for the Defense Acquisition Regulations System; and had also served as the Acting Chair of the Defense Acquisition Regulations Council, on a temporary basis. In her position she write acquisition regulations. At the time of the hearing, her current role was the processing of a proposed rule relating to OFA and FFS contracts, to implement the Joint Report And Policy Statement, issued by DoD, DoE and AbilityOne. The Joint Explanatory Statement was issued, at the request of Congress because of questions about how the RS Act related to procurements (under the JWOD Act) for the DoD. The proposed rule was published June 7, 2016, in the Federal Register. However, regulations for implementation have not been issued. The proposed rule included a definition for operation

of a military dining facility, to-wit: the exercise of management responsibility and day-to-day decision making authority by a contractor for the overall functioning of a military dining facility, including responsibility for its staff and subcontractors; and that this would be covered by the RS Act. She was not sure where that language came from. There was also a definition for dining support services, to wit: food preparation, food serving, ordering, inventory, meal planning, cashiers, mess attendant services, or any and all other services that are encompassed by and included in or otherwise support the operation of a military dining facility.

The DoE was consulted with during the process of writing the Rule, has submitted comments on it, concurred with the initial publication, but has not yet given its final approval. The content of the Joint Explanatory Statement, mentioned above, was not voted on by a Congressional Conference Committee or by either house of Congress.

RESPONDENT'S REQUEST FOR A NEW HEARING

At the outset of Respondent's Post-Arbitration Brief, the Department seeks a new hearing due to fundamental unfairness which occurred during the hearing and due to concerns of panel neutrality. The first prong rests on a complaint of exclusion of witness testimony and of the Chair's public announcement of riding to the airport with Petitioner's counsel; the latter rests on a complaint that the Panel lacked neutrality.

As to the first argument, the testimony of several of Respondent's witnesses was excluded upon the objection of Petitioner that the testimony was not relevant. These witnesses all had relationship to or with the AbilityOne Commission, which implements the program created by the JWOD Act. Respondent posits that the exclusion of this testimony prevented it from showing that the contract in question was lawfully covered by the AbilityOne program and was not within the provisions of the RS Act.

That this was unfair is based on several claims. The first is that the Panel Chair had previously found one of these witnesses to be essential. However, that finding was made for the purpose of the witness qualifying to receive payment from the Government for his travel expenses. Further, that finding was made administratively pre-hearing, and did not allow for objection to be raised by Kansas. Because it was made without benefit of hearing procedures, it was not binding on the Chair during the hearing. Witnesses who are called at a

hearing, and their anticipated testimony, are always subject to objections of relevancy. This is a basic element of fundamental fairness. The ruling excluding the witnesses came after Kansas objected on the grounds of relevancy.

Moreover, Respondent failed to include, from the Transcript of the hearing, at pp. 265-268, the following:

Major Oppel: . . . I had three other witnesses that I had listed to which we just got objections today, . . . and I provided . . . proffers as to what their expected testimony would be, ma'am. . . . And I . . . would ask if your ruling is that you're going to deny their testimony that (it) be made . . . on the record . . .

Ms. Marks-Barnett: Well, I'm not going to deny their testimony but if the -- if Mr. Nolan should object to any questions that you ask them on the ground of relevancy, I think you have an idea of how I would rule on that. Given that, if you want to -- I'm not going to stop you from putting witnesses on. . . (I) if you want to put them on, go ahead.

Major Oppel: I would like to at least . . . offer it, because . . . they have an understanding of what the RSA (RS Act) means as well, just as his expert does, we have other folks that have an understanding of what the RSA is and whether it should apply. So I think that's important. But I'll go ahead and offer then Mr. Barry Lineback will be the next witness I would like to call. . . If I may, ma'am, can I go ahead and get Mr. Lineback on the phone so that I can . . .

Ms. Marks-Barnett: Sure. I want to be perfectly clear, I do not need to hear from these witnesses about how they interpret the law.

Major Oppel: Concur.

The transcript of the hearing further reveals that Lineback was not called, but Diaz was. At pp. 270-272, Kansas objected, not to Diaz (who had already done some testifying as to foundational matters) but to a question that was posed to him. Diaz stated his role in AbilityOne was Vice-President of Operations. When he was then asked about his working knowledge of the RS Act, the Chair informed the Army that she didn't need any further testimony about the workings of the RS Act. The Army then inquired about AbilityOne. To this, Kansas objected on the ground of relevancy, stating that the nature of AbilityOne is irrelevant to whether the RS Act applies to the contract in question or not. The Army, laboring under the misapprehension that the issue was whether either the RS Act or the JWOD Act applied to that contract, responded with the argument that it was important for the Panel to know AbilityOne's perspective and its interpretation of the contract and that the RS

Act did not apply. Concluding that such testimony would not be probative of the issue to be decided, whether the RS Act, and only the RS Act, applied to the contract, the objection was sustained and the witness excluded. The Army did not call any other of this group of witnesses.

As to the second claim, that "the Panel Chair had full knowledge of their expected testimony almost a month before the hearing and neither she nor the Petitioner raised any objection to their testimony until the hearing," the response is the same as stated for the first claim, and will not be repeated here.

The third claim: "the Panel Chair asked questions regarding (the) AbilityOne Program to an Army Contract Specialist (Larry Graham), but was not willing to hear evidence from the most knowledgeable sources on the matter (i.e., the AbilityOne Witnesses), is very similar to the first two claims. It should be noted that Graham was called as the first witness by Kansas and was subjected to extensive questioning. Thereafter, he was cross-examined by the Army and given full opportunity to explore the facts more deeply. And, beyond that, after Kansas rested, the Army called Graham again, as its own witness, and subjected him, once more, to extensive questioning. Had the issue been whether the contract should be let under the RS Act or the JWOD Act, then there might have been some merit to this claim. But, as stated above, the issue in this case, once again, is whether the RS Act applies to the contract in question.

The fourth claim was that inasmuch as the AbilityOne witnesses were allowed to intervene in the Federal litigation related to this matter,⁴ it should have been relevant for the Panel to hear testimony from these witnesses. It is correct that in the District Court case, the Court granted the motion of the AbilityOne witnesses to intervene in that action, but they were not interveners in this arbitration, nor could they be since the RS Act makes no such provision. The relief requested in *Kansas v. United State, et al*, was solely for a preliminary and permanent injunction to "prohibit the Army's conduct of any procurement of cafeteria services until such time as the arbitration required by the Act is concluded." (at p. 6)

⁴ State of Kansas, by and through the Kansas Department for Children and Families v. United States, by and through Honorable Ashton B. Carter, Secretary of Defense and Honorable John McHugh, Secretary of the Army, 15-cv-04907-DDC-KGS (US District Court, for the District of Kansas). See Respondent's Exhibit 12.

In a nutshell, the relief was to stop any procurement of cafeteria services, not solely AbilityOne.

The second argument consists of a complaint that the Panel Chair asked Petitioner's counsel for a ride to the airport in the presence of members of the public, including some of the witnesses, which calls into question "the Panel Chair's Judgment, neutrality, and ability to assure a fair hearing" by those members of the public. Respondent was also singularly asked if he had any objection to the Chair obtaining a ride to the airport with Petitioner's counsel. Not only did Respondent not object, but in its Post (*sic*) Arbitration Brief And Request For A New Hearing, attorney for the Respondent noted that he did not object because he found this practice to be permissible. His objection was based on the fact that the request was made in the presence of one of the witnesses, without any effort to keep the request secret. The claim that avoiding transparency somehow serves the notion of fundamental fairness is a specious claim.

The last claim was that both the attorney for the Petitioner and the Panel Chair announced that they had return flights scheduled for the evening of the hearing day and that this unfairly influenced the evidentiary rulings. At the outset, it must be noted that early in the pre-hearing administrative process, both parties indicated that the hearing would take only one day, which resulted in only one day being scheduled. Respondent's evidence which was proffered at the hearing, but excluded, was excluded because it was objected to and then determined to be neither material nor relevant, given the very narrow inquiry put to the Panel, by the convening letter, issued by the Department of Education. Had they been determined to be relevant, those questions would have been allowed and, if necessary, a second day scheduled. As mentioned above, the following language appears in the transcript, at p. 266:

Ms. Marks-Barnett: Well, I'm not going to deny their testimony but if the - - if Mr. Nolan should object to any questions that you ask them on the ground of relevancy, I think you have an idea of how I would rule on that. Given that, if you want to -- I'm not going to stop you from putting witnesses on. . . (I)f you want to put them on, go ahead.

The second thrust of Respondent's arguments is that the Panel was not neutral in that neither the Chair nor the Petitioner's Designee, Susan Gashel, informed Respondent that they

had a working relationship since 2012. In response, the process for selecting panel designees and the chair is set out in the Revised Interim Policies and Procedures for Convening and Conducting an Arbitration Pursuant to Sections 5Cbl and 6 of the Randolph-Sheppard Act as Amended, at Paragraph No. 6. It provides each party shall designate one panel member and thereafter the two panel members shall designate a third member of the panel who is to serve as panel chairperson. Accordingly, the Panel Chair here was designated as the Panel Chair, not only by Susan Gashel, but by David Carey, the Respondent's designee, as well. Thus, the Respondent, through its designee, had full opportunity to weigh in on the selection of the Panel Chair. It would seem that the purpose of having the designees jointly select the panel chairperson would be to obviate any impression of possible bias.

Respondent claims that the Panel Chair and Susan Gashel have had a working relationship since 2012. However, familiarity with the processing of complaints under the RS Act reveals that the processing goes through several stages. In the matter of Murphy, et al., v State of California Department of Rehabilitation, Case No. RS/12-10, while the complaint may have been filed in February, 2012, and while the petitioner therein was represented by Susan Gashel, the Chair was not contacted, for the first time, by the RSA, and notified of her selection by the parties' designees until April 29, 2015. The Revised Interim Policies and Procedures does not provide for any direct contact between the parties, the designees and the panel chairperson until the panel chairperson submits a signed contract in response to the selection notice. The hearing was held on October 5 and 6, 2015. The decision was issued, as Respondent mentions, in January of 2016, and contained rulings in favor of Ms. Gashel's client; however, the petitioner's designee wrote a dissent in part and a concurrence in part, which, together with the respondent's dissent, was included in the decision.

The complaint herein was filed with the RSA on May 7, 2015. The same selection process prevailed in this matter, whereby the Panel Chair was not notified, by the RSA, that she had been selected as panel chairperson, by the parties' designees, including Susan Gashel, until July 26, 2016. Once again, the Panel Chair was not permitted to contact either the parties or their designees until she submitted a signed contract in response to the selection notice. The hearing was held on January 10, 2017.

After being notified in this case of her selection as Panel Chair, the Panel Chair was notified on September 1, 2016, of her selection in a third case, Sheets v State of California Department of Rehabilitation, Case No. RS/I 3-08. The selection was made, as before, by the parties' designees, including Susan Gashel. The hearing in this matter was held on December 8, 2016, with the decision being issued in February, 20 17. In the decision, the rulings of the majority of the Panel were against the petitioner, who was aligned with Ms. Gashel, the petitioner's designee. Ms. Gashel wrote a dissenting opinion.

The Revised Interim Policies and Procedures are also silent as to procedural issues for the drafting of the decision. A helpful discussion can be found in How Arbitration Works, 6th Ed., Elkouri & Elkouri, pp. 155-163. Pursuant to the issues highlighted by that discussion, the practice of the Panel Chair has been, when drafting a decision, to submit the decision, once drafted, to the partisan members of the panel so each can review and determine whether he/she will concur or dissent and take an opportunity to write a decision to reflect that determination. The purpose of following this path, rather than meeting in executive session to confer before the decision is drafted, is to assiduously insulate the Panel Chair's decision-making process from any bias that might result from such an executive session before the decision is made.

Although Ms. Gashel appeared for the petitioner in the Murphy case, Respondent here presents no evidence that demonstrates a working relationship between Ms. Gashel and the Panel Chair, or any relationship whatsoever, from 2012. In fact, the Panel Chair and Ms. Gashel did not even come into contact with other until after April 29, 2015. Lawyers, judges, hearing officers, arbitrators, etc., cross paths with each other frequently. If such were obligated to disclose, and, then be subject to reversal for failing to meet that obligation, the legal system would be effectively upended. And, all the more so, in the very unique and narrow area of litigation under the RS Act, where the attorneys and panel members constitute a very small community. The mere fact that attorneys have appeared before an arbitrator, or have previously participated on a tri-partite panel with the panel chair is not, in and of itself, sufficient to cast doubt on the impartiality of the panel. Even when an appearance or a participation may be repeated, this, in and of itself, is not sufficient to cast such doubt.

Based on all the foregoing, Respondent's Request for a New Hearing, should be, and hereby is, denied.

THE MERITS

PERTINENT STATUTORY AND REGULATORY PROVISIONS

20 USC Sec. 107, et seq., Vending Facilities for Blind in Federal Buildings

Sec. 107. Operation of vending facilities

(a) Authorization

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

(b) Preference regulations; justification for limitation on operation

In authorizing the operation of vending facilities on Federal property, priority shall be given to blind persons licensed by a State agency . . . ; and the Secretary . . . shall . . . prescribe regulations designed to assure that --

(1) the priority under this subsection is given to such licensed blind persons . . . , and

(2) wherever feasible, one or more vending facilities are established on all Federal property to the extent that any such facility . . . would not adversely affect the interests of the United States.

Any limitation on the placement or operation of a vending facility based on a finding that such placement or operation would adversely affect the interests of the United States shall be fully justified in writing to the Secretary, who shall determine whether such limitation is justified . . .

Sec. 107a. Federal and State responsibilities

(a) Functions of Secretary

The Secretary of Education shall --

(S) Designate . . . the State agency for the blind in each State . . . for the operating of vending facilities on Federal . . . property . . . for the vending of newspapers, periodicals, confections, tobacco products, foods, beverages, and other articles or services dispensed automatically or manually and prepared on or off the premises in accordance with all applicable health laws . . .

Sec. 107d-2. Arbitration

(a) Notice and hearing

Upon receipt of a complaint . . . , the Secretary shall convene an ad hoc arbitration panel Such panel shall, . . . conduct a hearing, and render its decision which shall be subject to appeal and review as a final agency action

(b) . . . (T)ermination of violations

. . . If the panel . . . finds that the acts or practices of any such . . . agency . . . are in violation of this chapter, or any regulations issued thereunder, the head of any such . . . agency . . . shall cause such acts or practices to be terminated promptly and shall take such other action as may be necessary to carry out the decision of the panel.

Sec.107d-3. Vending machine income

(e) Regulations establishing priority for operation of cafeterias

The Secretary . . . shall prescribe regulations to establish a priority for the operation of cafeterias on Federal property by blind licensees when he determined on an individual basis and after consultation with the head of the appropriate installation, that such operation can be provided at a reasonable cost with food of a high quality comparable to that current provided to employees, whether by contract or otherwise.

Sec.107e. Definitions

As used in this chapter-

(4) "Secretary" means the Secretary of Education.

(7) "Vending facility" means . . . cafeterias . . .

34 CFR §395--Vending Facility Program For The Blind on Federal and Other Property

Subpart A. Definitions

§395.1 Terms

(d) *Cafeteria* means a food dispensing facility capable of providing a broad variety of prepared foods and beverages A cafeteria may be fully automatic or some limited waiter or waitress service may be available and provided within a cafeteria and table or booth seating facilities are always provided

(x) *Vending facility* means . . . cafeterias . . . , and such other appropriate auxiliary equipment which may be operated by blind licensees and which is necessary for the sale of . . . foods . . . dispensed automatically or manually and prepared on . . . the premises in accordance with all applicable health laws . . .

Subpart C--Federal Property Management

§395.30 The location and operation of vending facilities for blind vendors on Federal property .

(a) Each department agency . . . shall take all steps necessary to assure that, wherever feasible, in light of appropriate space and potential patronage, one or more vending facilities for operation by blind licenses shall be located on all Federal property *Provided* that the . . . operation of such facility . . . would not adversely affect the interests of the United States. Blind persons licensed by State licensing agencies shall be given priority in the operation of vending facilities on any Federal property .

(b) Any limitation on the . . . operation of a vending facility for blind vendors by a department . . . based on a finding that such . . . operation would adversely affect the interests of the United States shall be fully justified in writing to the Secretary who shall determine whether such limitation is warranted . A determination made by the Secretary concerning such limitation shall be binding on any department . . .

§395.33 Operation of cafeterias by blind vendors.

(a) Priority in the operation of cafeterias by blind vendors on Federal property shall be afforded when the Secretary determines . . . that such operation can be provided at a reasonable cost, with food of a high quality comparable to that currently provided to employees . . . Such operation shall be expected to provide maximum employment opportunities to blind vendors to the greatest extent possible.

(b) In order to establish the ability of blind vendors to operate a cafeteria in such a manner as to provide food service . . . the appropriate State licensing agency shall be invited to respond to solicitations for offers when a cafeteria contract is contemplated . . . Such solicitations for offers shall establish criteria under which all responses will be judged . Such criteria may include sanitation practices, . . .

(c) All contracts . . . pertaining to the operation of cafeterias on Federal property not covered by contract with . . . SLAs shall be renegotiated subsequent to the effective date of this part [1977] on or before the expiration of such contracts . . .

John Warner National Defense Authorization Act (FY 2007), Public Law 109-364

Sec. 856. Contracting with Employers of Persons with Disabilities

(a) Inapplicability of Certain Laws -

(1) INAPPLICABILITY OF THE RANDOLPH-SHEPPARD ACT TO CONTRACTS AND SUBCONTRACTS FOR MILITARY DINING FACILITY SUPPORT SERVICES COVERED BY JWOD ACT - The Randolph-Sheppard Act . . . does not apply to full food services, mess attendant services, or services supporting the operation of a military dining facility that, as of the date of the enactment of this Act, were services on the procurement list established under section 2 of the JWOD Act.

(2) INAPPLICABILITY OF THE JWOD ACT TO CONTRACT FOR THE OPERATION OF A MILITARY DINING FACILITY -

(A) The JWOD Act . . . does not apply at the prime contract level to any contract entered into by the DoD as of the date of the enactment of this Act with a SLA under the RS Act for the operation of a military dining facility.

DISCUSSION

The contentions of the Petitioner, Kansas, are:

1. The RS Act arbitration process provides for a *de novo* review by the DOE arbitration panel.
2. The standard of review under the Administrative Procedures Act (APA) or the Federal Acquisition Regulations (FAR) is not applicable to matters brought to arbitration under the RS Act.
3. The RS Act priority applies to all contracts which pertain to the operations of cafeterias, regardless of whether the contractor prepares or serves food.
4. There can be more than one operator of a cafeteria as that word is used in the RS Acts and regulations promulgated thereunder .
5. The Army's arguments for avoiding the requirements under the RS Act are based upon restrictive definitions not supported by the language of the Act or any valid authorities .
6. The recommendations of the 2006 Joint Report to Congress did not go through any notice and comment period, have never been enacted, have been rejected by both the OMB and DOD and have been held to have no legal effect.
7. The Joint Explanatory Statement has no legal effect.
8. The Proposed Rules of DOD are of no effect and cannot contravene Regulations issued by the DOE.
9. The Army's argument that the priority mandated in the RS Act does not apply to contract renegotiations is illogical.
10. Even if the RS Act does not apply to dining facility attendant contracts, the Army violated the RS Act by eliminating a RS Act opportunity at Fort Riley without first securing the approval of the Secretary of Education.

11. The Army violated the JWOD Act by requesting that AbilityOne poach that RS Act opportunity.

Respondent, the Army, contends that:

1. The original intent of the RS Act is not being followed.
2. The contracting officer reasonably interpreted the RS Act to apply to only full food services contracts.
3. The proposed Defense Federal Acquisition Regulation Supplement (DFARS) will soon become law and reflects that the intent of Congress is that the RS Act does not apply to dining facility attendant services contracts.
4. A motion to dismiss should be granted.

Both parties took issue on many points and submitted voluminous authorities in support of each. These were all diligently read, studied and considered. However, to avoid an unduly lengthy decision, only those that were found to be outcome determinative will be discussed.

Analysis of the Issues

1. Whether the Standard of Review to be Used in This Matter is the Standard Required by the RS Act, and its Regulations, the APA or the FAR

There is no issue as to the Complainant having the burden of proof in this matter. However, there is an issue as to what the standard of review is to be used. The Army, without arguing for the proposition that the APA is to set the standard of review, merely assumed that to be the case; based on that assumption, the Army argues further that the original intent of the RS Act would not be served by letting the contract in question, a dining facility attendant services contract. For emphasis, the Army posits that this "Panel (and hopefully Congress in the future) should look closely at whether the RS Act helps the intended beneficiaries, as if this Panel would have the power to do that.

The Army continued by urging that the contracting officer (KO) has wide discretion under federal procurement regulations to apply and interpret procurement regulations and his

decisions should not be overturned unless those decisions can be "shown to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the Jaw."

The Army does not provide any legal support for this. To the contrary, a decision cited by the Army, in support of a different argument, Mississippi Department of Rehabilitation Services v U.S., 61 Fed.Cl. 20 (2004), stands for the proposition that, when interpreting the RS Act, and its Regulations, a contracting officer's (KO's) interpretation is not to be afforded deference. This is essentially the case because "it is the DoE, not the DoD, which is charged by Congress with responsibility for administering the RS Act."

Moreover, a close reading of the RS Act, and its regulations, reveals a statutory and regulatory scheme for the handling of disputes between SLAs and Federal agencies, with a particularized arbitral process, §107d-3, which is silent as to any reference to the APA or that the contracting officer's decision is to be granted deferential treatment or, if that decision is to be questioned, it can only be overturned if found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the Jaw.

Additionally, the DoE's convening letter identified the issue in this matter to be simply whether the OFA contract comes within the terms of the RS Act, and its regulations; and whether the Army's offering of this contract under the terms of the JWOD Act constituted poaching. Accordingly, this is the standard of review.

II. Whether the DFA Contract Solicitation No. W911RX-15-R-00 I O Comes Within the Terms of the RS Act, and its Regulations

The RS Act was enacted into law in 1936, amended in 1974. A host of Regulations were promulgated to implement the purpose and terms of the Act, creating a program of training and placement of blind persons to manage/own vending facilities, thereby being provided with remunerative employment sufficient to make themselves self-supporting. The law also provides that States which have agencies or departments that support the blind and agree to cooperate with the Secretary of Education in carrying out the purpose of the Act can apply to become a SLA. Once a State's agency or department is designated as a SLA, it can create opportunities by locating property within the State on which the blind person can operate a vending facility or, as in this case, by locating a Federal property.

Some major features of the program are that the property managers of Federal property, when considering offers for contracts to operate a cafeteria must afford priority to the blind vendors. Further, the operation is expected to provide maximum employment opportunities to the blind vendors to the greatest extent possible.

In this case, at some point prior to August, 2006, the Army solicited a contract for the operation of cafeterias at Fort Riley, pursuant to the RS Act, and, in the exercise of the priority requirements of that Act, awarded the same to the Kansas SLA. This contract required performance of full services, including food preparation, and was renewed on an annual basis, for the lifetime of the contract, which was five years. In 2011, the Army solicited a follow-on contract with the same terms. Once again, the awarding of the contract was done in recognition of the priority requirements of the Act.

Then, in March, 2012, the Army determined that it would bring in military service members to perform all of the food preparation services; it informed Kansas of the decision and offered a renewal to include sanitation and custodial services, along with some minor food preparation, i.e. potato peeling. This was awarded to Kansas and renewed annually for three years, when on March 13, 2015, the Army informed Kansas that it no longer had a follow-on requirement for any of the food preparation (no more potato peeling), and that the new contract would proceed for DFA services only, which, it had determined, would not be subject to the RS Act. Graham testified that the potato peeling was eliminated purposefully to bring the contract within the Army's definition as created by its policies and to insulate it from the RS Act mandate for priority.

Within a few days, the U.S. AbilityOne Commission, which is an independent Agency that administers the JWOD Act program, informed the RSA, at the DoE, that it had been asked by the Army to assess a "food-related service requirement" for addition to the Procurement List, pursuant to the JWOD Act. Thus was created the dispute which is the subject of this arbitration. Similar disputes have occurred elsewhere, and some have even progressed into litigation in the Federal courts. See NISH v. Rumsfeld, 348 F.2d 1263 (10th Cir.), 2003.

In the Regulations, are found definitions of a vending facility, which includes cafeterias; a cafeteria is defined as a food dispensing facility capable of providing a broad

variety of prepared foods and beverages served on a serve-yourself line. The contract for operation of a cafeteria may include performance requirements for sanitation practices, personnel, staffing, menu pricing and portion sizes, menu variety, and budget and accounting practices. A more recent Regulation provides, "all contracts . . . pertaining to the operation of cafeterias on Federal property not covered by contract with . . . (SLAs) shall be renegotiated subsequent to the effective date of this part pursuant to" priority mandates and the requirement to provide maximum employment opportunities to the greatest extent possible.

Kansas argues that the RS Act Regulations, including the mandates for priority and the definitions are entitled to the Chevron deference, that the Regulations are entirely consistent with the purpose of the RS Act. In Chevron. USA. Inc. v Natural Res. Def Council. Inc., 467 US 837 (1984), it was established that where there is an express delegation of authority to the agency to "fill out" the terms of the statute by regulation, those regulations are entitled to deference, unless shown to be "arbitrary, capricious, or manifestly contrary to statute." In the RS Act, the Secretary was specifically required to "prescribe regulations designed to assure that" the priority is achieved and protected. The mandate for priority is found in the Act itself, at 20 U.S.C. §§107(b), and 107(d)-3(e), as well as in the Regulations, at 34 C.F.R. §395.33. The specificity of cafeterias, as being included in the term, "vending facility", is also found in the Act, at §107e, as well as in the Regulations, at 34 C.F.R.

§395.1(x) and 395.33. That these mandates and definitions are found in the Regulations does not lessen their effectiveness.

The Army claims that the contracting officer's decision that the RS Act did not apply to the DFA solicitation is entitled to deference, unless it can be shown that the decision was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. This claim is based on the decision rendered Impresa Construzioni Geom. Domenico Garufi v U.S., 238 F.3rd 1324 (Fed.Cir.), 2001. While this case does stand for the proposition cited by the Army, it is not on point. The Army misunderstands the nature of the dispute at hand to be one between an unsuccessful bidder on a government contract and the government. What the Army fails to recognize is that the nature of the dispute before the Panel is that, by its decision to eliminate the DFA contract from the RS Act and its regulatory provision, it eliminated any possibility for Kansas to bid on the contract at *all*.

Kansas argues further that **if** there be any doubt that the DFA contract is squarely within the statutory and regulatory definition of a cafeteria, Section 395.33(c), of 34 C.F.R., makes clear that included in the definition of a cafeteria are all contracts which pertain to the operation of cafeterias. The Army's response is that the language of that Section, which was promulgated in 1977, to implement the 1974 amendments, "All contracts . . . pertaining to the operation of cafeterias on federal property not covered by contract with . . . SLAs shall be renegotiated subsequent to the effective date of this part . . . etc." limits its application to only those contracts which were in existence in 1977.

First of all, the Regulation was implemented in 1977, not 1974, as the Army asserts. Secondly, this claim was squarely rejected in Georgia Vocational Rehabilitation Agency v U.S. Department of Defense, Department of the Army, Fort Stewart, Georgia, R-S/13-09 (2016) and in Oklahoma Department of Rehabilitation Services v U.S. Department of the Army, Fort Sill, Oklahoma, R-S/15-10 (2016). The Section is neither impermanent or subject to any limitation of time, until amended otherwise.

It is the position of Kansas that the tasks required by the OFA contract, even though, they do not include any food preparation, pertain to the operation of the cafeterias. The testimony at the hearing was that the cafeterias could not operate without the performance of the OFA contract. This was not disputed. That this dependence brings the DFA contract within the RS Act was shared by the Fort Sill case. On this, the Fort Sill panel concluded that tasks of providing dinnerware, utensils and trays to diners, without delay; cleaning spills on all serving lines and self-service areas during meal periods and within five minutes of the occurrence; affording a clean area to eat without delay; making available appropriate condiments without delay; bussing tables and concomitant spills and removal of soiled trays and dinnerware within five minutes of occurrence; and bussing and replacement of tray carts during meal serving period, so that no diner is delayed from leaving the facility; all constitute an integral element of providing food service and closely related to the operation of a cafeteria, for "without such tasks being performed on a regular basis, multiple times per day, the cafeteria could not function or operate."

In the OFA contract under consideration by the Panel, one of the expressed terms of the Performance Work Statement (PWS), at 3.1.2, requires that the contractor execute and

maintain a quality control plan **in support of dining facility operations**. Also, at 3.2.1, the PWS required that the contractor shall clean and sanitize food service equipment and surfaces **to support dining facility operations**. Additional requirements also appear: prepare, maintain and clean dining areas to afford each diner a clean area to eat **without delay** and keep appropriate condiments available **without delay**; spills are to be cleaned, soiled dinnerware occasionally left by diners are to be removed, and soiled trays are to be bussed **within five minutes of occurrence**; tray carts are to be bussed and replaced during meal serving period and space made available for soiled trays, **without diner delay 100% of the time**. Because these performance requirements are so similar, if not identical, to those emphasized in the Fort Sill case, the reasoning of that case applies here and compels the conclusion that these tasks constitute an integral element of providing service, pertain to the operation of the cafeteria, and without which the cafeterias at Fort Riley would not be able to function.

Based on the foregoing, DFA Contract Solicitation No. W911RX-15-R-0010 comes within the terms of the RS Act, and its Regulations, and is entitled to afford priority as mandated in the law.

The Army asserts that the definitions of cafeterias found in the RS Act, and its Regulations, notwithstanding, there are have been, within the last several years, pronouncements containing different definitions of cafeterias. These can be found in a Joint Report to Congress (2006), Joint Policy Statement (2006), DoD Inspector General's Report (2008), Joint Explanatory Statement for the Carl Levin and Howard P. "Buck" McKeon National Defense Authorization Act for Fiscal Year 2015, and proposed DoD DFARS rule, as published for comments, in the Federal Register (2016). The Army urges that the DoE had a role in the review of this proposed rule,⁵ which is about to become law and should, therefore, be controlling in this matter.

There is no dispute that an incompatibility has been seen between the applicability of the RS Act and the JWOD act and that much effort has gone into reconciling when the

⁵ On March 3, 2017, the Army submitted Supplemental Facts And Argument, with Exhibit 10 attached, which consisted of numerous emails and memos. Because this was submitted after the close of the record, there was no opportunity to test the authenticity or identification of the documents or the authors or to object to their admissibility. For these reasons, they will not be considered.

preferences of the RS Act control. However, none of the foregoing has the effect of law, either by statute or regulation. See the Memorandum Opinion And Order in Commonwealth of Kentucky by and through the Education and Workforce Development Cabinet Office for the Blind v U.S.A., by and through the Honorable John Mattis, Secretary of Defense, and the Honorable Robert M. Speer, Acting Secretary of the Army, U.S. District Court, Western District of Kentucky, Paducah Division, No. 5:12-CV-00132-TBR, (2017).

Only proposed regulations have issued and these are for the DoD. To rest the decision in this case on proposed regulations requires a leap in faith and logic that the undersigned is unwilling to take. A further consideration is that, even if the proposed regulation gets approved, it was noted in State of Kansas, etc. v U.S., etc. and SourceAmerica and Lakeview Center, Inc., U.S. District Court, District of Kansas, No. 15-cv-04907-DDC-KGS (2016),⁶ that "(T)he (RS Act) directs the Secretary of the Department of Education - and not the DoD - to prescribe regulations interpreting (RS Act) priority. Therefore, the definitions and mandates for priority contained in the RS Act, and its Regulations, as currently in existence, are controlling in determining the issues of this case.

III. Whether the Army violated the RS Act, and the Regulations Issued Thereunder by Failing to Include the Randolph Sheppard Priority in the Solicitation for DFA Services at Fort Riley

A. Whether the Army Justified in Writing to the Secretary of Education its Decision to Not Award the DFA Contract to Kansas

On March 13, 2015, Kansas was performing a FFS contract for the Army, and had been doing so since 2006. On that day, the Army informed Kansas that it no longer had a follow-on requirement for any food preparation, and that the new contract would include DFA services only, and, thus, would not be subject to the RS Act. Section 395.30(a), CFR, provides that each agency in control of Federal property shall take "all steps necessary to assure that . . . one or more vending facilities for operation by blind licensees shall be located on all Federal property." (Emphasis added). If there is to be any limitation of this obligation, paragraph (b) provides it must be approved by the Secretary of Education after a written justification is made by agency in control of the Federal property.

⁶This is a Memorandum And Order issued in the case brought by the Complainant herein against the Respondent for injunctive relief.

When the Army informed Kansas that the new DFA contract would not be subject to the RS Act, that action deprived blind persons licensed by the Kansas SLA, of the priority granted by the RS Act. At the hearing, the evidence was uncontroverted that the Army had not submitted any written justification to the Secretary of Education. That action deprived the Secretary of his power to determine whether the limitation assumed by the Army was justified. This constituted a violation of the RS Act

B. Whether the Army Afforded RS Act Priority When it Determined that the DFA Contract did not come within the terms of the RS Act

As stated above, on March 13, 2015, the Army informed Kansas that it no longer had a follow-on requirement for any of the food preparation, and that the new contract would proceed for DFA services only, and would not be subject to the RS Act. The making of such a determination was not in accordance with the law and constituted a violation of the RS Act.

IV. Whether the Proposed Inclusion of DFA Services to the US. AbilityOne Commission's Procurement List Violated the No-Poaching Provisions of the John Warner National Defense Authorization Act of 2007.

Section 856, of the John Warner National Defense Authorization Act of 2007, sets out mutual restrictions against the applicability of the RS Act to DoD military dining facility contracts which were on the JWOD Act procurement list and the applicability of the JWOD Act to DoD military dining facility contracts entered into with a SLA under the RS Act, for contracts that were in effect on the date of the enactment of the act, October 17, 2006. These restrictions amount to anti-poaching prohibitions.

On July 17, 2015, the Army proposed a DFA contract and placement of the same on the JWOD Act Procurement List, designating Lakeview Center as the source of supply. This was published in the Federal Register. The contract was solicited on July 20, 2015. The number of this contract was W911RX-15-R-010. This was the DFA portion of the FFS contract which had previously been awarded to Kansas from 2006, under the RS Act. From that time, this contract with Kansas continued as a FFS contract until August 31, 2015, then as a DFA contract, extended until February 28, 2016, and, lastly, under coercion of a preliminary injunction granted to Kansas, and continues to this date.

Pursuant to the John Warner National Defense Authorization Act of 2007, when the Army placed the DFA contract on the JWOD Act Procurement List, it eliminated the opportunity for Kansas to bid on, and applied the JWOD Act to, what had been an RS Act contract. This constituted poaching and a violation of the John Warner National Defense Authorization Act of 2007.

FINDINGS OF FACT

1. At all times pertinent hereto, Complainant was a SLA, under the RS Act and its implementing regulations; as such, Kansas has a contract award priority to manage contracts pertaining to the operation of cafeteria services on Federal property through licensed blind vendors.

2. At all times pertinent hereto, the Respondent, acting through Wilfredo Delatore, the KO at Fort Riley, assigned to the dining facilities at issue.

3. The RS Act was enacted in 1936, with revisions in 1954 and 1974, to provide gainful employment opportunities for blind persons, business management opportunities for licensed blind vendors, all to enlarge their economic opportunities, with a goal to become self-supporting.

4. The 1974 amendments to the RS Act established a priority for blind vendors to operate vending facilities on Federal properties, expanded the scope of blind vendor opportunities to include operation of cafeterias, designated the DoE, through its Commissioner of Rehabilitative Services (CRSA), to publish regulations ensuring the priority of blind vendors on Federal property and to establish a priority for the operation of cafeterias on Federal property by blind vendors and expanded the scope of the RS Act to include management functions previously considered beyond blind vendors' capabilities.

5. As a SLA, Kansas had contracted with the Army to provide cafeteria operation services, including FFS and DFA services, at Fort Riley, since September, 2006, and assigned a licensed blind vendor to manage the operation.

6. Since 2006, Kansas, and its licensed blind vendor, has successfully operated contracts for multiple dining facilities at Fort Riley, which were renewed, on an annual basis, and re-awarded in 2011.

7. The RS Act requires that if the manager of a Federal property believes it not to be in best interest of the United States to maintain a RS Act opportunity for the dining facilities on Fort Riley, it must justify that decision to the Secretary of Education, in writing.

8. On March 13, 2015, the Army informed Kansas that it no longer had a follow-on requirement for any of the food preparation, and that the new contract would proceed for DFA services only, and would not be subject to the RS Act.

9. The Army failed to justify this decision, in writing, or in any mode of communication, to the Secretary of Education.

10. On July 20, 2015, the Army, having placed the DFA contract on the JWOD Act Procurement List, solicited the contract under the JWOD Act.

11. Said DFA contract was numbered W91 1RX-15-R-010.

12. Said DFA contract called for, *inter alia*, maintenance of a quality control plan in support of dining facility operations; cleaning and sanitizing food service equipment and surfaces in support of dining facility operations; preparing, maintaining and cleaning dining areas to allow each diner a clean area within which to eat without delay; keeping appropriate condiments available without delay; cleaning spills, removing soiled dinnerware and bussing soiled trays within five minutes of occurrence; and bussing and replacing tray carts during meal service period and making space available for soiled trays, without diner delay 100% of the time.

13. The Fort Riley dining facilities could not operate without the performance of the tasks mentioned in the preceding paragraph.

CONCLUSIONS OF LAW

1. This matter, complaining of a decision by the Army, consisting of a determination that its Contract No. W911RX-15-R-010, was not within the scope of the RS Act, has been presented to an arbitration panel, which is limited in its *de novo* review as to whether or not said Contract falls within the RS Act, and implementing regulations, definition of cafeteria operations, requiring that priority attaches to SLAs for awarding of the same.

Where the tasks to be performed by a contract for DFA services includes tasks that constitute an integral element of providing food service at a military cafeteria facility, or pertain to the operation of a cafeteria, or tasks that without which the cafeterias would not be able to function, fall within the definition included in the RS Act, and its implementing regulations, and are entitled to RS Act priority when awarding said contract.

2. Where there are proposed rules which could change the definition, as set forth in the RS Act, and its implementing regulations, of the operation of a cafeteria, which do not have the force of law, which have not resulted from an enactment of Congress, or which do not emanate from regulations authorized to be promulgated from Congress, the proposed rules are of no effect in determining whether the priorities mandated by the RS Act can be ignored.

4. When the Army determined that said contract would not be within the provisions of the RS Act, without first having secured approval for withdrawing the contract from Kansas and placing the same on the JWOD Procurement List, it violated the RS Act.

5. When the Army determined that said contract would not be within the provisions of the RS Act, it eliminated the opportunity for Kansas to bid on the contract, it violated the RS Act.

6. When the Army determined that said contract would not be within the provisions of the RS Act, and placed the same on the JWOD Procurement List, it violated the No-Poaching provisions of the John Warner National Defense Authorization Act of 2007.

7. The Army's Motion To Dismiss, with regard to the merits of Respondent's Complaint, is not well founded and should be denied.

AWARD

With regard to the merits of the Complaint, based on the foregoing, the compelling conclusion is that the Army has violated the RS Act by failing to apply the RS priority in the solicitation for DFA services at Fort Riley. Further, the Army has violated the No-Poaching provisions of the John Warner National Defense Authorization Act of 2007, by placing the DFA contract on the JWOD Procurement List. Lastly, the Army's Motion For A New Hearing and its Motion To Dismiss, with regard to the merits of the Complaint, are denied.

Dated this 9th day of May, 2017.

SYVIA MARKS-BARNETT

Panel Chairperson

**X I concur with the above Decision of the
Chairperson.**

I dissent from the above Decision or the Chairperson.

Dated this 4th day of May, 2017.

SUSAN ROCKWOOD GASHEL
Complainant's Designee

Susan Rockwood Gashel, concurring in the result.

I am fully in accord with the arbitration decision in this case, and write this concurrence to set forth my position as to the law regarding the Randolph-Sheppard Act's (R-S Act) reference to the Administrative Procedure Act (APA), my position as to the role of the arbitration panel in rendering its decision, and to refute statements contained in the dissent of the Army's Panel Member, Brigadier General David P. Carey.

In setting out the arbitration provisions, Congress stated that the R-S Act

panel shall, in accordance with the provisions of subchapter II of chapter 5 of Title 5, give notice, conduct a hearing, and render its decision which shall be subject to appeal and review as a final agency action for purposes of chapter 7 of such Title 5.

20 U.S.C. § 107d-2(a).

The Reference to the Administrative Procedure Act

As set forth in 20 U.S.C. § 107d-2(a), certain provisions of Title 5 apply to R-S Act arbitrations. Thus, contrary to the Panel Chair's statement that the R-S Act is silent as to reference to the APA, the R-S Act specifically references subchapter II of chapter 5's provisions, codified at 5 U.S.C. §§ 551 through 559. At 5 U.S.C. § 556(d) the standard of review of the agency's acts for the arbitration panel is set out:

A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence.

5 U.S.C. § 556(d). In our case, the burden is on the SLA to show by substantial evidence that the Army violated the R-S Act. *Dickinson v. Zurko*, 527 U.S. 150 (1999). "This is something more than a mere scintilla but something less than the weight of the evidence." *Pennaco Energy v. U.S. Dep't of Interior*, 377 F.3d 2247, 1156 (10¹ Cir. 2004)

Role of the Panel

Based on the language in 20 U.S.C. § 107d-2(a) that the Arbitration Panel is to "render its decision," such decision must be that of the entire Panel, to the extent possible. The Panel Chair explains that her practice has been to submit the decision, once drafted, to the partisan members of the panel for their concurrence or dissent, without conferring with other panel members. I write to point out that that the Panel Chair's practice is not contemplated in R-S Act arbitrations; in fact, the language of the R-S Act gives the parties the substantive right of having their designee participate in reaching the panel's decision. Otherwise, Congress could have either designated the arbitrator appointed by the two party panelists to solely conduct the hearing, or, could have designated the Rehabilitation Services Administration to designate an individual as a hearing officer.

Given that the Revised Interim Policies and Procedures for Convening and Conducting an Arbitration Pursuant to Sections 5(b) and 6 of the Randolph-Sheppard Act as Amended provide, at paragraph 9, that (1) the panel chair is to preside over the arbitration, and (2) that the arbitration panel shall be responsible to make a final agency decision, discussions among panel members ensure that such decision has the benefit of the knowledge, background and expertise of all panel members. In my opinion, having such knowledge prevents any bias in the decision making process, and ensures that a full and fair hearing of all points of view, and legal theories, is achieved by the panel.

Response to Army Panelist Brigadier General David P. Carey

The Joint Explanatory Statement

Throughout the dissent, General Carey states that Congress intended that Dining Facility Attendant (DFA) contracts be excluded from the R-S Act. The supposed authority for the regulations is a document called a Joint Explanatory Statement (JES) that accompanied the 2015 National Defense Authorization Act.

In the JES, the Director of Legislative Operations of the House Committee on Armed Services explained: "there is no conference report and no formal joint explanatory statement of the conference committee." for HR 3979. Instead, Chairman Howard P. Buck McKeon and Chairman Carl Levin submitted a Joint Explanatory Statement. <https://www.gpo.gov/fdsys/pkg/CPRT-113HPRT92738/pdf/CPRT-113HPRT92738.pdf>, p. 111.

Thus, the writers of the Joint Explanatory Statement (JES) were only two individuals, and do not represent the will of Congress. Respondent's witness, Amy Williams, testified that a conference committee did not vote on the JES (TR 261, I. 19-22), and that neither chamber of Congress voted on the JES (TR 261, I. 1-4).

Two members of Congress cannot adopt a law. Moreover, the JES provision that was enacted into law authorizes intra-governmental federal contracting, which has nothing to do with the application of the R-S Act. See Roeder v. Islamic Republic of Iran, 333 F.3d 228, 238 (D.C. Cir. 2003), a JES does not have the force of law and is unpersuasive when it goes well beyond the statute it accompanies to interpret a previously enacted law.

The Department of Defense does not have authority to overrule the R-S Act by means of a regulation. It does not have statutory authority to promulgate regulations concerning the R-S Act, only the Department of Education has that authority. See 20 U.S.C. § 107(b). An "agency's interpretation of the statute is not entitled to deference absent a *delegation of authority* from Congress to regulate in the areas at issue." MPAA, 309 F.3d at 801 (citing Ry. Labor Executives, 29 F.3d at 671). Am. Library Ass'n. v. F.C.C., 406 F.3d 689, 699 (D.C. Cir. 2005) (emphasis in original).

While the defense department has authority to publish rules, it does not have authority to apply those rules in the case of the R-S Act where they contravene the R-S Act or its implementing regulations. 10 USC § 2304(a)(1). Military procurement law applies "except in cases of other procurement procedures expressly authorized by statute." The R-S Act is such a statute. NISH v. Rumsfeld, 348 F.3d 1263 (10th Cir. 2003), NISH v. Cohen, 247 F.3d 197 (4th Cir. 2001). The R-S Act cannot be amended by a regulation that was not authorized by Congress, no matter what the two members of Congress called their report.

The Joint Report

The Joint Report was not adopted by Congress. It is irrelevant to these proceedings, as the only recommendation of the Joint Report adopted by Congress is the no poaching agreement. Defense's own memorandum is that the guidelines are not to be cited until implemented in complementary regulations by Defense and Education. See also, Moore's Cafeteria, 77 Fed.Cl. 180, 186 (2008). The Joint Report is not authoritative. It is not law. In fact, it conflicts with the law. The Department of Education has not formally adopted the Joint Report by means of formal rulemaking; accordingly, it is not entitled to any deference whatsoever, except with respect to the no poaching agreement, duly enacted into law by Congress.

The Contracting Officer Has No Authority to Interpret the R-S Act so as Exclude DFA Contracts

Military procurement law and Defense's regulations apply "except in case of other procurement procedures expressly authorized by statute." 10 U.S.C. 2304(a)(1), Automated Comm. Sys. v. U.S., 49 Fed. Cl. 577-78 (2001). That the R-S Act is such a procurement procedure has long been established. NISH v. Rumsfeld, 348 F.3d 1263 (10th Cir. 2003), NISH v. Cohen, 247 F.3d 197 (4th Cir. 2001).

The R-S Act authorizes blind licensees to provide services; those services that pertain to the operation of a cafeteria are particularly to be afforded the priority. 34 CFR 395.33(c). This accords with the R-S Act's mandate that one or more vending facilities are to be established on Federal property, "wherever feasible." 20 U.S.C. § 107(b). It is unreasonable to limit the R-S Act to food services, when the definition of vending facility itself at 20 U.S.C. § 107e(7) authorizes blind licensees to provide any type of services "which may be operated by blind licensees." This, of course, includes DFA services; particularly in this case, where the blind licensee had previously provided DFA services.

Fairness of the Proceedings

General Carey himself opined that testimony concerning Ability One was not relevant; it was not logical for Respondent to present irrelevant testimony given the unanimous ruling, as set out below.

Counsel for the Kansas State Licensing Agency objected to the relevance of testimony concerning Ability One. Hearing transcript (TR), at 86, lines 14-22, TR at 87, lines 1-14. Panel Chair Marks-Barnett left it to the panel members to weigh in on the relevancy of testimony as to Ability One. TR 88, lines 19-20.

General Carey weighed in:

My concern dealt with the issue of whether there was poaching in this case, but I certainly understand where counsel's coming from. I think there's probably enough evidence in the record to answer that question at this point, as a matter of law. So I'm -- I think I'm satisfied that we have enough information on that issue. I have changed my opinion, because at first I did want to hear more about AbilityOne, but I think given the state of where we are and where -- where we might be going if we allow too much of this in, we'll never get out of there today.

TR 93, lines 17-22, TR 94, lines 1-6

Ms. Marks-Barnett:

Well, if I thought it was relevant we would take all the time we needed to hear it, but I don't -- I don't think it is and I think the Panel -- the other members of the Panel agree the poaching issue can be resolving without knowing who the poachee is. So....

TR 93, lines 7-12.

General Carey:

Well, I would just differ on that. I think we -- we know who the parties are. The question is whether it occurred or it didn't occur. I'm just -- in elaboration I'm just saying it doesn't matter --

TR 93, lines 13-17.

Ms. Marks-Barnett:

Okay

TR 93, line 18.

General Carey:

-- that we describe in more detail who the parties were. We know who is alleged to have poached, and I think we can reach a decision on whether or not it happened based on what we already have before us.

TR 93, lines 19-22, TR 94, line 1.

Ms. Marks-Barnett:

All right. Then the objection is sustained.

TR 94, lines 2-3.

Thus, the statement at page 21 of General Carey's dissent that it was improper to sustain objections regarding Ability One is baffling. With respect to the allegations that the panel was not neutral, given the contradiction between his view expressed as to the relevance of the testimony concerning Ability One at the hearing, any contentions as to panel neutrality must be disregarded.

Dated May 4, 2017.

I concur with the Decision of the Chairperson.

I dissent from the above Decision of the Chairperson. (See Attached Dissenting Opinion 1

Dated this 3rd day of May, 2017

David P. Carey

Brigadier General. U.S. (Ret)

Respondent's Designee

UNITED STATES DEPARTMENT OF EDUCATION
REHABILITATION SERVICES ADMINISTRATION

THE KANSAS DEPARTMENT FOR Case No: R-S/15-15
CHILDREN AND FAMILIES,

Petitioner.

DEPARTMENT OF THE ARMY,
FORT RILEY

Respondent.

DISSENT

At stake in this arbitration is whether the U.S. military, specifically the Department of the Army, may contract for custodial services to support on-post military dining facilities without applying the requirements of the Randolph-Sheppard Act. This is unfortunately yet another in a long line of cases that involve what should be straight-forward contracts to feed our troops. My two colleagues believe that the Randolph-Sheppard Act should apply; I conclude that it does not apply. Therefore I respectfully dissent.

SUMMARY OF THE COMPLAINT

Kansas requested arbitration because the Army took the position that the new Fort Riley dining facilities contract will no longer include food preparation and would no longer be subject to the Randolph-Sheppard Act ("RSA"). The parties agree that the RSA applies to cafeteria contracts and that the military dining facilities in question are cafeterias. However, Kansas maintains the RSA applies to contracts that pertain to the operation of these cafeterias, whether food is cooked by Army personnel or the contractor, while the Army maintains the RSA only applies to contracts that call for the operation of every aspect of the cafeteria.

In the most recent solicitation (the "Solicitation"), the Army removed limited food preparation (potato peeling) from the requirements of the dining facilities contract and then contended that the new contract would no longer be subject to the RSA. The issue before the arbitration panel is the propriety of this action. The primary question before the panel is whether the RSA applies to the Solicitation. A secondary question is whether the Army violated the no-poaching provisions of the John Warner National Defense Authorization Act of 2007 ("NDAA") by eliminating a contract performed by a Randolph-Sheppard vendor and placing that contract on the United States' AbilityOne Commission's Procurement List.

LEGAL BACKGROUND

The Randolph-Sheppard Act.

The purpose of the Randolph-Sheppard program is to create and expand economic opportunities for people who are blind to own and operate their own businesses. To grant priority to blind vendors under the RSA, the Secretary of Education designates a State Licensing Agency ("SLA") in each state "to issue licenses to blind persons . . . for the operating of vending facilities" on federal property such as the dining facilities in question. 20 U.S.C. 107(a)(5). When a federal agency procures dining facility services, it either may negotiate a contract directly with the SLA or invite the SLA to bid on the contract. Kansas is such an SLA.

Under the RSA, Kansas issues licenses to qualified blind entrepreneurs to operate vending facilities. 20 U.S.C. 107a(a)(5). The RSA grants priority to these blind entrepreneurs to operate vending facilities, including cafeterias on federal properties. 20 U.S.C. 107 et seq. It is the Department of Education ("DoE") which promulgates regulations as to the operation of cafeterias on federal property by blind licensees. Critically, those regulations provide that all contracts "pertaining to the operation of cafeterias on federal property" are subject to the provisions of the RSA. 34 C.F.R. 395.33(e).

Under the RSA, blind entrepreneurs do not contract directly with the federal government. Instead, the SLA responds to a solicitation issued by a federal agency for work covered by the RSA. 34 C.F.R. 395.33(b). If the SLA is awarded the contract, a licensed blind entrepreneur is assigned to operate the vending facility. *Id.* The blind vendor then operates the dining facility and manages the day-to-day operations. At Fort Riley, the blind manager works with a commercial company, which not only helps him operate the dining facility, but also trains him in all aspects of the operation of the facility.

If a dispute arises between the SLA and the federal agency who has solicited vending-facility services, the RSA provides for arbitration of the dispute. The SLA may file a complaint with the Secretary of Education (the "Secretary") whenever it "determines that any department, agency, or instrumentality of the United States that has control of the maintenance, operation, and protection of Federal property is failing to comply" with the RSA or regulations issued under it. 20 U.S.C. 107d-1. After the State Licensing Agency has filed a complaint with the Secretary, the "Secretary . . . shall convene a panel to arbitrate the dispute . . . and the decision of such panel shall be final and binding on the parties except as otherwise provided in this chapter." *Id.* The decision of the arbitration panel is subject to appeal and review as a final agency action. *Id.* at 107d-2(a).

Since September 2006, Kansas has operated multiple contracts for the dining facility services at Fort Riley pursuant to the RSA. However, the Army announced it would not solicit the follow-on contract pursuant to the RSA, but would award the contract to a United States AbilityOne Commission company ("AbilityOne") pursuant to another statute, the Javits-Wagner-O'Day Act ("JWOD"). Kansas filed a complaint with the Secretary on May 7, 2015, to commence an arbitration proceeding to determine whether the Army had violated the RSA by refusing to apply the act to the Solicitation for the operation of the dining facility services at Fort

Riley. On October 15, 2015, RSA convened this panel stating that "The central issues to be addressed are whether the Department of the Army has violated the Randolph-Sheppard Act by failing to include the Randolph-Sheppard priority in the solicitation of DFA services at Fort Riley, and whether the proposed inclusion of DFA services to the United States AbilityOne Commission's Procurement List would violate the no poaching provisions of the John Warner National Defense Authorization Act of 2007." On July 22, 2015, Kansas filed a Complaint seeking an injunction to preserve the status quo pending arbitration. On February 26, 2016, the United States District Court for the District of Kansas issued a preliminary injunction enjoining the Army from issuing the procurement, except as permitted under the RSA and its regulations, until this arbitration concluded.

Dining Facility Attendant Services at Fort Riley, Kansas.

Although the RSA does not distinguish between the types of contracts pertaining to the operation of a cafeteria, Army Regulations refer to two types of military dining facility contracts, Full Food Service ("FFS") and Dining Facility Attendant ("DFA").

In an FFS contract, the contractor can be asked to provide all labor and management required to serve food in a military dining facility, including preparation of meals. Even in a dining facility where military food specialists and cooks prepare meals, a contract might include Limited food preparation or a contingency capability to fill food-handling and cooking positions on a temporary basis when the military members deploy. If there is limited food preparation, or even one cook available to fill contingencies, the contract is characterized as FFS. The Army acknowledges that FFS contracts are subject to the RSA.

In contrast, under a DFA contract, the contractor provides the labor required to perform discrete support functions related to military dining facility operations, up to but not including meal preparation. The Army contends that DFA contracts are not subject to the RSA

Kansas has successfully bid on and operated the military dining facility contracts at Fort Riley since 2006. Contract W911RX-IJ-D006 (the "Contract") was awarded to Kansas on September 1, 2011. It was primarily a DFA services contract, but it included limited food preparation and contingency cooks, and thus, it was labelled as a FFS contract. The Contract was set to expire on August 31, 2015, but has been extended until February 29, 2016.

The Draft Performance Work Statement developed for the Solicitation contains a requirement that the contractor hire management and supervisory personnel, including a contract project manager and dining facility attendant supervisors. It also requires that the contractor perform a variety of tasks relating to the operation of the dining facility at Fort Riley, including "pot and pan cleaning and other sanitation related functions in the dining facilities." The Fort Riley dining facilities could not operate without the performance of the tasks contracted under the contract. All of the tasks are integral to the safe, efficient, and hygienic operation of the dining facility at Fort Riley.

Application of the RSA and the JWOD Act to Procurements.

There are numerous beneficial government programs bestowing various preferences or priorities on different groups to operate military dining facilities. JWOD provides for one such program. If a government contract is placed on the JWOD procurement list, a JWOD company will be awarded the contract. The merits of these programs is not an issue before this panel. And the competing application of the JWOD and the RSA to procurements for services performed at military dining facilities has long been decided. If the RSA applies to the Solicitation, both the Fourth Circuit and the 10th Circuit have held that because the RSA is a specific statute closely applicable to the substance of the controversy at hand it must control over the JWOD statute. *NISH v. Cohen*, 247 F.3d 197, 205 (4th Cir. 2001); *NISH v. Rumsfeld*, 348 F.3d 1263, 1272 (10th Cir. 2003). The questions before the panel concern whether the RSA applies to the

Solicitation.

RATIONALE

A. Congress Has Stated That The Randolph Sheppard Act Does Not Apply To DFA Services.

Even if Kansas continues to ignore the unique realities confronting how the Department of Defense operates military dining facilities, Congress has not. Through the 2015 NDAA, signed into law on December 19, 2014, Congress expressed its intent that the Randolph-Sheppard Act does not grant bidding priority to blind vendors with regard to solicitations by the military for dining-facility-attendant services.

B. The Proposed Regulations Incorporate Congressional Intent.

On June 7, 2016, the proposed regulations at issue in this case were published in the Federal Register. *See* 81 Fed. Reg. 36506 (proposed June 7, 2016). Consistent with the 2015 NDAA, the proposed regulations state that there is no preference under the Randolph-Sheppard Act, 20 U.S.C. §§ 107-107e, (RSA) requiring the Government to afford blind vendors priority when bidding on solicitations to provide dining-facility-attendant services on military installations. As the explanation to the proposed regulations states:

Pursuant to the Joint Policy Statement, the R-S Act [Randolph-Sheppard Act] applies to contracts for the operation of a military dining facility, also known as full food services, while the CFP statute [the Committee for Purchase from People Who Are Blind or Severely Disabled] statute, 41 U.S.C. § 8501, et seq., formerly known as the Javits-Wagner-O'Day Act] applies to contracts and subcontracts for dining support services (including mess attendant services)

The proposed rule amends the DFARS to clarify the application of the R-S Act and the CFP statute to contracts for the operation and management of military dining facilities.

See 81 Fed. Reg. 36506-07 (proposed June 7, 2016).

Congress's first intervention occurred on January 6, 2006, when it passed Section 848 of the National Defense Authorization Act for Fiscal Year 2006, Public L. 109-163 ("2006 NDAA").

Section 848 required the Departments of Education and Defense and the Committee for Purchase from People Who Are Blind or Severely Disabled (CFP) to issue a joint statement of policy concerning application of the Javits-Wagner-O'Day Act, 41 U.S.C. § 8501, et seq., (JWOD) and the Randolph-Sheppard Act to contracts for operation and management of military dining facilities and contracts for food services, mess attendant and other services supporting the operation of military dining facilities. This joint statement of policy was completed on August 29, 2006.

The joint report to Congress was issued by the Departments of Education and Defense almost a decade ago, titled "Application of the Javits-Wagner-O'Day Act and the Randolph-Sheppard Act to the Operation and Management of Military Dining facility Contracts" (Report). The Report advised Congress by defining which aspects of dining facility services were to be covered by each act. The Report advised Congress that military dining facility Contracts should be competed under the RSA when DOD solicits a contract to exercise management and day-to-day decision-making for the overall functioning of a military dining facility." *Id.* (emphasis added). However, the Report sought to limit RSA applicability by also recommending:

[i]n all other cases, the contracts will be set aside for JWOD performance (or small businesses if there is no JWOD nonprofit agency capable or interested) when the DOD needs dining support services, (e.g., food preparation services, food serving, ordering and inventory of food, meal planning, cashiers, mess attendants, or other services that support the operation of a dining facility) where DOD food service specialists exercise management and responsibility over and above those contract administrative functions described in FAR Part 42.

id. 4(b) (parentheses in original, emphasis added).

The Report, signed and submitted to Congress with the explicit approval of the Department of Education, belies Kansas' assertion that the Department of Education "has not determined that dining facility attendant services are not covered by the RS-A, or that the RS-A *only* applies to the overall operation of a military dining facility." Moreover, pursuant to a September 19, 2006, request by the United States Senate Health, Education, Labor and

Pensions (HELP) Committee, the Department of Defense, the Department of Education and the CFP issued a joint analysis of the Report (Analysis) which was "designed to provide background information on the reason or reasons for the section, the thinking behind the approach chosen, and the effect of the section." The Analysis provided agency guidance concerning the inter play between RSA and JWOD and the intention behind the recommendations contained in the Report. Importantly, the Analysis states that RSA contractors only have priority for the operation of an entire military dining facility:

It should be noted that State RSA agencies do not have authority to provide military dining support services as limited contractual services. The RSA role in military food service is for the operation of an (entire) military dining facility (cafeteria), for which these agencies have a procurement priority.

Analysis at p. 4. (parenthetical original, emphasis added).

Congress then adopted these findings through the John Warner National Defense Authorization Act for Fiscal Year 2007, P.L. 109-364, § 856(c) (October 17, 2006) ("John Warner Act"). The John Warner Act provides clear guidance that Congress recognized a distinction between how the RSA and JWOD interplay within the context of military dining facilities – stating that the RSA would not have preference over JWOD for dining facility attendant services. The John Warner Act also tasked the Inspectors General of the Departments of Education and Defense to review their respective procedures under RSA and JWOD. See John Warner Act § 856(c). In accordance with this mandate, in 2008, the Department of Defense, through an Inspector General report, gave a statement on the applicability of RSA to military dining facility attendants under the John Warner Act:

Therefore, DoD and DoED treat the RSA as a procurement statute and the Military Departments can provide a priority for blind vendors when a contracting officer determines the contract will be for 'operation of a dining facility.' However, the JWOD and other socio-economic preferences govern contracts for mess attendant services', dining support services, or other services supporting DoD operation of a cafeteria. Further, if there is a conflict

between RSA and JWOD, then RSA provisions are the dominating factors for the overall 'operation' of the cafeterias. but JWOD is controlling over the general services that support the operation.

DOD Assessment of Contracting with Blind Vendors and Employers Who Are Blind or Have Other Severe Disabilities. Apr. 15, 2008, at 5 (emphasis added).

The 2015 NDAA acknowledges this history, incorporating a "Joint Explanatory Statement to Accompany the National Defense Authorization Act for Fiscal Year 2015" (hereinafter "Explanatory Statement") which "shall have the same effect with respect to the implementation of this Act as if it were a joint explanatory statement of a committee of conference.., Pub. L. No. 113-291, Section 5. The Explanatory Statement notes that Congress tried to "resolve this long-standing issue by requiring a Joint Policy Statement in section 848 of Public Law 109-163 [the 2006 NDM] and enacting a permanent 'no-poaching' provision in section 856 of Public Law 109-364. [the John Warner Act]" *Id.*, D.N. 42-3 al Page JD #1408. However, the Explanatory Statement further explained that "without complementary regulations to implement the Joint Policy Statement, confusion remains on when to apply the two acts, particularly with regard to new contracts that are not covered by section 856 of Public Law 109-364.,. *id.*

In order to alleviate any further confusion, the Explanatory Statement adopted the findings of the August 29, 2006, joint report which clarifies how the two acts are to be applied within the context of all military dining facilities:

Pursuant to the Joint Policy Statement, the Randolph-Sheppard Act applies to contracts for the operation of a military dining facility, or full food services, and the Javits-Wagner-O'Day Act applies to contracts and subcontracts for dining support services, or dining facility attendant services, for the operation of a military dining facility.

Id. Through the Explanatory Statement, Congress directed the Department of Defense, **not the Department of Education**, to "prescribe implementing regulations for

the application of the two acts to military dining facilities. Such regulations shall implement the Joint Policy Statement and specifically address DOD contracts that are not covered by section 856 of Public Law 109-364." *Id.*

The proposed regulations issued by the Department of Defense on June 7, 2016, are consistent with Congress's intent as indicated in the 2006 NOAA, the John Warner Act, and the 2015 NOAA. They are also consistent with the Joint Policy Statement issued by all three executive agencies affected by this issue: the Department of Defense, the Department of Education and the CFP. It also bears noting that the process to implement these regulations incorporates a mechanism – through the OMB – for the White House to permit affected agencies to provide input into the proposed regulations.

The public then had 60 days to provide comments on the regulations – a comment period that was to have expired on August 6, 2016. Thereafter, the DAR Council will resolve any public comments, the Department of Defense will finalize the proposed regulations, and they will be submitted to OMB/OIRA for clearance to publish the regulations. (Ms. Amy Williams, Deputy for the Defense Acquisition Regulation System, (Respondent's Exhibit 3)).

During the process of drafting my dissent, one federal District Court specifically rejected this analysis. *Commonwealth of Kentucky by and through the Education and Workforce Development Cabinet Office for the Blind, v. United States*, U.S. District Court, Western District of Kentucky (Paducah Division). Civil Action No. 5:12-CV-OO 132-TBR. In that case, the Court observed:

The joint explanatory statement does not carry the force of law. *Roeder v. Islamic Republic of Iran*, 333 F.3d 228, 236-37 (D.C. Cir. 2003); accord *Kansas v. United States*, 171 F. Supp. 3d 1145, 1161-62 (0. Kan. 2016). See generally 2A Norman Singer & Shambie Singer. *Sutherland Statutory Construction* § 48:8 (7th ed.), Westlaw (database updated November 2016). As a post-enactment statement, it is likewise of little value in clearing up the confusion between the Randolph-Sheppard Act and the Javits-Wagner O'Day Act. See *Singer & Singer. supra*, § 48:20. Upon considerable reflection, the Court finds its earlier decision to be correct—the joint explanatory statement notwithstanding.

Despite the precedential value of the District Court's memorandum opinion, I believe that Congressional intent deserves deference. Therefore, I am keeping this argument preserved for the record.

C. The Department Of Education Had Input Into The Proposed Regulation.

Kansas suggests that the Department of Education (DOE) takes a contrary view to the 2015 NDAA and proposed regulations. Nevertheless, and contrary to Kansas' assertions, the DOE cosigned the Report which concluded almost a decade ago that DFA services should not be given priority under the RSA. More recently, the DOE participated in reviewing the proposed regulations published on June 7, 2016. Because the DOE -along with the other impacted federal agencies – has provided input into the proposed regulations, the result is the proposed rules published on June 7, 2016 are consistent with the 2015 NDAA and Congressional intent.

The proposed DFARS rule embodies the intent of Congress and will clarify the applicability of RSA to DFA services. As evidenced by the Joint Report, DoD and DoE have conferred and agreed upon how DFA services should be treated - they are not to be covered under the RSA. Ms. Amy Williams, Deputy for the Defense Acquisition Regulation System, also testified that DoE had a role in the review of the proposed DFARS Rule and concurred in its publication (Respondent's Exhibit 3, page 259-260). Another reference showing DoE support for the Joint Report is a DoE IG Report entitled Management Procedures Under the Randolph-Sheppard Act and Javits-Wagner-O'Day Act (Respondent's Exhibit 7, Department of Education, Office of Inspector General, Final Report: Management Procedures Under the Randolph-Sheppard Act and Javits-Wagner-O'Day Act (31 July 2007)). In this report, the DoE IG made the following finding:

The Department has been working to improve its efforts to provide clear guidance. On August 29, 2006, the Department, DoD, and CFP submitted a Joint Report to Congress, as required by Section 848 of the National Defense Authorization Act for FY 2006. This report provided a joint policy statement for the application of the JWOD Act and Randolph-Sheppard Act to contracts for the operation and management of military dining facilities. The joint analysis was performed to reach an agreement on issues where there had been long-standing confusion or lack of agreement among parties. The Department is in the process of drafting new regulations to implement the joint policy report and clarify program requirements with regard to military food service facilities. These regulations are currently under review at DoD. DoD has been tasked with drafting complementary regulations.

In my opinion, DoE and the Respondent both agree as to the meaning and effect of the Joint Report. The DoD IG Report is further evidence that the proposed DFARS Rule is the final step to implementing the will of Congress. Because the Respondent's actions are fully consistent with the proposed *law*, I agree with the Respondent's assertion that it does not make any sense to punish the Respondent for DoE's failure to implement the Joint Report in a timelier fashion.

The Contracting Officer Reasonably Interpreted the RSA to Apply Only to FFS

The contracting officer has wide discretion under federal procurement regulations to apply and interpret procurement regulations. The decision regarding whether the RSA or some other socio-economic program apply in a particular procurement should be upheld unless it is shown to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law—an extremely high burden for the Petitioner. In this case, there are vast interpretations of the meaning and effect of the RSA; however, we should uphold the contracting officer's decision in this case unless Kansas shows the contracting officer's actions were arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. Kansas has not met this burden of proof.

Kansas focuses on 34 C.F.R. 395.33(c) and uses the "pertaining to the operation of cafeterias" to suggest that the decision of the contracting officer was not in accordance with the law. Further, Kansas broadly contends that the RSA not only applies to food services, but any

type of service that pertains to the operation of a cafeteria. This overly broad interpretation has been taken out of context and is not in keeping with the true intent of the RSA

The contracting officer acted in accordance with the law when he interpreted the meaning and intent of the RSA to apply only to FFS contracts. Additionally, the statutory scheme supports a reasonable interpretation that Congress wanted RSA to apply when food services are contemplated, not when other unrelated services are contemplated.

The RSA clearly contemplates the services of food in Section 107d-3(e) when it states "The Secretary ... shall prescribe regulations to establish a priority for the operation of cafeterias ... by blind vendors ... that such operation can be provided at reasonable cost with food" In the DoE Regulation under Section 395.33, the first two paragraphs clearly contemplate the service of food: 395.33(a) "Priority in the operation of a cafeterias by blind vendors ... that such operation can be provided at a reasonable cost, with food of a high quality comparable ..."; and 395.33(b) "in order to establish the ability of blind vendors to operate a cafeteria in such a manner as to provide food service ... " As a result, the contracting officer's determination that food preparation is a requirement for the RSA to apply should be given deference. Because of that deference, I find that Petitioner has not shown that the contracting officer's actions were arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

Kansas apparently relies on a transitional paragraph in the DoE Regulation to suggest that the RSA should somehow apply to any contract pertaining to the operation of a cafeteria. In the DoE Regulation under Section 395.33, the third paragraph states: 395.33(c) "All contracts or other existing arrangements pertaining to the operations of cafeterias ...shall be renegotiated subsequent to the effective date ... or other arrangements pursuant to the provisions of this section." A plain reading of this paragraph shows that Petitioner has misinterpreted the meaning and effect of this

provision. This provision is extremely narrow and clearly addresses what should happen to existing arrangements at the time the DoE Regulation was implemented in 1974. To broadly read this provision to apply to the entire DoE Regulation and to open up RSA to all services pertaining to the operation of cafeterias does not make sense. The hearing revealed that Kansas wants to cherry-pick out DFA services to apply under the RSA, but does not wish to perform other services that clearly pertain to the operation of cafeterias-building maintenance and improvements, painting, plumbing, electrical, heating, cooling, refrigeration, fire suppression, and roof repair.

It should go without saying that the DoE Regulation language leaves a lot to be desired in providing clear, unambiguous guidance on the applicability of DFA services. Nonetheless, the contracting officer's interpretation that the RSA only applies to FFS should be given deference. Therefore, Kansas has not shown that the contracting officer's actions were arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

Because I believe that Respondent has properly interpreted the law in this case that DFA services do not fall under the purview of the RSA, I would dismiss the complaint.

FAIRNESS OF THE PROCEEDINGS

In its Post Arbitration Brief, Respondent requests a new hearing because of matters it alleges made the arbitration hearing fundamentally unfair. On January 10, 2017, the Department of Education ("DoE") convened this Arbitration Panel in Kansas City, Kansas in accordance with Section 107d-2(a) of the RSA. Respondents allege the following:

I. The Panel Chair Excluded Relevant Witness Testimony From AbilityOne, SourceAmerica, and Lakeview Center, Inc. After Knowing the Substance of Their Testimony Approximately Twenty Days Before the Hearing

A. Panel Chair's Public Announcement of Riding to Airport with Petitioner's Counsel

B. Additional Factors Underlying Panel Chair's Improper Exclusion of Evidence

As I am in the minority for this panel, it should be no surprise that I respectfully disagree with the majority that believes fundamental fairness of these proceedings was guaranteed. I feel compelled to recount Respondent's allegations herein to establish why I believe the proceedings were flawed. What follows is the verbatim argument advanced by Respondents:

I. The Panel Chair Excluded Relevant Witness Testimony From AbilityOne, SourceAmerica, and Lakeview Center, Inc. After Knowing the Substance of Their Testimony Approximately Twenty Days Before the Hearing

At the hearing, the Panel Chair excluded relevant testimony from the following Respondent witnesses: the United States AbilityOne Commission (Mr. Barry Lineback), SourceAmerica (Mr. Joe Diaz), and Lakeview Center, Inc. (Mr. Gary Murphy) (collectively, the "AbilityOne Witnesses"). The Respondent relied on these witnesses to present a defense and suffered prejudice when it was not allowed to offer their testimony at the hearing. The arbitrary decision to not hear this testimony prevented the panel from hearing evidence to establish that Respondent's DFA requirement did not fall within the purview of RSA. Had the Panel Chair permitted the testimony, the Respondent would have had the opportunity to put on a proper defense and the evidence would clarify that the Army's requirement fell squarely within another statutory program, the Javits-Wagner-O'Day ("JWOD") Act, now called AbilityOne. The Panel Chair's ruling both precluded the Respondent from showing that the DFA services were lawfully covered by the AbilityOne Program; and, it prevented the Respondent from showing that the RSA did not cover the DFA services.

The Panel Chair made the decision to exclude relevant testimony from these witnesses notwithstanding the following: (a) the Panel Chair previously found one of the Respondent's witnesses (Mr. Gary Murphy) to be essential to the Respondent's defense and ordered the DoE to fund his travel to the hearing; (b) the Panel Chair had full knowledge of their expected testimony almost a month before the hearing and neither she nor the Petitioner raised any objection to their testimony until the hearing; (c) the Panel Chair asked questions regarding AbilityOne Program to an Army Contract Specialist (Larry Graham), but was not willing to hear evidence from the most knowledgeable sources on the matter (i.e., the AbilityOne Witnesses); and (d) the Panel Chair knew or should have known that SourceAmerica and Lakeview Center, Inc., were intervenors in the Federal Litigation related to this case. By excluding such evidence, the Respondent was unable to present an adequate defense and, as the evidence below demonstrates, the Panel Chair abused her discretion and failed to ensure a fair hearing.

(a) The Panel Chair Previously Found a Witness (Mr. Gary Murphy) Essential for the Respondent's Defense and Ordered DoE to Fund His Travel to the Hearing, and Subsequently Found His Testimony Irrelevant at the Hearing

Prior to the hearing, Respondent's Counsel requested DoE reimburse certain witness travel expenses for witnesses whose personal presence it deemed essential for the defense. As part of this process, the Panel Chair requested Respondent's Counsel explain why the witnesses were

essential for the defense, with a summary of the expected testimony and an explanation of why the testimony was essential. On December 19, 2016, Respondent's Counsel provided a detailed witness list with summary of expected testimony for all of Respondent's witnesses and the following information was provided regarding the three witnesses that the Panel Chair found irrelevant:

3. Barry Lineback, Director of Business Operations, Ability One Commission

Summary of Testimony: Mr. Lineback will testify regarding the Ability One Program which creates employment opportunities for people who are blind or have significant disabilities. He will further testify that AbilityOne and one of its non-profit agencies SourceAmerica has an interest in this litigation and can perform the DFA services.

4. Joe Diaz, Vice President Operations, SourceAmerica

Summary of Testimony: Mr. Diaz will testify regarding SourceAmerica's relationship with the AbilityOne Program and its relationship with Lakeview Center, Inc. He will testify to the following: (1) SourceAmerica's role in creating employment opportunities for people who are blind or have significant disabilities; (2) how dining facility attendant services are different than full food service contracts; (3) why SourceAmerica is lawfully entitled to receive dining facility attendant service contract in this case; (4) SourceAmerica's agreement with the RSA/DoE to receive the dining facility contract at issue in this case; and (5) the impact and continuing harm SourceAmerica experiences because it is not able to currently perform the dining facility attendant service contract in this case

5. Gary Murphy, Representative, Lakeview Center, Inc

Summary of Testimony: Mr. Murphy will testify regarding Lakeview Center's relationship with SourceAmerica's and the AbilityOne Program. He will testify to the following: (1) Lakeview's role as a nonprofit organization that creates employment opportunities for people who are blind or have significant disabilities; (2) how dining facility attendant services are different than full food service contracts; (3) why Lakeview Center Inc. is lawfully entitled to receive the dining facility attendant service contract in this case; (4) Lakeview Center's involvement in this case; and (5) the impact and continuing harm Lakeview and potential employees in the Fort Riley community are experiencing due to not currently performing the dining facility attendant service contract.

On 22 December 2016, the Panel Chair notified Respondent and Petitioner that she found three of the Respondent's witnesses essential for the defense, including Mr. Murphy. By finding the witnesses essential, DoE would pay for their travel expenses. At the hearing, the Panel Chair abruptly reversed course, and excluded the testimony or witness representatives of the United States AbilityOne Commission (Mr. Barry Lineback), Source America (Mr. Joe Diaz), and Lakeview Center, Inc. (Mr. Gary Murphy) for the following reasons:

MS. MARKS-BARNETT: Well, first of all, I did not grant that these people could participate or testify. They are always subject to claims of relevancy and other evidentiary objections. What I did was, as far as your case was concerned, we were discussing or considering travel expenses. And so I determined that for those that you noted were essential I agreed with that, that they would be essential to your case, but I did not make a - I didn't have an objection at that point as to relevancy; so I couldn't have ruled on it and would not have done it summarily. As far as their interpretation -anybody else's interpretation of the law that -- you have supplied us with a tremendous amount of information and authorities and those will be duly considered ...

At the hearing, Respondent's counsel argued that this evidence was material because the AbilityOne Commission, SourceAmerica and Lakeview Center, Inc., "have agreed and taken action consistent with the Army and interpreted the law that RSA just does not apply to the new solicitation." Counsel for SourceAmerica and Lakeview-entities that the Federal District Court permitted to intervene in ongoing litigation-attempted to make a statement regarding the AbilityOne Program, but the Panel Chair summarily cut him off: "No. You're not a party to this matter." Subsequently, after further discussions among the panel and counsel regarding the relevancy of these witnesses, the following was stated:

MAJ OPPEL: ... certainly this is unfortunate, because I think a lot of expenses were needlessly expended by the Department of Education and the Department of the Army, would have been awfully nice to know this back in November vis-a-vis today, that would be my only concern. It would seem that he [Petitioner] waived his ability to object to that. We should have addressed that way before today's hearing. Because we have all been on ample notification as to what these witnesses were going to testify to, ma'am, and this is the first time I've heard of it.

MR. NOLAN: I'll answer that unless you've ruled and we can go on.

MS. MARKS-BARNETT: I've ruled and we can go on.

The Panel Chair made a determination that Mr. Murphy's testimony was "essential" to the defense approximately twenty days before the hearing, and turned around at the hearing and found it irrelevant. When she excluded these witnesses' testimony in its entirety, the Panel Chair even acknowledged that she previously ruled that Mr. Murphy's testimony "would be essential to [the Respondent's] case." The Panel Chair articulated no reason why this same testimony was irrelevant days later. Moreover, she had full knowledge of what Mr. Murphy was expected to provide at the hearing. Nothing in the Revised Interim Policies and Rules prevent the chair or Petitioner from raising concerns as to relevancy at any time prior to the hearing. In any event, at the hearing Petitioner's Counsel had opened the door to AbilityOne-related testimony, by trying to elicit testimony about which statute must "control," "to the extent a conflict exists between the two statutes ... the Randolph-Sheppard Act and the Javits-Wagner O'Day Act." Under these circumstances, the Panel Chair's ruling is an absolute abuse of discretion, which prevented Respondent from being able to show that Lakeview Center, Inc. should be the lawful awardee of the DFA services contract.

(b) The Panel Chair Had Full Knowledge of the Expected Testimony of (Mr. Gary Murphy, Mr. Joe Diaz, and Mr. Barry Lineback) Approximately Twenty Days before the Hearing, and Denied Their Testimony as Irrelevant

Applying the same analysis explained above, the Panel Chair denied the relevant testimony of Mr. Diaz, Mr. Lineback, and Mr. Murphy. Respondent's summary of expected testimony for these witnesses was provided approximately twenty days before the hearing. Each of these witnesses would testify about their respective organizations and why Lakeview Center, Inc. was lawfully entitled to the DFA services at Fort Riley, and why the DFA services fell under the AbilityOne Program, not RSA. Nothing prevents the Panel Chair from raising concerns as to relevancy prior to the hearing.

(c) The Panel Chair Inquired into the AbilityOne Program from an Army Contract Specialist (Larry Graham), But Was Unwilling to Hear Evidence From the Most Knowledgeable Sources on the Matter (AbilityOne Witnesses)

The Panel Chair refused to allow the most knowledgeable witnesses to testify regarding the AbilityOne Program and SourceAmerica. Instead, the Panel Chair intermittently heard limited AbilityOne-related evidence from Army witnesses. Larry Graham is an employee for the United States Army and the Army Contracting Specialist for this procurement. He provided the bulk of what little testimony was introduced at the hearing describing the AbilityOne Program and SourceAmerica's role in the procurement. During and after Mr. Graham's testimony, the Panel Chair expressed confusion regarding the role of SourceAmerica and the AbilityOne Program, and she had several questions about these organizations. These questions demonstrate that, in making her ruling, the Panel Chair did not appreciate core elements of the Respondent's position, namely: (1) if the DFA services lawfully fell under the AbilityOne Program, they did not fall under RSA, and vice versa; and (2) the AbilityOne Commission's responsibilities included determining whether the JWOD covered the services in question, and thus such evidence was highly probative as to the panel's determination whether the RSA covered these DFA services.

To allay these concerns and clarify the confusions, Respondent's counsel had planned and offered the witnesses from the AbilityOne Commission (Mr. Barry Lineback), Source America (Mr. Joe Diaz), and Lakeview Center, Inc. (Mr. Gary Murphy). These witnesses were the most knowledgeable to explain the respective roles and factual involvement of these organizations in, and the application of the JWOD Act to this procurement.

Respondent was never afforded the opportunity to clarify any confusion and present a clear picture of AbilityOne and SourceAmerica's role. Thus Respondent could not demonstrate that the AbilityOne Program covered the DFA services, or that the RSA did not cover such services. Rather than hear from these witnesses directly, the Panel Chair only sporadically permitted evidence from individuals outside of these organizations to explain their involvement and relevance to this procurement. It made no logical sense to exclude the best evidence.

For example, the Panel Chair denied testimony of Mr. Joe Diaz related to his working knowledge of the RSA and JWOD program. Mr. Diaz is the Vice President of Operations for SourceAmerica. The Panel Chair stated even without Petitioner raising an objection "*Major Opper, I don't need this. I don't --- I have this. We've already had this in the hearing. I don't need it again about Randolph-Sheppard. If he wants to talk to me about JWOD, ok.*" And again, "If he could just tell me what AbilityOne is." However, the Panel Chair immediately changed course and denied any testimony about JWOD and found it irrelevant after an objection by Petitioner's counsel. In other words, the Panel Chair excluded Respondent's witnesses' testimony

about RSA, and then excluded their testimony about JWOD--they just were not allowed to testify. period. The Panel Chair had the opportunity to afford a fair hearing, but failed.

(d) The Panel Chair Knew or Should Have Known that SourceAmerica and Lakeview, Inc. Were Intervenors in the Federal Litigation Related to this Case

The Panel Chair failed to allow the testimony of the AbilityOne Witnesses after she knew or should have known that SourceAmerica and Lakeview Center, Inc. were allowed to intervene in the Federal Litigation. On December 28, 2016, both the Petitioner and Respondent filed PreArbitration Briefs in this case. As part of Respondent's brief, the Exhibits listed below show SourceAmerica and Lakeview, Inc. as Intervenors in the Federal Litigation. These exhibits clearly showed that potential testimony from AbilityOne, SourceAmerica, or Lakeview Center, Inc. may provide important information to determine if JWOD or RSA applies to this procurement. A review of the briefs and their exhibits begs the question, "*if it's relevant enough for the Federal Court to allow these parties to intervene, why wouldn't it be relevant for the arbitration panel to hear testimony from these witnesses?*" It appeared from the onset that the Panel Chair wanted to consider this case in an RSA vacuum and significantly limit Respondent's ability to put on any evidence related to JWOD. However, this approach only further confused the facts and issues, and resulted in an unfair hearing that is having significant ramifications for all the parties involved.

Exhibits contained in Respondent's Pre-Arbitration Brief that show SourceAmerica and Lakeview, Inc. as intervenors in Federal Litigation:

- (a) Exhibit 16. Transcript on Court's Ruling on SourceAmerica's Motion to Intervene, dated 22 April 2016.
- (b) Exhibit 17. Memorandum and Order denying SourceAmerica's Motion to Dismiss, dated 24 June 2016.
- (c) Exhibit 20. Appellate Brief by SourceAmerica, dated 3 Oct. 2016.
- (d) Exhibit 21. Appellate Brief by Kansas Department for Children, dated 2 Nov. 2016.

2. Panel Chair's Public Announcement of Riding to Airport with Petitioner's Counsel

At the close of the hearing, the Panel Chair requested permission of Respondent's Counsel "*to ride to the airport with your enemy.*" or words to that effect. Respondent's counsel did not object to the request because there is an understanding among members of the legal profession that these types of activities are permissible under appropriate circumstances. Here, however, the manner in which this was communicated creates a public appearance that the panel was biased. The Panel Chair made the announcement in the presence of the public and witnesses. No efforts were made to keep this communication private. This statement immediately caused an Army witness to question the relationship of the Panel Chair with the opposing side, and he was dumbfounded that this happened. The timing and manner of the announcement called into question the Panel Chair's judgment, neutrality, and ability to assure a fair hearing, by witnesses and members of the public.

3. Additional Factors Underlying Panel Chair's Improper Exclusion of Evidence

From the onset of the hearing, the Panel Chair and Petitioner's Counsel made it known that they both had flights. This immediately set the tone at the hearing that their schedules were more

important than obtaining evidence. At various times in the hearing, Petitioner's counsel would mention his flight and let the Panel Chair know that if we are going to hear from the AbilityOne Witnesses it will take hours. It was a clear warning to the Panel that if evidence from AbilityOne Witnesses was heard, Petitioner intended to unnecessarily prolong the hearing, and no one was going home on schedule. Petitioner was never rebuked or cautioned for this inappropriate behavior by the Panel Chair. Rather, the Panel Chair continued to improperly sustain objections that the AbilityOne Witnesses were irrelevant to the prejudice of Respondent's defense. To top it off, the Panel Chair asked to ride with Petitioner's Counsel to the airport. It is fundamentally unfair to deprive a party the full opportunity to present material evidence to support its position. The Panel Chair should not have allowed or created an environment at the hearing where the topic of scheduling flights was so prevalent and in the public eye. That driving consideration impaired the panel's function to hear material evidence, rendering the hearing unfair.

[Footnotes omitted; italics in the original.]

Taken individually, the Respondent's allegations may be explained away. Taken as a whole, however, they clearly lead to the impression that the hearing was unfairly flawed. The Respondent's final allegation, though, sealed my decision to conclude this hearing was unfair:

III. REQUEST NEW HEARING BASED ON CONCERNS OF PANEL NEUTRALITY

Based on the foregoing concerns of unfairness, Respondent's Counsel conducted additional research after the hearing to determine if there was more information available that calls into question the fairness of the hearing. Prior to the hearing, Respondent did not have a reasonable basis to question the neutrality of the panel or the fairness of the hearing. After discovering the information below that should have been-but was not-publicly available to Respondent, Respondent has significant concerns regarding the Arbitration Panel's neutrality, and requests a new hearing with new panel members.

When conducting research, Respondent sought to review prior decisions of arbitration panels made in RSA cases. In accordance with 34 C.F.R. 295.13(g) "The decisions of the arbitration panel convened by The Secretary [of Education] under this section shall be matters of public record and shall be published in the FEDERAL REGISTER." Respondent went to the Federal Register's website and searched the terms "Randolph Sheppard" and discovered that the most recent arbitration panel decision published was April of 2012. Knowing that several hearings are heard every year, Respondent's counsel contacted Mr. Hartle, the RSA Arbitration Clerk, and asked him where to find previous RSA panel decisions. Mr. Hartle responded that due to the department's budget situation and staff shortage, decisions had not been recently published. DoE's failure to follow its own regulation is not only unfair to the general public and potential Litigants, but deprived Respondent of the ability to timely inquire into possible conflicts by the Panel Chair and other panelists.

Although the prior arbitration panel decisions since 2012 are not public information, DoE did provide Respondent's Counsel all cases in which Ms. Sylvia Marks-Barnett is the Panel Chair. Respondent discovered the information detailed below that raises concerns as to the neutrality of the panel. If the Respondent had known of this information and been able to research this in the public domain prior to the hearing, it would have questioned the panel on these matters.

(1)) On January 29, 2016, Ms. Marks-Barnett was the Panel Chair and issued a decision in the matter of *Murphy et al v. The State of California, Department of Rehabilitation*, Case No. R-S/12-10.30 In this case, a current panel member, Ms. Susan Gashel, was the complainant's attorney. The complaint in this case was filed in February 2012 and Ms. Gashel's client received a favorable ruling in January 2016.

(2) Ms. Sylvia Marks-Barnett is also the Panel Chair in a pending case in the matter of *Sheets v. The State of California, Department of Rehabilitation*, Case No. R-S / 13-08. This is another case where Ms. Susan Gashel serving as a panel member with Ms. Marks-Barnet. Here, it is the understanding of Respondent that the complaint was filed in 2013 due to the case number.

Respondent is troubled to learn that Ms. Gashel has been practicing as an attorney in front of Ms. Marks-Barnett from 2012 to 2016 while at the same time serving as an arbitrator with Ms. Marks-Barnett in *Sheets v. The State of California, Department of Rehabilitation* from 2013 to present, and in this case from 2016 to present. It is equally troubling that Ms. Marks-Barnett made a decision ON Ms. Gashel's case while working alongside her in the *Sheets v. The State of California, Department of Rehabilitation* arbitration. At a minimum, this information should have been available to the Respondent either through public record (as required by regulation) or notice from Ms. Gashel and Ms. Marks-Barnett prior to the hearing. This would have allowed Respondent to inquire into the issue whether these prior working relationships could jeopardize either panelists' ability to render a neutral decision in this case.

[Footnotes omitted; italics in the original.]

CONCLUSION AS TO RESPONDENT'S CLAIM OF THE FUNDAMENTAL UNFAIRNESS OF THE ARBITRATION HEARING

Naturally, I proceed with caution anytime the actions of colleagues raise the specter of unfairness in any legal proceedings. I am grateful to my colleague, Ms. Gashel, for doing the following research in arriving at the conclusion that the arbiters in RSA matters do not have to be necessarily neutral:

Although only scant case law exists on the subject of arbitrator bias in the tripartite context, "there has grown a common acceptance of the fact that the party-designated arbitrators are not and cannot be 'neutral', [sic] at least in the sense that the third arbitrator or a judge is." *Astoria Medical Group*. 227 N.Y.S.2d at 403-404. 182 N.E.2d al 87; *see also, Society for Good Will to Retarded Children, Inc. v. Carey*, 466 F.Supp. 722, 728 (E.D.N.Y.1979); *Aetna Casualty and Surety Co. v. Grabbert*. 590 A.2d 88, 92-93 (R.I.1991). The Code of Ethics for Arbitrators in Commercial Disputes ("Code of Ethics") provides additional guidance on the issue of arbitrator neutrality in the tripartite context:

[i]n all arbitrations in which there are two or more party-appointed arbitrators, it is important for everyone concerned to know from the start whether the party appointed arbitrators are expected to be neutrals or non-neutrals. In such arbitrations, the two party-appointed arbitrators *892 should be considered non-neutrals unless both parties inform the arbitrators that all three arbitrators are to be neutral, or, unless the contract, the applicable arbitration rules, or any governing law requires that all three arbitrators are to be neutral.

In tripartite arbitration, therefore, "each party's arbitrator 'is not individually expected to be neutral.'" *Carey*, 466 F.Supp. 2d 728, quoting *Astoria Medical Group*, 227 N.Y.S.2d at 403-404, 182 N.E.2d at 87.

Metro. Prop. & Cas. Ins. Co. v. J.C. Penney Cas. Ins. Co., 780 F. Supp. 885, 891-92 (D. Conn. 1991).

[Email from Susan Rockwood Gashel, dated March 1, 2017]

While I agree with Ms. Gashel's conclusion that "each party's arbitrator is not individually expected to be neutral," I cannot escape my conclusions based on Respondent's arguments (nor based on my own observations) that the proceedings lacked fundamental fairness. Clearly, the proceedings in this matter give rise to the appearance of unfairness, regardless of the putative neutrality (or lack thereof) on the part of the arbitrators.

For these reasons, I would grant Respondent's plea for a new hearing and would recommend to the Department of Education that an entirely new arbitration panel be appointed.